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The American Influence on the Development of Canadian Commercial Law

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American influence on Canadian law was minimal during the early stages of Canadian history, but became more pronounced as Canada became progressively commercialized and industrialized. The author explores the extent of this American influence, focuses on the Canadian reaction to the different articles of the Uniform Commercial Code, and notes that Canadians are most receptive to legal imports when their domestic law either supplies no answers or is seriously inadequate in the face of changing conditions. He further hypothesizes that the Canadian response to the Uniform Commercial Credit Code will exhibit the same inquiries that were made when consideration was given to the articles of the Uniform Commercial Code.

I. INTRODUCTION

The subject which has been assigned to me for discussion is of such magnitude that I am overwhelmed by my sponsor's generosity. Admittedly, commercial law is not a term of art and reasonable men may disagree where its boundaries should be drawn. But even its common core—the core that any self-respecting text on commercial law would embrace—would tax my ingenuity and, I fear, display an all too obvious ignorance. My difficulties are aggravated because Canadian legal history as an intellectual discipline is still in its infancy[1] and serious study of the evolution of our commercial law is largely conspicuous by its absence. Where so much is still virgin territory it would be presumptuous for me to play the part of a Columbus.

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1. P. Maddaugh, Bibliography of Canadian Legal History, February, 1972 (Mimeo., York University Law Library); Flaherty, *The Prospectus for Canadian Legal History*, 8 LSUL GAZ. 199 (1974); Risk, *A Prospectus for Canadian Legal History*, 1 DALHOUSIE L.J. 227 (1973).

I hope therefore I may be forgiven if I walk a much more eclectic path. I propose to use as my compass some of the better known articles of the Uniform Commercial Code. This will involve the exclusion of almost all aspects of corporate and security law, an omission that I particularly regret because these are areas in which the American influence has been particularly pronounced.[2] If I am restrictive at this end of the spectrum I fear I may be guilty of offending at the other, for I hope to include in my remarks some observations on the comparative development of Canadian and American consumer credit laws. I adopt this expansive view of the scope of my subject for a number of reasons. The most selfish one is that it coincides with a professional interest which I have attempted to cultivate for a number of years. A more respectable reason is that the astonishing growth of consumer credit in the post-war period both north and south of the border provides a particularly instructive example of the way our respective jurisdictions have sought to resolve essentially common problems.

A distant observer, blissfully ignorant of the complexities of the actual picture, might be forgiven for assuming that Canadian commercial law is essentially a replica of its powerful neighbour to the south. On the face of it the assumption makes sense. We speak the same language, we have a common legal heritage, and the Elvis Presleys and their ilk gyrate as merrily on Canadian T.V. screens as they do on American sets. American investment plays a critical role in the Canadian economy and many of our best known companies are wholly or substantially owned by American investors.[3] No less significant, we are each other's most important trading partner. About a fifth of all American exports go to Canada, which reciprocates with more than 60 percent of its own.[4] It would be natural, therefore, to assume the existence of a common law merchant.

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2. This influence is illustrated by the Canada Business Corporations Act, 23 & 24 Eliz. 2, c. 33 (1974-1975); The Ontario Business Corporations Act, ONT. REV. STAT. c. 53 (1970); The Ontario Securities Act, ONT. REV. STAT. c. 426 (1970). *See generally* 2 STUDIES IN CANADIAN COMPANY LAW: CORPORATION AND SECURITIES LAW IN THE SEVENTIES (J. Ziegel ed. 1973).

3. *See* GOVERNMENT OF CANADA, FOREIGN DIRECT INVESTMENT IN CANADA (1972); ONTARIO INTER-DEPARTMENTAL TASK FORCE ON FOREIGN INVESTMENT REPORT (1971); TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY (1968). *See also* The Foreign Investment Review Act, CAN. STAT. c. 46 (1973); Grover, *The Foreign Investment Review Act: Phase I*, 1 CANADIAN BUSINESS LAW JOURNAL [CAN. BUS. L.J.] 54 (1975).

4. 55 BUR. OF ECONOMIC ANALYSIS, U.S. DEPT. OF COMMERCE, SURVEY OF CURRENT BUSINESS 5-23 (1975); 50 CANADIAN STATISTICAL REVIEW [CAN. STATIS. REV.] § 11 (1975) (Tables 1, 2).

And yet our observer is profoundly mistaken. Canadian commercial law is far from being a carbon copy of American law or, for that matter, any other country's law. Our commercial law is a mosaic which reflects a variety of influences—English, French, and American—on which there is superimposed an increasingly important indigenous element. Had Canada started its legal and political career on a blank sheet, as it were, had we suddenly been transported from the ice age into the wonders of the North American industrial age, the result might well have been different. But, of course, our origins were very different.

Cast your mind back to 1867, the year in which the British North America Act, Canada's founding charter, was adopted.[5] Our population was only 3 1/2 million[6] and it was scattered among a handful of self-governing colonies stretching across a vast land mass from Prince Edward Island off the East Coast to Vancouver Island in the West. There was little manufacturing industry, and agriculture and the forests provided the most common forms of livelihood.[7] Politically and legally our ties were overwhelmingly with the United Kingdom,[8] which also supplied much of the capital and the manpower for the development of the Canadian economy. Canada evolved to modern nationhood over a period of fifty years and, unlike the U.S., there was never any disposition or need to disregard our cultural heritage and to fashion new concepts or institutions on a massive scale.[9] It is not then surprising that the foundations of Canadian commercial law are solidly anchored in British precedents.

I must mention quickly a number of other factors that explain the preponderant transatlantic influence and the modest role of American law during this formative phase of Canadian commercial law. Britain was at the height of her industrial and commercial power. Her commercial laws developed rapidly during the second half of the 19th century, so much so that the time was deemed ripe for a series of codifications as influential in their day as the Uniform Commercial Code promises to be in ours. Witness such important landmarks as the Bills of Exchange Act,[10] adopted in 1882,

5. The British North America Act, 30 & 31 Vict., c. 3 (1867). The Act has since been amended on a substantial number of occasions.

6. HISTORICAL STATISTICS OF CANADA, (Series A1, M. Urquhart & K. Buckley eds. 1965).

7. *Id.* series F, at 246-69.

8. *Cf.* B. LASKIN, THE BRITISH TRADITION IN CANADIAN LAW (1969).

9. *Cf.* R. DAWSON, THE GOVERNMENT OF CANADA (4th ed. 1963). Note in particular the discussion in chapter 3.

10. 45 & 46 Vict., c. 61 (1882).

the Partnership Act,[11] adopted in 1890, the Sale of Goods Act,[12] adopted in 1893, and the Merchant Shipping Act of 1894.[13] These major initiatives were accompanied by a great deal of ancillary legislation, such as the Factors Act 1889[14] and the Mercantile Law Amendment Act,[15] much of which was also reproduced in Canada. In contrast, the law of the American states was far from being settled and presented a bewildering array of often conflicting answers to common problems.

Two other factors, indigenous to Canada's position, also militated against the simple absorption of American influence. One was the structure of the Canadian constitution; the other was the civil law heritage of the Province of Quebec. In the British North America Act the constitutional responsibility over the major areas of commercial law is much more clearly divided between the federal and provincial governments than it is between Congress and the states in the American constitution. In consequence the federal government in Canada has tended to play a more active role in this branch of the law than its counterpart in the U.S., though this difference has probably diminished considerably in the postwar period. The British North America Act assigns exclusive jurisdiction to the federal government over such important subjects as navigation and shipping,[16] banks and banking,[17] bills of exchange and promissory notes,[18] interest,[19] bankruptcy and insolvency,[20] and interprovincial works and undertakings.[21] For good measure the federal government also enjoys legislative power over such amorphous areas as trade and commerce[22] and criminal law and procedure,[23] as well as a residuary power under the embarrassingly vague peace, order and good government clause.[24] It will be seen, therefore, that there are few if indeed any commercial law areas into which the federal government could not inject its presence. Until now it has shown little disposition to monopolize the field and, for the most part,

11. 53 & 54 Vict., c. 39 (1890).
12. 56 & 57 Vict., c. 71 (1893).
13. 57 & 58 Vict., c. 60 (1894).
14. 52 & 53 Vict., c. 45 (1889).
15. 19 & 20 Vict., c. 97 (1956).
16. The British North America Act, 30 & 31 Vict., c. 3, § 91, at 10 (1867).
17. *Id.* at 15.
18. *Id.* at 18.
19. *Id.* at 19.
20. *Id.* at 21.
21. *Id.* § 92, at 10(a).
22. *Id.* § 91, at 2.
23. *Id.* at 27.
24. *Id.* at preamble.
25. *Id.* § 92, at 13.

has been quite content to share it with the provinces whose jurisdiction is derived almost exclusively under their "property and civil rights" power.[25] Given this duality of sources and jurisdictions, a simple osmosis of foreign influences would have been more accidental than planned.

Quebec's position is sui generis. Quebec has no constitutional prerogative to legislate in the commercial law area that is not shared by the other provinces. It does, however, have a strong and abiding loyalty to the principles of French civil law as reflected in its Civil Code.[26] Admittedly, it has no separate *code de commerce* but this means simply that those areas of commercial law over which the province has jurisdiction have been incorporated in the Civil Code.[27] I do not mean to suggest that the common law has played no role in shaping the character of Quebec's commercial law. It has.[28] Almost from the beginning the Quebec courts, and later the draftsmen of the Civil Code, borrowed from common law judicial and legislative precedents where French law was silent or where its rules seemed inappropriate in a North American context. But this is an important story of its own which deserves to be related by hands much more competent than mine. All I wish to emphasize is that in viewing the Canadian mosaic we bear in mind the important role played in it by the civil law component that is Quebec.

II. THREE PHASES OF AMERICAN INFLUENCE

If I have carried you with me so far you may begin to wonder, perhaps even to despair, if and when the American influence began to emerge. Like Gaul, it seems to me that from a historical perspective the subject can be divided into three fairly recognizable periods. The first stretches from the early 19th century to the First World War. The second from approximately 1914 until the end of the Second World War. The third period, the present, covers the years since 1945.

I have already suggested the minor role which American legal

26. The Civil Code was first adopted in 1866 and is currently in the final phases of a complete revision by the Civil Code Revision Office under the chairmanship of Prof. P. A. Crépean of McGill University. *See generally*, J. G. CASTEL, THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC (1962).

27. *See* CIVIL CODE OF THE PROVINCE OF QUEBEC Bk. III, tit. 5-16, Bk. IV (1968). See generally A. PERRAULT, TRAITÉ DE DROIT COMMERCIAL (3 vols. 1936-40).

28. *Cf.* Falconbridge, *The Bills of Exchange Act in Quebec*, 20 CANADIAN BAR REVIEW [CAN. B. REV.] 723, 726 (1942); Nicholls, Book Review, 15 *Id.* 733, 735 (1937).

concepts and legislation apparently played during the first period. Perhaps it could more accurately be described as an interstitial role. Undoubtedly it existed, though the precise extent of its influence is buried in government archives and other less accessible sources. Until the legal historian comes to our assistance I can only illustrate with a few examples. The characters of Canada's first banks—particularly that of Canada's oldest surviving bank, the Bank of Montreal—borrowed heavily from the charter of the first Bank of the United States, said to have been prepared by Alexander Hamilton.[29] Canada's banking system differs today in fundamental respects from the American system[30] but, to quote the author of a standard text, "even in the present Bank Act a number of features of Hamilton's charter may still be recognized."[31] American influence again manifested itself in the first general banking act of 1850 of the Province of Canada which was modelled on the lines of the free banking laws of the State of New York and was designed to encourage the easier incorporation of banks.[32]

New York was also an important source of precedents in at least two other areas. As in the United Kingdom, keen controversy surrounded the desirability of allowing easy incorporation for general business enterprises. When the critical breakthroughs came in a series of general incorporation statutes, that of 1850 permitting incorporation of manufacturing and mining enterprises was based on a New York counterpart.[33] I shall have much more to say presently about the influence of American chattel security law, particularly Article 9, on the contemporary Canadian scene. For the moment it will suffice to note some early influences. Ontario's first Conditional Sales Act of 1889[34] with its marking provisions[35] as a means of providing notice of absentee ownership and the blissfully domestic exceptions in favour of household furniture other than pianos, organs and other musical instruments, was apparently based, at least in part, on a contemporary New York statute.[36] The term

29. A. B. JAMIESON, CHARTERED BANKING IN CANADA 3-4 (1962).

30. *See* J. A. GALBRAITH, CANADIAN BANKING (1971); A. B. JAMIESON, *supra* note 29, at chapt. X (1962); E. NEUFELD, MONEY AND BANKING IN CANADA: HISTORICAL DOCUMENTS AND COMMENTARY (1964).

31. A. B. JAMIESON, *supra* note 29, at 4.

32. *Id.* at 6, 7.

33. Risk, *The 19th Century Foundations of the Business Corporation in Ontario*, 23 UNIVERSITY OF TORONTO LAW JOURNAL [U. TOR. L.J.] 270, 277 (1973).

34. STAT. ONT. c. 19 (1889).

35. *Id.* § 6.

36. *See* 4 N.Y. REV. STAT. § 4 *et seq.* (1889). However, the New York and Ontario provisions were not identical. According to my colleague, Prof. R. C. B. Risk, there is no authoritative guide to the source of Ontario legislation of the period, but based on the similarity of the legislation in question and on newspaper

lien note, in common use throughout the prairie provinces,[37] was also an American borrowing and through its draftsman's attempt to combine the features of a negotiable promise with the elements of chattel security (the modern chattel paper) provided a fertile source of litigation for about a quarter of a century.[38]

American influence during the interwar period became much more pronounced, much more visible, and in a sense much more institutionalized. The Conference of Commissioners on Uniformity of Legislation in Canada[39] was established in 1918 and, to this day, its goals and constitution resemble closely those of its American parent.[40] The Canadian Commissioners early focused their attention on the commercial law scene. The first Uniform Bulk Sales Act adopted in 1920 and, in particular, the Conditional Sales Act adopted in 1922, bear conscious marks of their American origins though they were not, I hasten to add, simple copies of their prototypes.[41] A still more striking example of hemispheric influence was the Small Loans Act adopted by the federal Parliament in 1939,[42] which was largely based on the sixth draft of the Uniform Small Loan Law.[43] American influence also clearly manifested itself in the developing corporation laws. This was true of the earliest Canadian Blue Sky laws,[44] with their emphasis on disclosure and the establishment of a supervisory regime, and equally of the introduction of no par value shares and the largely ineffectual attempts to prevent share watering.[45]

So we reach what I venture to predict future historians will describe as the golden age of American influence. Just as continen-

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reports of legislative debates, he is satisfied that New York was a fertile source of precedents for Ontario in the corporate and commercial law areas.

37. *See, e.g.*, Killoran v. Monticello State Bank, 16 Alta. 341 (Alberta App. Div. 1920), *aff'd*, 61 Can. S. Ct. 528 (1921).

38. Hogg, *The Lien Note*, 2 CAN. B. REV. 491 (1924); Read, *Negotiability as it Affects Lien Notes*, 5 *Id.* 314 (1927). The Canadian treatment of consumer notes and the holder in due course predicament is discussed at the text accompanying notes 129-37 *infra*.

39. Now renamed the Uniform Law Conference of Canada.

40. *See* Palmer, *Federalism and Uniformity of Laws: the Canadian Experience*, 30 LAW & CONTEMP. PROB. 250 (1965); Ryan & Lehoux, *The Conference of Commissioners on Uniformity of Legislation in Canada*, in UNIFORM LAW CONFERENCE OF CANADA, PROCEEDINGS OF THE 53RD ANNUAL MEETING 414 (1971).

41. *See* Ziegel, *Uniformity of Legislation in Canada—the Conditional Sales Experience*, 39 CAN. B. REV. 165 (1961).

42. *See* CAN. REV. STAT. c. 5-11 (1970).

43. *See* Ziegel, *Retail Instalment Sales Legislation: A Historical and Comparative Study*, 14 U. TOR. L.J. 143, 153 (1962).

44. J. P. WILLIAMSON, SECURITIES REGULATION IN CANADA ch. 7A (1960).

45. *Cf.* W. FRASER & J. STEWART, COMPANY LAW OF CANADA 184 *et seq.* (5th ed. 1962); Fraser, *No Par Shares*, 7 CAN. B. REV. 84 (1929).

tal Europe emerging from the confining fetters of the Middle Ages felt the need for the absorption of new principles and a more critical look at its legal system in the light of rapidly changing conditions, so Canada was faced in the post-World War II period with an infinitely more complex industrial and social society than before the war. Our industry expanded rapidly during the war and, with the influx of large numbers of immigrants in the forties, fifties and sixties, coupled with a high birth rate, Canada's population figure showed equally impressive growth. For better or ill, the pendulum swung decisively in favour of a predominantly urbanized society. Our financial markets came of age and consumer credit burgeoned at an astonishing rate.

In an earlier era the United Kingdom might have been able to supply the legal resources to enable the Dominion to cope with the congeries of new problems. But conditions had changed. Greatly weakened by the exertions of war, the United Kingdom lay prostrate. The British Empire was rapidly being converted into a much more loosely knit association of fully autonomous Commonwealth states. The mother country was no longer the cynosure of legal developments, certainly not in the commercial sphere and possibly not in others. The mantle of legal leadership had clearly fallen on Uncle Sam and Uncle Sam was ready to assume it with bold new doctrinal strokes, masterful forms of codification, and a plethora of innovative legislative measures in the corporate, commercial, and consumer areas. Canada was the most immediate and still remains the single largest beneficiary of this shift in direction. The influence has been so pervasive that the narrator is confronted with an embarrassment of riches. A long citation of examples would accomplish little except to provoke boredom. I shall therefore focus on the influence of the Uniform Commercial Code on Canadian law and the interaction of Canadian and American legal developments in the consumer credit area.

III. THE INFLUENCE OF THE UNIFORM COMMERCIAL CODE

It is no longer sensible to ask whether the Uniform Commercial Code has left its legacy on Canadian law. The answer is clearly yes. The Ontario[46] and Manitoba Personal Property Security Acts[47] are closely modelled on Article 9 and so is the Model Uniform Personal Property Security Act adopted by the Canadian Bar Association in 1970.[48] The influence of Article 8 is clearly reflected in the

46. ONT. REV. STAT. c. 344 (1970).
47. MAN. STAT. c. 5 (1973).
48. *See* Ziegel, *The Model Uniform Personal Property Security Act*, 78

Ontario Business Corporations Act 1970[49] and the recently adopted Canada Business Corporations Act.[50] In 1972 the Ontario Law Reform Commission embarked on an intensive study of the provincial Sale of Goods Act with a view to recommending desirable changes in the Act. It is an open secret that Article 2 has played a focal role in the deliberations of the group of law teachers and others entrusted by the Commission with the detailed research functions.[51] Having regard to these developments, it is more illuminating to ask a series of new questions than to regurgitate the old. The questions that will occur to the reader are whether the transplants have been successful, what problems were encountered in the operation, and what are the prospects for the transplanting of the other Articles of the Code.

A. The Experience with Article 9

It is premature to pass final judgment on the first two questions, but the data is sufficiently rich to admit of at least some tentative answers. Secured and unsecured lending for medium and short term purposes and the sale of goods of all types on credit is as important in Canada and as well entrenched as it is in the United States. In 1974 the value of general loans made by the Canadian chartered banks amounted to $35 billion.[52] The balance outstanding on consumer credit extended by vendors and lenders (including the banks) reached the impressive figure of $20.6 billion.[53] Much of this business and consumer credit is secured by some form of collateral in personal property, both tangible and intangible, nonpossessory as well as possessory.

Canadian chattel security law has a rich and complex history which shares important features with pre-Code American law but differs from it in other respects.[54] Before the advent of the new

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CANADIAN BANKER [CAN. BANKER] 16 (1971). The same is true of the recommendations for the enactment of personal property security legislation made recently in British Columbia and Saskatchewan. See LAW REFORM COMMISSION OF BRITISH COLUMBIA REPORT ON DEBTOR-CREDITOR RELATIONSHIPS (PROJECT NO. 2), *Part V Personal Property Security* (LCR 23, 1975) and LAW REFORM COMMISSION OF SASKATCHEWAN, TENTATIVE PROPOSALS FOR A SASKATCHEWAN PERSONAL PROPERTY SECURITY ACT (March 1976).

49. ONT. REV. STAT. c. 53 (1970).

50. 23 & 24 Eliz. 2 c. 33 (1975). The final version was assented to on March 24, 1975.

51. The author is serving as research director of the project. The views expressed in this article are his own and are not to be ascribed to the Commission or any other Canadian governmental agency.

52. BANK OF CANADA REVIEW, Sept. 1975, Table 10.

53. *Id.*

54. *See, e.g.*, CANADIAN CHATTEL SECURITY LAW: PAST EXPERIENCE AND

legislation Canadian law suffered from the same proliferation of common law, equitable, and statutory security devices, each designed to accomplish substantially the same goals but differing significantly in detail and the intensity and scope of statutory regulation. We also believed in using registration requirements as the principal vehicle for perfecting security interests and giving notice of their existence to the world where perfection by possession is not possible or practicable.

At the other end of the spectrum, Canadian pre-PPSA doctrine was much more generous than American law in allowing the contracting parties freedom to shape their security agreement pretty much as they saw fit. Following the decision of the House of Lords in *Holroyd v. Marshall*,[55] after-acquired property clauses were freely recognized with respect to all forms of collateral. Our conception of the floating charge was copied from English, not American, law and we never fell heir to the rule in *Benedict v. Ratner*[56] nor to the intimidatingly complex fraudulent preference rules in section 60(a) of the American Bankruptcy Act.[57] In inventory financing the right to follow proceeds was early recognized, even without the aid of a Trust Receipts Act. Finally but not least, federal law has exerted a much greater influence on the development of chattel security law in the Canadian system than it has in the American.[58] The chattel security provisions in the federal Bank Act[59] have a continuous history dating back to 1859 and one section in particular, section 88, has been the object of fulsome praise by successive generations of bankers because of its liberality, simplicity, and sound pragmatism.

So it will be seen that what appealed about Article 9 to Canadian practitioners and scholars was not its liberality. In large measure we had that already. What was most attractive was its comprehensiveness, its absence of useless formalities, and above all the

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CURRENT DEVELOPMENTS, SECURITY OVER CORPOREAL MOVEABLES ch. 5 (J. G. Sauveplanne ed. 1974); Lee, *Secured Financing in Canada*, 8 ALBERTA LAW REVIEW [ALTA. L. REV.] 389 (1970).

55. 10 H.L.C. 191, 11 Eng. Rep. 999 (H.L. 1862).

56. 268 U.S. 353 (1925). *Benedict* held void an assignment by a corporation of its present and future accounts made more than four months before it was adjudged bankrupt, where the transferor was at liberty to use the accounts collected to conduct business after the transaction in the same way as he had before the assignment.

57. 11 U.S.C. § 96(a) (1970).

58. *See* CANADIAN CHATTEL SECURITY LAW, *supra* note 54, at 81.

59. CAN. REV. STAT. c. B-1, §§ 82-90 (1970); *cf.* A. B. JAMIESON, *supra* note 30, at 11 *et seq.*, 244-80; ANSTIE, *The Historical Development of Pledge Lending in Canada*, 74 CAN. BANKER (1966); 75 *Id.* 35 (1967).

substitution of a single concept, the security interest, for the bewildering array of security devices, each with its own complex body of rules, provided by existing Canadian law.

At any rate this was the reaction of the Ontario committee chaired by Fred M. Catzman, a distinguished Toronto practitioner, when it embarked as far back as 1960 on its task of revising Ontario's four principal registration acts in the chattel security field.[60] The rest is now legal history. The committee produced a draft bill in 1964 and this, after some amendments by the newly created Ontario Law Reform Commission, was finally enacted in 1967.[61] It is embarrassing to have to admit that most of the Act has not yet been proclaimed. The evil genius responsible for this unconscionable delay is the computer, though I dare say that bureaucratic confusion has also contributed its fair measure. The Act with its new computer hardware and all-encompassing central registry was supposed to have been proclaimed in 1974. The latest predictions are that, barring new unforeseen difficulties, the registry will be fully operational by the end of 1975.[62]

Aside from these practical differences a number of other features, good as well as bad, distinguish the Ontario Act from its Code counterpart. On the negative side, the members of the Catzman committee were divided on the merits of notice filing[63] and the enacted bill only permitted it for limited types of inventory financing.[64] Fortunately the requirements of a computerized registry system have made the debate academic and, as the result of a 1973 amendment,[65] notice filing will be the required form of filing in all cases. However, what has sensibly been conceded with the right hand has been illogically withdrawn by the left because the amended section 47 of the Ontario Act also provides that the financing statement shall not be registered before the execution of the security agreement or after thirty days from the date of its execution.[66] We see here a recurring phenomenon. Old habits die hard. The Ontario practitioner has for so long been accustomed to a time filing requirement that he feels uneasy about abandoning this

60. *See* Ziegel, *The Draft Ontario Personal Property Security Act*, 44 CAN. B. REV. 104, 107-09 (1966); *Symposium, Chattel Security: Order out of Chaos*, 7 CANADIAN BAR JOURNAL [CAN. B.J.] 278 (1964).

61. ONT. STAT. c. 73 (1967), *re-enacted as* ONT. REV. STAT. c. 344 (1970), *amended by* ONT. STAT. 1973, c. 102.

62. The forecast was slightly too optimistic. The Act was proclaimed to come into effect on April 1, 1976.

63. *See* Ziegel, *supra* note 60, at 124.

64. ONT. REV. STAT. c. 344, § 47(2) (1970).

65. ONT. STAT. c. 102, § 9 (1973).

66. ONT. REV. STAT. c. 344, §§ 47(4), (5) (1970).

familiar landmark in provincial chattel security law. Paradoxically, the Ontario Act contains no time requirements with respect to perfection of a security interest by possession.[67] Hopefully this anomaly will be resolved in due course.

A more serious anomaly involves the exclusion from the Ontario Act of those secured transactions governed by the Corporation Security Registration Act.[68] The exception was introduced under somewhat obscure circumstances because it was feared that the registration requirements of the new Act might jeopardize the security of corporation debenture financing which, in Ontario, amounts to many millions of dollars annually. To meet these objections the committee of the Canadian Bar Association suggested some compromise proposals which were adopted in the Model Act.[69] Hopefully they will also be incorporated in a future revision of the Ontario Act. If they are not, some baffling problems of priority will arise between corporate and noncorporate forms of chattel security.

Wittingly or otherwise, the Ontario Act fell heir to a number of other uncertainties which also afflict Article 9. The status of the English-style floating charge is one striking example.[70] Understandably Article 9 did not concern itself with this congeries of problems because the English concept was never adopted in the United States. The Ontario omission is less comprehendable because floating charge financing *à l'anglais* is a familiar phenomenon. Here again the Canadian Bar Association committee rushed in where angels fear to tread with a number of specific proposals,[71] but its efforts were rebuffed.[72] Wiser heads apparently thought that the position was tolerably clear or, at any rate, that it was better to leave the issue to judicial resolution than to attempt a premature statutory formulation of the answers. The uncertainty surrounding the status of equipment leases will be even more familiar to you than to us. I regret to say that so far the Ontario Act has been no more successful in finding a simple solution than

67. *Id.* § 24.

68. *Id.* c. 88 (1970).

69. COMMITTEE ON UNIFORM PERSONAL PROPERTY SECURITY ACT, CANADIAN BAR ASSOCIATION, DRAFT UNIFORM PERSONAL PROPERTY SECURITY ACT vii-ix (Aug. 1969 Draft) [hereafter cited as Draft UPPSA]; COMMITTEE ON UNIFORM PERSONAL PROPERTY SECURITY ACT, CANADIAN BAR ASSOCIATION, MODEL UNIFORM PERSONAL PROPERTY SECURITY ACT §§ 1(ee), 46(2), 53(2) (1970) [hereafter cited as Model UPPSA].

70. *Cf.* Abel, *Has Article 9 Scuttled the Floating Charge?*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW ch. 27 (J. S. Ziegel & W. F. Foster eds. 1969).

71. Draft UPPSA at x, §§ 9(2), 12(2), 25 (1)(e), 55(2a) & 55(11).

72. Model UPPSA at iii-iv.

was the Article 9 Review Committee. Indeed, the Ontario Act does not even provide the limited guidance afforded by section 1-201(37) of the Code.[73] The CBA committee recommended[74] that equipment leases running for more than a year should be subject to perfection requirements but this suggestion, too, still awaits implementation.[75]

After this very incomplete catalogue of deficiencies in the Ontario Act, allow me to draw attention to some of its more positive virtues. The difficult distinction in Article 9 between contract rights, accounts, and other intangibles was never adopted. Instead section 5 simply provides that the validity and the perfection of a security interest in intangibles shall be governed by the law of the jurisdiction in which the debtor has his chief place of business.[76] "Intangibles" is defined negatively in section 1(m) as meaning all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments, or securities.[77] It will be noted that in striving for simplicity of treatment in this area the Ontario Act anticipated the 1972 amendments to Article 9.

Canadian law has also benefitted from the vigorous discussions which preceded the adoption of the report of the Article 9 Review Committee with respect to the respective merits of the priorities of accounts receivable and inventory financers. Section 34(2) of the Ontario Act decides the issue squarely in favour of the inventory financer.[78] The CBA committee adopted a less draconian

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73. UNIFORM COMMERCIAL CODE [UCC] § 1-201(37) provides inter alia that:
Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

74. Draft UPPSA at x, & §§ 1(y), 2.

75. The Uniformity Commissioners were opposed to the suggestion, and the CBA Committee did not wish to jeopardize the prospects for the adoption of the Model UPPSA. The change was therefore deleted in the final version. *See* Model UPPSA at iii.

76. ONT. REV. STAT. c. 344, § 5 (1970).

77. *Id.* § 1(m).

78. The Act currently provides:
A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral,
(a) if the purchase-money security interest was perfected at the time the debtor received possession of the collateral; and
(b) if any secured party whose security interest was actually known to the holder of the purchase-money security interest or who, prior to the registration by the holder of the purchase-money security interest,

view and incorporated a compromise solution which, once again, bears a striking resemblance to the revised version of UCC 9-312(4). Section 34(2) of the Model UPPSA provides that "a security interest in proceeds shall not have priority over a security interest in accounts given for new value where a financing statement relating thereto has been registered before the purchase money security interest in inventory was perfected or a financing statement relating thereto was registered."[79]

I have given you a very inadequate account of the differences between the Ontario Act and Article 9 and I have said very little about the variations in the Model Act and the Manitoba version. It may seem surprising that a piece of legislation as complex and technical as Article 9 could have been transplanted to northern soil with so little apparent difficulty. I have already supplied one clue to explain the easy transition—the congeniality to Canadian eyes of the basic conceptual framework of Article 9. But honesty also compels me to admit the importance of another factor. The number of Canadian specialists in chattel security law is much smaller than in the U.S. Many of the individual rules in Article 9 could have been challenged on policy grounds but were adopted largely by default because the resources and time simply were not available for an in-depth examination of every section. It would be a mistake, however, to take for granted the continuing essential uniformity of the two laws. Conceivably after Ontario lawyers have had time to absorb the practical implications of some of the new rules there may be pressure for a greater number of changes.

B. Article 2

The ready adaptability of Article 9 to Canadian conditions may suggest an easy replication of the earlier success in the case of Article 2. The preliminary signs appear indeed very favourable. All the common law provinces have adopted almost verbatim the Imperial Sale of Goods Act of 1893[80] and remarkably few changes

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had registered a financing statement in the prescribed form covering the same items or type of inventory, had received notification of the purchase-money security interest before the debtor received possession of the collateral covered by the purchase-money security interest; and

(c) if such notification states that the person giving the notice had or expected to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type.

Id. § 34(2).

79. Model UPPSA § 34(2).

80. CCH CANADIAN LTD., CANADIAN SALES AND CREDIT LAW GUIDE (2 vols., loose leaf service).

have been made since then to the parent Act or its offspring.[81] Such changes as have been made in Canada principally affect consumer sales.[82] The Imperial Act was deficient in a number of important respects when it was first adopted and the intervening years have accentuated the defects and enlarged the gulf separating 19th century sales practices and distributive patterns from those obtaining at the present day.[83] On grounds of modernity alone, therefore, Article 2 would have great appeal.

But there are formidable difficulties. The sheer length of the more than one hundred sections in Article 2 look forbidding when compared to the economy and tight language of the 57 sections of the Ontario Act, but this is a difference that can readily be justified in terms of the expanded scope of Article 2 and its much more detailed provisions. There is a more significant difficulty. Article 9 proceeds from a single powerful concept. Article 2 does not lend itself to this simple generalization. Admittedly it contains such pervasive concepts as commercial good faith and unconscionability[84] but these provide no structural framework and only limited assistance in the solution of specific problems. It therefore behooves the foreign observer to work his way systematically through every section of Article 2 and to appraise its merits against the background of his own legal system and the value judgments to which he has become accustomed.

The research team of the Ontario Law Reform Commission has submitted Article 2 to this type of scrutiny and we have found numerous instances in which the Code solution seemed of doubtful value in the Canadian context. In some vital areas the Code solution was already dated; in a number of others none was proffered. Ambiguities abound and sometimes the generally excellent comments fail to explain the reasons for significant changes in the prior law. Permit me to select a few examples at random. The United Kingdom repealed the Statute of Frauds provisions in the British Sale of Goods Act as long ago as 1954.[85] At least one prov-

81. *See* "Table of Concordance between the Imperial and Canadian Acts," in G. H. L. FRIDMAN, SALE OF GOODS IN CANADA xlii-liii (1973) [hereafter cited as FRIDMAN].

82. *See, e.g.*, The Consumer Protection Act, ONT. REV. STAT. c. 82 (1970); The Government Reorganization Act of 1972, c. 1, § 35 (Ont.), The Consumer Protection Amendment Act of 1972, c. 53 (Ont.); *cf.* ONTARIO LAW REFORM COMMISSION, REPORT ON CONSUMER WARRANTIES AND GUARANTEES IN THE SALE OF GOODS (1972) [hereafter cited as WARRANTIES REPORT].

83. *See* FRIDMAN 443-49; WARRANTIES REPORT 65-69.

84. UCC §§ 2-103(1)(b), 2-302.

85. Law Reform (Enforcement of Contracts) Act of 1954, 2 & 3 Eliz. 2, c. 34, § 2.

ince (British Columbia) has followed suit in Canada.[86] Does it make sense for a revised Ontario Sales Act to enact the modified Statute of Frauds provisions in UCC 2-201 or should Ontario be guided by British experience? A still more difficult problem confronts the Canadian reformer with respect to the other formational rules in Part 2 of Article 2. Some basic elements of Canadian contract law are badly in need of revision, particularly those involving the law of consideration. Provisions such as those in UCC sections 2-205, 2-206, and 2-209 greatly appeal but should they be confined to sales law? And has the "battle of the forms" conundrum really found its quietus in section 2-207?

Consider also the most contentious area of sales law, the provisions concerning the law of warranties. Canada is still a long way from adopting a doctrine of strict liability in tort for defectively manufactured goods,[87] but if we were minded to pursue this line of reform a provision like section 402A in the *Restatement (Second) of Torts* would surely provide a cleaner solution than the various versions of section 2-318.[88] A modern sales act ought also to state

86. *See* B.C. REV. STAT. c. 344, § 10 (1960) (permitting contracts made under the British Columbia Sale of Goods Act to be either written or oral).

87. *Cf.* S. M. WADDAMS, PRODUCTS LIABILITY 117-20, 229-34 (1974).

88. Section 2-318 of the Uniform Commercial Code provides three alternative theories of liability of manufacturers of defective goods toward third parties not in privity to the contract. The intent of the draftsmen of the Code was to allow each state to select one of the alternatives, depending on the development of the state's case law on the issue. The three versions are as follows:

> Alternative A
>
> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative B
>
> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative C
>
> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. . . .

UCC § 2-318 (1972 version).

Section 402A of the *Restatement (Second) of Torts* provides for strict liability in tort for injuries resulting from defectively manufactured goods. It is analogous to alternative C of UCC section 2-318, since it provides a remedy not only for injuries to the person, but also for injuries to property. Section 402A states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

much more explicitly than does the Code the liability of a manufacturer or other seller not in privity with the ultimate buyer for breach of express and implied warranties only resulting in economic losses. Perhaps the generally accepted American theory of the hybrid origins of the binding character of an express warranty[89] is sufficient (but surely only partially sufficient) to bridge the gap south of the border. Anglo-Canadian law, however, has long been wedded to the contractual nature of a warranty[90] and express language would be needed to change so fundamental a concept in the Canadian pantheon.

Consider also the perfect tender rule in section 2-601. In view of the frequent criticism which has been directed against the rule, it seems surprising that it should have been retained in the Code as the dominant *leitmotif* of the buyer's remedies with respect to a defective tender. Of course, the rigours of the common law rule have been relaxed by allowing the seller a right to cure[91] and by refusing to allow the buyer to revoke his acceptance unless there has been a substantial impairment of value.[92] But would it not have been better to start with a substantial impairment test as the basis of the right of rejection in all cases and to confer on the buyer a right to demand cure in appropriate circumstances for lesser breaches as is done in the Uniform Law for the International Sale of Goods?[93] At least from the point of view of a jurisdiction considering the adoption of Article 2 the alternatives deserve careful scrutiny even if in the end no superior solution can be found to an apparently intractable problem.

I have intentionally seized upon some of the more controversial aspects of Article 2, not in order to deny its very real achieve-

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

89. *Cf.* Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960).

90. This is especially true since attempts to apply a simple injurious reliance test were rebuffed by the House of Lords in Heilbut, Symons & Co. v. Buckleton, [1913] A.C. 30.

91. UCC § 2-508.

92. UCC § 2-608.

93. Article 44. The Uniform Act is in the final phases of revision by the United Nations Commission on International Trade Law (UNCITRAL), but the principle of Article 44.1 appears to have been retained. *See* Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session 9-10, arts. 29-30, U.N. Doc. A/CN.9/100 (1975).

ments but to illustrate that, unlike Article 9, it is not a monolithic structure. The prospective adopting jurisdiction can borrow generously from the rich lodestone of ideas without feeling that by rejecting others it is destroying a carefully orchestrated plan. It must be admitted, however, that this is not the only option. For a young country with a small population and limited intellectual resources there are immense attractions in copying a powerful neighbour's master plan without even the price of a license fee. And moreover, at a stroke of the pen, uniformity can be achieved between two of the world's closest trading partners. This ought surely to weight heavily in the balance.

Curiously the business community itself appears to be indifferent. As part of its programme of empirical studies the research team of the Ontario Law Reform Commission surveyed the members of the Ontario branch of the Canadian Manufacturers' Association.[94] The team also distributed a legal questionnaire to a representative number of trade associations. The results revealed no strident complaints about the existing dichotomy of commercial laws between Ontario and the U.S. and no passionate longing for international uniformity.[95] Presumably the apparent contentment with the status quo reflects the businessman's feelings that intelligent cooperation, good faith in commercial dealings and, above all, freedom to shape agreements according to individual needs, are more important than interesting intellectual structures.[96]

C. *The other Articles of the Code*

Somewhat different considerations enter into the question which of the other Articles of the Code lend themselves to ready adoption in Canada. I have already mentioned[97] the reproduction of Article 8 in the Ontario Business Corporations Act and the Canada Business Corporations Act. This transplant occurred because of a recommendation made in a 1967 report by the Select Committee

94. As of November 1975 the statistical findings had not been made public, but they are expected to be released in due course.

95. Many of those responding to the survey were apparently not aware of UNCITRAL's work in the sales field, and it may be safely assumed that knowledge about the important differences between Article 2 and the provincial Sale of Goods acts is not much greater among Canadian manufacturers.

96. These findings are not novel; American investigators have encountered similar reactions. *See, e.g.*, Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963); Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRAC. LAW. 13 (1963).

97. *See* notes 49, 50 *supra* and accompanying text.

on Company Law of the Ontario Legislative Assembly.[98] Prior provincial law concerning the rights and duties of issuers, transfer agents and purchasers of corporate securities was fragmentary and largely of common law origin.[99] It was therefore no doubt useful to update the rules and place them in a coherent statutory framework. Ontario's version of Article 8 is incomplete and some observers have complained that some of the key provisions in Article 8 have been emasculated.[100] The judgment is probably a little too harsh. It is true, however, that the Ontario provisions were adopted with little discussion and apparent indifference by most members of the Bar. Some practising lawyers claim that they do not fully understand them, an admission which can be viewed as an atypical example of forensic modesty. What appears to be generally conceded is that the Article 8 provisions in the Ontario Act have made no practical difference to the daily operations of the Ontario securities market.

An even stronger case can be made for the adoption by the provinces and the federal government of an Article 7 type law on documents of title. The present position is manifestly unsatisfactory. The Canadian federal law consists of an antiquated Bills of Lading Act,[101] copied almost verbatim from the British Act of 1855,[102] and of scattered provisions in various transportation and grain acts.[103] The provincial laws are a little more recent. Six provinces[104] have enacted the Uniform Warehouse Receipts Act

98. SELECT COMM. ON COMPANY LAW, ONTARIO LEGIS. ASSEMBLY, INTERIM REPORT ch. VI (1967).

99. Ziegel, *The New Look in Canadian Corporation Laws*, in 2 STUDIES IN CANADIAN COMPANY LAW 26-27 (J. Ziegel ed. 1973).

100. *Id.* at 28. The most damaging omissions have occurred in the adoption of Article 8 definitions. The Ontario Business Corporations Act of 1970 did not include the Article 8 definitions of "purchaser," "purchaser for value," "genuine," "unauthorized," and "noted conspicuously." ONT. REV. STAT. c. 53 (1970). A 1971 amendment added the last three definitions to the Act, but "purchaser" and "purchaser for value," two extremely important definitions, are still missing from the Act. *See* The Business Corporations Amendment Act 1971, c. 26, § 16 (Ont. 1971).

The definition of "security" in the Ontario Act is also significantly different from that found in Article 8. *Compare* ONT. REV. STAT. c. 53, § 63(1)(i) (1970) *with* UCC § 8-102(1)(a).

101. CAN. REV. STAT. c. B-6 (1970).

102. The Bills of Lading Act of 1855, 18 & 19 Vict., c. 111.

103. CAN. REV. STAT. c. C-14, sched. 1, c. C-15, c. G-16, §§ 127-30 (1970). *See also* General Orders T. 5 (Feb. 1, 1965) and T. 909 (Dec. 9, 1964) adopted by the railway commissioners under the former Railway Act, CAN. REV. STAT. c. 271 (1966-67), now superseded by the Transport Act, CAN. REV. STAT. c. T-14 (1970).

104. UNIFORM LAW CONFERENCE OF CANADA, PROCEEDINGS OF THE 56TH ANNUAL MEETING 234 (1974).

first adopted by the Canadian Uniformity Commissioners in 1945,[105] but there remains the not inconsiderable difficulty that its provisions overlap and conflict with sections in the earlier adopted provincial Sale of Goods, Factors, and Mercantile Law Amendment legislation.[106] Despite this fact, there is no concerted pressure to adopt a more coherent and consistent body of law based on Article 7.

Article 6 can, I think, be disposed of quickly. A Uniform Bulk Sales Act was adopted by the Uniformity Commissioners in 1920[107] and substantially revised in 1960.[108] One or the other version is in force in a majority of the common law provinces and territories.[109] The revised Act differs substantially from Article 6, but even if the provinces suddenly discovered an irresistible passion for the Uniform Commercial Code, I doubt that they would place the harmonization of the existing law and the Code version high on their list of priorities. The effort simply would not generate enough sex appeal.

This brings me, with almost indecent haste, to Articles 3, 4 and 5, or what I may loosely call the banker's corner. The Canadian Bills of Exchange Act,[110] a federal emanation, is a close copy of the British prototype of 1882 and dates from 1890.[111] It has been amended only slightly since and would appear to be eminently ripe for revision. Yet, as a Toronto scholar noted a few years ago, there is barely a whisper of support for such a step.[112] Dr. Falconbridge, the former dean of the Osgoode Hall Law School and a distinguished Canadian authority on negotiable instruments law, catalogued many years ago a list of the defects in the then Canadian Act and urged correction,[113] but his effort met with no success.

105. CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA 22-23, 179 (1945).

106. *See, e.g.*, ONT. REV. STAT. c. 156, §§ 2, 3, 8; c. 272, §§ 7-9, 14; c. 421, §§ 25, 45 (1970).

107. CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA 9 (1920).

108. *Id.* at 31, 120-40 (1960). For a critical analysis of the original Ontario Bulk Sales Act and a comment on the 1960 revised version of the Act, *see* Catzman, *The Bulk Sales Act (Ontario)*, 1 CAN. B.J. 38 (1958); Catzman, *The Bulk Sales Act (Ontario)*, 3 CAN. B.J. 28 (1960).

109. *Viz.*, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, the Northwest Territories, and the Yukon. *See* PROCEEDINGS, *supra* note 104, at 231.

110. CAN. REV. STAT. c. B-5 (1970).

111. CAN. STAT. c. 33 (1890). *See also* J. FALCONBRIDGE, THE LAW OF BANKS AND BANKING ch. 36 (6th ed. 1956).

112. Abel, *Canadian Commercial Law*, 17 BUFF. L. REV. 5, 7-8 (1967).

113. JOHN D. FALCONBRIDGE, THE LAW OF BANKS AND BANKING vi-viii (4th ed. 1928).

Other qualified observers have remarked on the technical and stylistic superiority of the Uniform Negotiable Instruments Law[114] and no doubt the same could be said of Article 3. Whatever interest there may be in a general overhaul of the Canadian Act arises from the expected impact of an electronic funds transfer payment system.[115]

It seems to me that the surprising acquiescence in the status quo is largely explicable in terms of the Canadian banking system. Whatever common origins our two systems may have had,[116] they have long ago parted company. Canada has only one banking law, the federal one,[117] and from the beginning of Confederation it has permitted branch banking.[118] Inevitably, therefore, the historical trend has favoured bank mergers and the concentration of banking business in the hands of a small number of powerful banks. Today Canada only has eleven banks, five of which accounted in 1968 for 93 percent of all chartered bank assets.[119] Compare this miniscule number with the approximately 14,000 banks in the U.S.[120] and it will be readily understood not only why there is so little pressure for a revised Bills of Exchange Act, but also why most aspects of the private law of Canadian banking remain uncodified. This includes the law of deposits and collections and equally of letters of credit. So far as letters of credit are concerned, there is also another reason. Documentary letters of credit in Canada are used almost exclusively in connection with international transactions and retaining international uniformity, as reflected in the Uniform Customs and Practices of the International Chamber of Commerce, is no doubt more important than uniformity with respect to the modest amount of letters of credit financing conducted at the domestic level.

The reader may now feel depressed. After ascending the lofty heights of Article 9 and noting its encouraging impact on the adoption of progressive legislation in Canada, we have gradually drifted

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114. JOHN D. FALCONBRIDGE, THE LAW OF BANKS AND BANKING 490 (5th ed. 1935).

115. LAW REFORM COMMISSION OF CANADA, THE CANADIAN PAYMENT SYSTEM AND THE COMPUTER: ISSUES FOR LAW REFORM (Ottawa 1974).

116. See note 29 *supra* and accompanying text.

117. CAN. REV. STAT. c. B-1 (1970). The Act is revised decennially and the next revision is due in 1977.

118. *See id.* § 75(1)(a) (1970). For the importance of branch banking in the evolution of the Canadian banking system, see A. B. JAMIESON, CHARTERED BANKING IN CANADA 161 (1962).

119. J. GALBRAITH, CANADIAN BANKING 14 (1970).

120. Redford, *Dual Banking: A Case Study in Federalism*, 31 LAW & CONTEMP. PROB. 749, 755 (1966) (Table I).

downwards. Like American foreign policy, good intentions are meeting with successive rebuffs. We saw that Article 8 has found a Canadian home but without any marked enthusiasm on the part of its hosts. Article 7 deserves to be treated at least as favourably but is still awaiting a Canadian sponsor. Of the remaining articles only one, Article 2, is likely to make a significant impact in the foreseeable future and then probably only in a much modified form. If one can draw a moral from this variegated tale, it is that Canadians are most receptive to legal imports when domestic law supplies no answers to newly emerging problems or when existing answers prove to be seriously inadequate in the face of changing conditions. This was true in the case of Article 9 and partly true in the case of Article 8. It should also apply, though perhaps with no strong sense of urgency, to Articles 2 and 7. The other articles, I fear, are likely to remain outside the charmed circle for an indefinite period of time.

IV. THE LESSONS OF CONSUMER CREDIT

Canadian receptiveness to American precedents when answers are being sought to new problems is amply demonstrated in the field of consumer credit. In common with American experience, the volume of outstanding consumer credit in Canada has grown prodigiously, from a modest $870 million in 1948 to an astonishing $20 billion at the end of 1974.[121] The sources and types of consumer credit have also multiplied generously and in Canada, as in the United States, consumer credit has become an accepted way of life.

Unhappily, the problems, legal and social, have also grown apace. It would require a lengthy paper to describe adequately the Canadian responses and I will therefore limit myself to illustrating the importance of the American influence in a number of representative areas.

As I have previously mentioned, the Canadian federal Small Loans Act[122] is largely an American borrowing. It has served us well but it is beginning to show the signs of its age and the federal government has promised an early overhaul. If I read my tea leaves correctly the most contentious issue is likely to revolve around the retention of the concept of a regulated interest ceiling. Our present Act uses a graduated step rate.[123] As is well known, the Na-

121. CAN. STATIS. REV. § 10 (May 1975) (Table 6).
122. CAN. REV. STAT. c. S-11 (1970).
123. *Id.* §§ 3, 14.

tional Commission on Consumer Finance[124] was divided on the issue and influential financial economists seriously question the wisdom of regulated ceilings. Conceivably the debate may be even more intense in Canada than it is in the U.S. because with us restrictions on the imposition of interest charges are the exception rather than the rule.[125]

Furious controversy also marked the introduction in Canada of proposals for truth-in-lending laws.[126] Here the interacting influence of legislative initiatives was particularly noticeable. Your founding crusading warrior was Senator Douglas; by a happy coincidence his opposite number in Canada was also a senator, Senator Croll. In Canada, however, the first accolade of success was bestowed on the provinces because two of them, Ontario and Nova Scotia,[127] adopted truth-in-lending requirements before the Canadian government did[128] and indeed before the requirement became fashionable in the United States. Is it conceivable that news of the northern mischief may have swayed the legislative debates below the border?

Holder in due course problems and freedom from defences arising out of the use of consumer notes and cut-off clauses are familiar problems on both sides of the border. Here too our respective jurisdictions display a striking parallel of judicially evolved doctrines and legislatively enshrined solutions. Until the seminal decision in 1962 of Mr. Justice Kelly of the Ontario Court of Appeal in *Federal Discount Corp. v. St. Pierre*,[129] finance companies sailed serenely through the increasingly troubled waters with the aid of an earlier decision of the Supreme Court of Canada.[130] In what for Canada was a bold stroke of judicial creativity, Mr. Justice Kelly denied holder in due course status to a finance company which had an intimate relationship with the seller and, as the judge found, was

124. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES ch. 6-7, 220-30 (1972) (dissenting statement of Sen. Proxmire).

125. The Federal Interest Act, CAN. REV. STAT. c. I-18, § 2 (1970), states the basic postulate that, unless otherwise provided, the lender is free to bargain for any rate of interest that may be agreed upon. The regulation of interest rates is primarily a federal responsibility.

126. J. S. ZIEGEL & R. E. OLLEY, CONSUMER CREDIT IN CANADA, ch. 7 (1966).

127. Consumer Protection Act, ONT. STAT. c. 23, §§ 21-23 (1966); Consumer Protection Act, N.S. REV. STAT. c. 5 (1966).

128. CAN. STAT. c. 87, §§ 91, 92 (1966-67); CAN. REV. STAT. c. B-1, §§ 91-92 (1970); [1967] CAN. STAT. ORDERS & REGS. 67-504.

129. 32 D.L.R. 2d 86 (1962), *noted in* 40 CAN. B. REV. 461 (1962).

130. Killoran v. Monticello State Bank, 57 O.L.R. 359 (1921), *distinguished in* Corp. de Finance Belvédère v. Range, 5 D.L.R. 3d 257 (1969), *noted in* 48 CAN. B. REV. 309 (1970).

fully privy to its sales methods. In justifying his decision he relied on a line of well-known American cases[131] which had also adopted the joint venture theory. For good measure, he added the heretical view that the law of negotiable instruments was merchant's law and was never intended to intrude into the regulation of domestic transactions.

Other Canadian courts were quick to follow Mr. Justice Kelly's lead and the blows against the finance companies' previously impregnable position came thick and fast. In *Beneficial Finance Co. of Canada v. Kulig*[132] the *Federal Discount* doctrine was applied to a purchase money loan transaction where the lender and vendor stood in a symbiotic relationship. Concurrently with these judicial developments a dual legislative attack was launched at the federal and provincial levels. The provinces nullified the effect of disclaimer clauses in consumer sales transactions[133] while the federal government added in 1970 a new Part V to the Bills of Exchange Act.[134] This requires all consumer notes, including post-dated cheques, given in respect of a consumer purchase to be marked "Consumer Purchase" and provides that the holder of such an instrument takes it subject to the purchaser's defences and rights of set-off.[135] The new provisions also extend to instruments given in respect of a purchase money loan where the seller and lender were not acting at arm's length to each other.[136] None of these developments will strike the American ear as very revolutionary. They were in fact foreshadowed by successive drafts of the Uniform Consumer Credit Code[137] and individual action by numerous state legislatures. What is significant is that collective action was taken in Canada at a time when the Code's sponsors were still agonizing about the merits of abolishing entirely the holder in due course doctrine in consumer credit transactions.

Restrictions on creditor's remedies have likewise been the focus of increasing legislative activity at the provincial level in Canada,[138]

131. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940); Taylor v. Atlas Security Co., 213 Mo. App. 282, 249 S.W. 746 (1923); Buffalo Indus. Bank v. De Marzio, 162 Misc. 742, 296 N.Y.S. 783 (Buffalo City Ct. 1937).

132. 13 D.L.R. 3d 134 (1970).

133. *See, e.g.*, The Consumer Protection Act, ONT. REV. STAT. c. 82, § 42 (1970), *as amended*, ONT. STAT. c. 24, § 1(1) (1971).

134. CAN. REV. STAT. c. 48 (1970). *See generally* Ziegel, *Canada Regulates Consumer Notes*, 26 BUS. LAW. 1455 (1971).

135. CAN. REV. STAT. c. 48, §§ 190(1), 191 (1970).

136. *Id.* § 189(3).

137. *See* UNIFORM CONSUMER CREDIT CODE §§ 2.403, 2.404 (Draft 1968).

138. *See* Cuming, *Protection of Consumer-Borrowers—Limitations on the Remedies of Consumers-Lenders*, 33 SASK. L. REV. 58 (1968); Ziegel, *Recent Developments in Canadian Consumer Credit Law*, 36 MOD. L. REV. 479 *passim* (1973).

but here it is much more difficult to determine the extent of American influence. A sue or seize rule was adopted in Alberta as early as 1942[139] and now obtains in a majority of the provinces.[140] Wage assignments were outlawed in Ontario in 1968[141] and this precedent is likely to be copied by the other provinces in the foreseeable future to the extent that it has not already happened. Ontario was also a leader in imposing substantial restrictions on wage garnishments. The provincial Wages Act[142] exempts 70 percent of the debtor's salary from garnishment and allows a judge, on the debtor's application, to grant total exemption.[143] One can detect here the reciprocating influence of scholarly writings and public agitation in both the United States and Canada. It seems surprising, however, that neither country appears so far to have followed the simple solution enshrined in the British Attachment of Earnings Act of 1971.[144] That Act allows wages to be attached only after individual provision has been made for a "protected earnings rate" which is based not on some arbitrary amount but on the court's assessment of the debtor's resources and actual needs.[145]

What of the debtor who is so overcommitted that he needs greater assistance than relief from garnishment? The Canadian response has been a little slower than the American one but we have been catching up rapidly. As early as 1932 Manitoba adopted an Orderly Payments of Debts Act[146] which was basically a statutory prorating plan which enabled the debtor to consolidate his debts and pay them in approved instalments over a period of time not exceeding three years. Alberta adopted an almost identical measure in 1959[147] but this was ruled unconstitutional by the Supreme Court of Canada in a 1960 decision[148] on the grounds that it trenched on the exclusive federal bankruptcy jurisdiction. The federal government responded to this turn of events by re-enacting

139. ALTA. STAT. c. 52, § 2 (1942).

140. For example, British Columbia, Alberta, Manitoba, Quebec, and Newfoundland. Saskatchewan law goes further and restricts the seller's remedy to repossession and realization of his security interest. SASK. REV. STAT. c. 103, § 18 (1965), *as amended*, SASK. STAT. c. 57, § 2 (1973).

141. ONT. STAT. c. 142, § 7 (1968). Wage assignments to credit unions are excepted. The prohibition was recommended in the SELECT COMMITTEE, ONTARIO LEGISLATURE, FINAL REPORT ON CONSUMER CREDIT ¶ 308 (1965).

142. ONT. REV. STAT. c. 486, § 7 (1970).

143. *Id.*

144. C. 32 (U.K.).

145. *Id.* §§ 6(5), 14.

146. MAN. STAT. c. 34 (1932).

147. Validity of the Orderly Payment of Debts Act, ALTA. STAT. c. 61 (1959).

148. *In re* Validity of the Orderly Payment of Debts Act, 1959 (Alta), c. 61, 23 D.L.R. 2d 449 (1960).

the provincial legislation in the form of a new Part in the federal Bankruptcy Act.[149] The new provisions do not apply in any province unless the provincial authorities have requested it and several provinces still have to make the election. It is anticipated, however, that the pending revision of the Bankruptcy Act[150] will eliminate the optional feature and make the wage earner receivership provisions uniformly available across the country.

This was one of a number of important recommendations affecting insolvent consumers made in 1970 by a Canadian federal task force on bankruptcy and insolvency legislation.[151] Its report also envisaged a simplified form of bankruptcy for those consumers who do not wish to avail themselves of a prorating plan or are hopelessly insolvent. Consumer and nonbusiness bankruptcies in Canada numbered only 3,086 in 1972 or about 2 percent of the corresponding American figure.[152] The striking difference can be explained, at least in part, by the stigma which still attaches in Canada to a bankruptcy order and to the high cost of retaining the services of a private trustee in bankruptcy. Under a programme initiated in 1972 the Canadian federal Department of Consumer and Corporate Affairs makes available for a nominal fee the services of a public trustee but this facility is restricted to indigent consumers who can satisfy a fairly stringent means test. In 1972 the federal trustees rejected 675 applications out of a total of 1,446.[153] It is not clear to what extent the revised Bankruptcy Act will remedy this defect in the delivery of legal services.

Let me conclude these discursive remarks on a more cheerful note. As I have touched base with some of the salient problems in modern consumer credit law the thought must surely have leapt to the reader's mind, "Why don't those guys adopt our Uniform Consumer Credit Code?" An intriguing question, to be sure, but one which calls for a lecture of its own!

149. CAN. STAT. c. 32, § 22 (1966-67), CAN. REV. STAT. c. B-3, Part X, §§ 188-213 (1970).

150. *See* Bill C-60, 30th Parl., 1st Sess., Part III, §§ 63 *et seq.* (1975).

151. STUDY COMMITTEE ON BANKRUPTCY AND INSOLVENCY LEGISLATION, REPORT, pt. III, ch. 7 (1970).

152. SUPERINTENDENT OF BANKRUPTCY, REPORT FOR THE YEAR ENDED MARCH 31, 1973, at 17 (Table G-2). Nonbusiness bankruptcies in the United States totaled 164,737. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS 240 (1972) (Table 75).

153. SUPERINTENDENT OF BANKRUPTCY, REPORT, *supra* note 152, at 40-41.

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