

Why Bother With Theory?

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INTRODUCTION	103
I. COURTS	107
II. LEGISLATURES	110
III. PRACTITIONERS	114
CONCLUSION	118

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This essay is, of course, a statement of the perspective of the author in writing in a private capacity and should not in any way be understood as reflecting the views of the Law Commission of Canada.

I remember, some 25 years ago now, my initial lecture at the University of Windsor. I stopped in the Faculty Lounge to get a cup of coffee before heading down to give the opening class in my Introduction to Law course — at that time entitled Legal Process. A colleague, Eddie Veitch, then as now a great tease, asked me what I was going to teach. I mumbled something about my opening rhetorical salvo that was undoubtedly as confused as it was pompous. To which he replied, subtly reversing the standard jibe : "Well Rod, that's a great idea in practice, but it won't work in theory".

Since that first class I have had several occasions to reflect upon the relationship between theory and practice, and how that relationship is characterized by jurists. Today, many claim that legal theory has no purpose — other than to confuse judges and lawyers; conversely, others assert the centrality of legal theory to legal practice. Often, however, the issue in dispute is not clearly formulated, with neither opponents nor proponents of theory being able to state exactly what they mean by "theory". For this reason, I should like to begin this essay with a brief exploratory detour into the question : "What is legal theory"?

This simple question is actually far from easy to answer. In one sense, all intellectual activity is rooted in theory. For example, when I say that I am standing at a podium addressing an audience, it is obvious that I have to have some concept of podium, an idea of what an audience is, and a working hypothesis about the differences between haranguing a crowd, babbling incoherently and delivering a serious speech. But it is not just abstract ideas that are theory-laden. Even such seemingly irreducible units of experience as "facts" depend on us deploying our perceptive *apparati* and generating intellectual structures that allow us to recognize, sort, categorize and label things and happenings.¹ Obviously, however, you don't need me here to tell you that all dimensions of the practice of law are unavoidably theory-rich.

If legal activity is self-evidently rooted in theory, why is it necessary to examine the question "the role of theory in commercial law"? Why three law professors to explain the matter and to rehabilitate theory in the minds of the commercial bar? The reason lies in a quite different idea of theory that most lawyers have in view when they distinguish theory from practice and theory from reality, and when they disparage legal theory. To them, theory is what pointy-headed academics who have never practised law write; theory typically involves asserting bizarre, curious or implausible explanations about people's motives or about the real meaning of ideas that practitioners have long taken for granted. Among the first types of theory to be dismissed in such a manner are all contemporary external critiques of law and legal institutions : critical legal studies, law and economics, feminist theories, natural law theories, jurimetrics and scalogram analysis, critical race theory, hermeneutics, and the current darling of the polemicists, deconstruction. The target of lawyerly scepticism of theory is any idea that does not immediately look like it can serve legal practice. So, the dismissive question goes, "what use is this to me in my day-to-day affairs — either in negotiations or in court"?

1. This point is brilliantly explored in a set of first-year teaching materials by B. Bishin and C. Stone. See W. Bishin & C.D. Stone, *Law, Language and Ethics* (Mineola : Foundation Press, 1972).

The rejoinder by those with a theoretical bent, or who do theory, is two-fold. To begin, they point out that to be able to make such a claim about the disutility of theory, a lawyer has to have a theory both about what law is and about what practice is. The diverse theoretical approaches being criticized at least have the merit of being coherent and transparent: it is obvious what claim is being asserted, and why. At bottom, the rejoinder is simply this. The only difference between a person who has a theory and a person who doesn't, is that the person who disclaims having a theory just is not aware that he or she in fact does have a theory.

Then, and more pointedly, defenders of theory advance a second, empirical retort. They note that a read of recent Supreme Court of Canada judgments would indicate how relevant these so-called irrelevant theoretical questions are to top-level legal practice. If anything, contemporary opinion writing is becoming more aware of and explicit about its deep theoretical underpinnings. Whether or not this is proper in judicial judgments — itself a matter of great theoretical debate — it is a fact. And being a fact, good legal practice demands that lawyers take cognizance of it, and organize their activities in consequence.

These two contrasting viewpoints — the one opposed to and the other in favour of legal theory — permit me to stake out the boundaries, and target the main themes, of this short essay. I do not, nor do I need to, answer the question whether theory inheres in all human endeavours (although, I acknowledge, this is a perspective I personally find persuasive); nor do I take a position on the question whether one can practice law effectively only if one consciously adopts an external theoretical position of some sort (once again, a perspective I personally find congenial). My objective is much more modest. It is two-fold.

I want to argue, first of all, that regardless of whether I am right about grand theory — critical legal studies, law and economics, feminist theories, natural law theories, etc. — there is a kind of mid-level legal theory that is absolutely essential to the daily life of the practitioner. In civil law jurisdictions, this type of theory is known as *la théorie générale du droit*. When it is directed to the rules and principles of particular branches of law — banking and secured transactions, for example — it is called *la doctrine*.² This theory is not the stuff of black-letter analysis of statutes, or even of reconciling lines of cases, that one finds in most legal textbooks or practitioners' manuals.

The latter efforts are, let me emphasize, theoretical. But they are not *la doctrine* since they do not consciously depart from first-level legal artifacts. In the language of the social sciences, they reflect positive (describing what is) rather than normative (describing what ought to be) theory. They adopt the perspective of the 19th century French legal writer who said, "I know nothing of the Civil law; I only know the Civil Code" and who then proceeded to write a four-volume article-by-article exegesis of the *Code civil des français* without once developing an organizing theme that was not explicit in the text of the Code itself. These *Manuels du Code civil* and their Common law equivalents — the

2. See generally, R.A. Macdonald, "Understanding Civil Law Scholarship in Quebec" (1985) 23 Osgoode Hall Law Journal 573, especially at 577-590 and sources cited.

statute citator or the digest — are not what I have in mind when I talk of *la doctrine* (or, in English, doctrinal legal theory).³

My further claim is more controversial. I believe that there are two different kinds of normative legal theory. There is the explicit normative legal theory of the type one finds especially in jurisprudence textbooks. Here, writers are trying to explain whole fields of law by reference to one, or a very small number of, big ideas. Richard Posner asserts in *Economic Analysis of Law*⁴ that most private law is organized by reference to the idea of wealth maximization through markets. He then argues that some rules and principles of the Common law should be modified because they do not reflect this goal. Similarly, Ernie Weinrib argues in *The Idea of Private Law*⁵ that the Aristotelian notion of corrective justice underlies the law of contracts and torts. Doctrines in these fields that are incoherent with this idea of justice should, consequently, be reassessed and revised by courts.

There is also a broad and deep compendium of what might be called implicit normative legal theory. This is a body of doctrinal legal knowledge that is neither legislatively announced, nor judicially pronounced, nor scholastically denounced. It is secreted in the pages of the best treatises, law review articles and *syllabi* of law faculty courses. Let me give two rhetorical illustrations. How much of our current understanding of the common law of judicial review of administrative action derives from the magnificent rationalizing efforts of Stanley A. deSmith in the late 1950's and early 1960's? Again, how much of our current understanding of the law of negotiable instruments and banking in Canada is directly tributary to the treatise penned by Dean J.D. Falconbridge? In neither case did these authors explicitly set out to write normative legal theory. Both — disingenuously one might even think — disclaimed a theoretical project. Yet both shaped the evolution of the law by the power of their unstated conceptual syntheses. This is the type of implicit normative legal theory that I would claim is the life-blood of law, legal practice and internal legal analysis.

In the classical treatise tradition of the Common law and the Civil law, implicit doctrinal legal theory serves a number of important functions. The treatise-writer's analytical task is three-fold:⁶

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3. See, for a discussion of the different forms of legal scholarship and writing, H.W. Arthurs, *Law and Learning* (Ottawa : Social Sciences and Humanities Research Council, 1983). Arthurs identifies four archetypes : doctrinal analysis; law reform research; legal theory; and fundamental social-science research. Citators and digests (and most legal texts) fall into what he characterizes as doctrinal analysis; what I have here labeled *la doctrine* falls, along with more philosophical writing about law, into the category legal theory.
 4. R. Posner, *Economic Analysis of Law*, 4th ed. (Boston : Little Brown, 1992).
 5. E. Weinrib, *The Idea of Private Law* (Cambridge : Harvard University Press, 1995).
 6. I derive the ideas expressed in the following paragraphs from A.W.B. Simpson, "The Rise and Fall of the Legal Treatise : Legal Principles and the Forms of Legal Literature" (1981) 48 *University of Chicago L. Rev.* 632; A.W.B. Simpson, "The Legal Treatise and Legal Theory" in E. Ives & A. Manchester, eds., *Law, Litigants and the Legal Profession* (London : Stevens, 1983).

1. The treatise seeks to assemble and rationalize judicial decisions in a given field of law — particularly judicial decisions that at first glance seem contradictory. It is more than a simply inventory of judicial decisions. It seeks to draw out the general principles that these decisions imply, to criticize cases wrongly decided, and to suggest where the discovered *rationes decidendi* might ultimately point.
2. The treatise seeks to distil the normative content of a statute or statutes, and to organize this content within a logical analytical frame. A treatise is much more than a section by section commentary on a statute. It is a presentation and interpretation of the law expressed through that statute.
3. The treatise, especially in its Civil law variant, *Le traité théorique et pratique*, attempts to give an account of legal practice — especially legal practice that stretches existing legal doctrine. Once more, the point of the treatise is not just to inventorize. It is to suggest better practices, and ways to deploy standard legal devices in novel ways and for novel purposes.

In this essay I should like to focus my analysis on doctrinal legal theory (*la doctrine*) principally as it appears in the materials produced primarily within the legal academy. I have selected three examples from the field I know best : the law of secured transactions. These three examples are directed to three different moments in the life of the law — the adjudicative moment, the legislative moment, and the contract-drafting moment. I seek to show, in each case, the uses, abuses and non-uses of doctrinal legal theory in commercial law.

I should point out that the examples I have chosen derive directly from my own experience and, therefore, may reflect considerations primarily present in the law of Quebec. Moreover, the footnote references I provide will often be to my own writing in the field, if only because these texts provide rather detailed bibliographies of the relevant doctrinal writing on the themes raised. I shall, nonetheless, draw parallel illustrations from the Common law tradition in an attempt to demonstrate the generality of the points under consideration.

I. COURTS

In this first section I should like to address what might appear to be a straightforward question : How does doctrinal legal theory assist jurists at the point of commercial litigation? I argue that there is a central role for this kind of theory in helping courts and lawyers make sense of previous judicial decisions in a given field, and especially, of helping them do so when these decisions relate to the interpretation of commercial law statutes.

By "making sense of previous judicial decisions" I do not just mean finding and sorting cases; any good digest will do that. Nor do I just mean reconciling diverse interpretations of statutory language; again, any good student text will serve this purpose. I mean, rather, to signal the business of drawing out implicit legal policy and seeking higher levels of abstraction in legal reasoning.⁷ The point of this kind of legal theory is, to take an example drawn from Grant Gilmore's *The Death of Contract*,⁸ to synthesize a general concept of contract from a series of different 19th century nominate contracts. In all human endeavours — from history to physics — the ambition of the theorist is to generate more comprehensive and more coherent explanations of events in the world. The fundamental epistemological premise of western rationality is that the best theory explains the most data with the least complex intellectual construction.

For present purposes there is probably no better example of the misuse and non-use of theory by courts and lawyers than the saga of interpretation in Quebec concerning what has successively been section 88, section 178 and now section 427 of the *Bank Act*. The litigation spawned by this provision in its various iterations since it was first enacted in 1890 is graphic evidence of how incompletely theorized law generates confusion and unproductive litigation. No doubt, it can be argued that the problem with section 427 is that the statutory text itself is poorly drafted. While some commentators — in both the Common law and the Civil law traditions — have so claimed, I leave that issue aside for the moment. Legal practice is not like a law school examination where the professor can always be called into the exam room to clarify obscurities and contradictions. Even in the presence of totally incoherent legislative language, courts must still decide cases and lawyers must still advise clients. The practical issue is how to interpret a statutory provision, however well or however poorly it has been drafted.

Section 427 appears to create a security device that takes the form of a modified chattel mortgage, using the technique of a self-constituted document of title delivered as security to a creditor. This much is evident from the decision of the Supreme Court of Canada in the 1927 case *Landry Pulpwood v. Banque canadienne nationale*.⁹ Of course, analogies to chattel mortgages can work in Canadian Common law jurisdictions, even if

7. The general absence of *a priori* abstract rationality is, of course, why M. Weber considered the Common law to be an inferior expression of the legal ideal than the Civil law. For a concise elaboration, see A.T. Kronman, *Max Weber* (Palo Alto : Stanford University Press, 1983) at 59 *sqff*.

8. G. Gilmore, *The Death of Contract*, 2nd ed. (Columbus : Ohio State University Press, 1995).

9. *Landry Pulpwood v. Banque canadienne nationale*, [1927] S.C.R. 605.

the analogy is becoming increasingly inelegant and incoherent by virtue of the enactment of various *Personal Property Security Acts*.¹⁰

But these analogies fail miserably in so far as the law in Quebec is concerned. The chattel mortgage is a legal institution unknown to the Civil law tradition. So courts in Quebec were confronted with a dilemma whenever they had to characterize section 88 security in relation to competing interests arising under the Civil law — for example, in order to determine whether a good faith holder of charged assets that has previously been disposed of in a non-ordinary course of business transaction acquired clear title to the assets. For many years they were divided as to whether the creditor-bank should be treated as :

1. a Common law mortgagee (even in Quebec!); or
2. a Civil law non-dispossessory pledgee; or
3. a Civil law hypothecary creditor with security over moveable property; or
4. a person holding some kind of *sui generis* right in the assets. Obviously, none of these options was theoretically attractive.

Gradually, however, a variant of the third idea emerged as the favoured judicial analysis. In 1951, the Quebec Court of Appeal decided, in the case *Banque canadienne nationale v. Lefavre*,¹¹ that the bank holding section 88 security was vested with a "right of ownership *sui generis*". But to say that a right is a *sui generis* right really adds nothing to the solution of the intellectual puzzle : everything depends on the unexplained *sui* in the *genus* identified. Nonetheless, for thirty years thereafter, this non-characterization was never seriously challenged. Courts and lawyers simply declined to work through the detail of *Bank Act* security with a view to deducing its essential characteristics, and elaborating in a coherent fashion the various rights and remedies open to debtor, creditor and third parties (including trustees in bankruptcy). Legal scholars also seemed uninterested in theorizing this security device, notwithstanding the uncertainties it caused for procedures in realization and non-bankruptcy priorities.

In part the reason for this attitude of neglect can be attributed to the quasi-monopoly of banks on commercial credit. It also can be traced to the absence of a codal non-dispossessory security device over moveables that could be taken over present and future raw materials and inventory. The absence of major priority conflicts between deep-pocket competing lenders who could afford expensive litigation explains the disinterest of lawyers; the fact of section 88 being an extra-codal, federal security explains the disinterest of Civil law (that is, private law) scholars in the Quebec legal academy.

10. See the examples of incoherence set out in R.C.C. Cuming & R. Wood, "Compatibility of Federal and Provincial Personal Property Security Law" (1986) 65 Canadian Bar Review 267; J.S. Ziegel, "Protecting the Integrity of the Ontario Personal Property Security Act" (1987-88) 13 Canadian Business Law Journal 359; R.C.C. Cuming, "P.P.S.A. — Section 178 Overlap : No Closer to Solutions" (1991) 18 Canadian Business Law Journal 135.

11. *Banque canadienne nationale v. Lefavre*, [1951] Q.B. 83 (C.A.).

In 1984, however, there appeared a law review article entitled "Security Under Section 178 of the *Bank Act* : A Civil Law Analysis".¹² This article took all the reported Quebec cases up to that point, assessed the reasons for decision and the actual outcomes of the litigation, and concluded that the "ownership *sui generis*" analysis could not be sustained. It suggested an alternative characterization — section 178 as an innominate Civil law security right — and traced out the implications of such an analysis for questions of enforcement, realization and priorities. The article immediately provoked an aggressive counter-attack from certain sectors of the banking bar.¹³ Yet, probably in part because the Quebec legislature soon enacted an analogous provincial security device that required theorizing within the Civil law itself — the transfer of property-in-stock regime — the novel analysis soon found a measure of acceptance among scholars and in the courts.

By 1990, the Supreme Court of Canada was seized of a case that squarely raised the issue whether the bank had a right of ownership *sui generis* or whether section 178 created a novel type of security right.¹⁴ It declined to decide this central issue, but its judgment on the precise question before it could only have been reached were it to have adopted the novel characterization.¹⁵ Since that time, litigation in Quebec has never generated a result inconsistent with the security right analysis — even though there has never been a Supreme Court of Canada decision directly confirming either that particular characterization or the right of ownership *sui generis* characterization.

What are the lessons to be derived from this example? What has doctrinal legal theory actually contributed to Quebec commercial law at the point of litigation? I would suggest the following three ideas.

Most importantly, because statutes are episodic reflections of legislative will, they can often be incompletely integrated into existing structures of legal regulation. Section 88 was initially designed to solve a particular practical problem — the need to develop a credit economy for primary producers and manufacturers. Parliament sought a practical solution to that problem without much concern for existing legal institutions, largely because it knew that, given the absence of other devices serving the same object, its statute would create few conflicts in practice. With the expansion of the section 88 device to almost all forms of bank lending over the subsequent century, and the development of more sophisticated devices in Common law provinces for the granting of competing security rights, the necessity of seeking a means to integrate section 427 security into provincial secured transactions law became patent. Moreover, in view of its intellectual

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12. R.A. Macdonald, "Security Under Section 178 of the Bank Act : A Civil Law Analysis" (1983) 43 R. du B. 1007.
 13. See M. Paquet, "Pouvoir de prise de possession informelle dans le cas des garanties des alinéas 178(1)(a) et (b) de la loi sur les banques : existence ou inexistence" (1984) 44 R. du B. 333.
 14. *Banque nationale du Canada v. Atomic Slipper*, [1991] 1 S.C.R. 1059.
 15. See R.A. Macdonald, "Atomic Slipper v. Banque Nationale du Canada : Commercial Practice Meets Constitutional Law" (1989) 73 Canadian Bankruptcy Reports 1-23, commenting on the decision of the Quebec Court of Appeal; R.A. Macdonald, "Provincial Law and Federal Commercial Law : Is *Atomic Slipper* A New Beginning?" (1992) 7 Banking and Finance Law Review 437-452, commenting on the decision of the Supreme Court of Canada.

origins, this device always required some adjustment to make it work in Quebec. The exercise of interpreting new legislative concepts and institutions so that they speak to existing doctrinal structures (whether codified as in Quebec, or uncodified as in Common law provinces) demands a sophisticated theoretical endeavour of synthesis and organization.¹⁶

In addition, especially when the integration of federal and provincial institutions is in issue, federal commercial law statutes have to be drafted to speak equally to Common law and Civil law systems. With the now explicit federal policy of legal bijuralism, this means that they often will adopt novel vocabulary and novel conceptual structures. These federal institutions increasingly will be system neutral, using a language that is generic, and definitions that are teleological (as in the *Personal Property Security Act* regime), rather than (as in most existing private law regimes) essentialist. Traditional federal initiatives such as section 427 can, however, only be made to speak to provincial law by an effort to distil their essence and general intellectual structure. Jurists are then obliged to undertake an exercise of cross-characterization : federal institutions must be characterized in terms of provincial law, and provincial law and institutions must be characterized under the conceptual structure adopted by federal law. Working out the manner and mechanics of legal cross-characterization is a central task of doctrinal legal theory in the Canadian context.¹⁷

Finally, litigators are always seeking, either explicitly or implicitly, to explain to judges the theory of their case. This requires making on deeper judgments about the conceptual underpinnings of the legal institutions being invoked. Whether section 427 is, or is not, any of a modified chattel mortgage, a right of ownership *sui generis*, a security interest subject to the *Personal Property Security Act* for provincial purposes, or an innominate Civil law security right cannot be determined from the face of the *Bank Act*. A carefully elaborated doctrinal legal theory, complete with serious debate about which of competing doctrinal characterizations best reveals the nature of the legal institution in question, and is best deployed in the solution of practical problems, is an essential element in the conceptualization of legislative texts that all litigation requires.

II. LEGISLATURES

I have chosen my second example of the contribution of legal theory to commercial practice so as to speak to the legislative moment : "How does doctrinal legal theory help the legislature enact a more coherent commercial law"? Once again I should like to take an example that is drawn from the Civil law, but that has antecedents and a parallel in the Common law tradition. Both deal with the same substantive issue, namely, how the law of security over personal property (moveable property in Quebec) can be modernized and rationalized along functional lines.

16. A powerful argument in this direction is made by G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge : Harvard University Press, 1982).

17. See the remarkable series of studies on this point published in *The Harmonization of Federal Legislation With Quebec Civil Law and Canadian Bijuralism* (Ottawa : Department of Justice of Canada, 1997).

Historically, both the Common law and Civil law developed a plethora of distinct and independent legal devices as means for generating security on various classes of assets (for example, capital equipment, inventory, receivables) and to serve particular sectors of the market for credit (for example, inventory financiers, whole undertaking financiers, accounts receivable financiers, plant and equipment financiers, on the one hand, and buyers, borrowers, manufacturers, wholesalers, retailers and consumers, on the other).¹⁸ Some fifty years ago, academic commercial lawyers began to conceive the project of synthesizing these devices into a single concept — the security interest. Under such a synthesis, they believed, the creation and enforcement of security would be facilitated, and priorities would be fixed according to a coherent policy schema. The root idea was that transparency and simplification would significantly reduce the transaction costs associated with the granting and taking of security on personal property. This rationalizing project was gradually accomplished, first in the United States with Article 9 of the *Uniform Commercial Code*, and later in most Canadian Common law jurisdictions with the enactment of *Personal Property Security Acts*.¹⁹

The central element in all this new secured lending legislation was a functional approach to defining what constitutes a security right. This functionalism is reflected in what has come to be known as the "substance of the transaction" idea. Any transaction which in substance created a security interest in personal property would be subject to the rationalized regime : "if it walks like a duck and it quacks like a duck, it's a duck".²⁰

Both the elaboration of this principle and the specific techniques by which security could be taken and enforced reflected a revolutionary development for the Common law, although this approach to legal knowledge was longstanding, perhaps even inherent, in the Civil law tradition.²¹ The idea of generating and theorizing a legal concept, distilling its essential attributes and deducing its specific legal outcomes is, after all, a fundamental feature of Civilian legal methodology.²² In almost every Common law jurisdiction, the adoption of legislation modernizing the regimes of creditors' rights, debtors' interests in secured assets, and priorities involved the active and energetic participation of doctrinal theorists. Their counsel provided the initial support for steering

18. For a review of this history see, E. Sykes & S. Walker, *The Law of Securities*, 5th ed. (Sydney : The Law Book, 1993); G. Gilmore, *Security Interests in Personal Property*, 2 vols. (Boston : Little Brown, 1965).

19. See K. Llewellyn, "Why We Need the Uniform Commercial Code" (1957) 10 *University of Florida Law Review* 367 for the story in the United States, and J.S. Ziegel, "The Quest for Uniform Personal Property Security Legislation" (1989) 23 *Law Society of Upper Canada Gazette* 274 for the story in Common law Canada.

20. The rationale and evolution of the idea is discussed at length in G. Gilmore, *Security Interests in Personal Property*, vol. 1 (Boston : Little Brown, 1965) ch. 9, 10.

21. See generally, R.A. Macdonald, "Le droit des sûretés mobilières et sa réforme : principes juridiques et politiques législatives" in P. Legrand, Jr., ed., *Common Law : d'un siècle à l'autre* (Cowansville : Éditions Yvon Blais, 1992) at 423-448 for the position at Common law, and R. A. Macdonald, "The Counter-Reformation of Secured Transactions Law in Quebec" (1991) 19 *Canadian Business Law Journal* 239-295 for the position in the Civil law.

22. See J.E.C. Brierley, *Quebec Civil Law* (Toronto : Emond Montgomery, 1993) at 173-180.

the project through the political and legislative processes, and remains central to various attempts to produce second generation statutes in this field. Perhaps more than any other artifact of commercial law in Common law systems, legislation relating to security on personal property is the fruit of a consciously and carefully orchestrated effort in the legal academy.²³

The story of rationalization of security on moveable property and the substance of the transaction principle in Quebec has been less happy.²⁴ In 1977, after extensive public consultation, the Civil Code Revision Office carefully elaborated a modernized regime of security on property that attempted to incorporate the general ideas of Article 9 into the Civil law. It rendered the substance of the transaction principle by means of a technique it called the "presumption of hypothec". This presumption would operate to deem all transactions by which a security right in property was created to be the codal security device — the hypothec.²⁵

By contrast with the Article 9 regime, the effect of this presumption of hypothec was not just to treat title devices such as conditional sales as if they were security for the purposes of (1) ensuring their publicity and perfection, (2) regulating their enforcement, and (3) determining the rank of competing creditors. It was to take any such device imagined by parties or their advocates, and automatically transform it into a hypothec. The Civil Code Revision Office proposal was supported by the commercial lending establishment in Quebec, but was resisted by some consumer groups and by the notarial profession, who saw it as a direct attack on the principle of freedom of contract.

The criticisms proved more telling. When the draft title of the *Civil Code of Québec* dealing with security on property was released in 1985 the presumption of hypothec did not appear. During legislative hearings about this title of the new Code various groups — bankers and lenders, the bar and several legal academics — argued for its inclusion. These arguments were again met by the initial critique and were rejected by the National Assembly. Thereupon some doctrinal theorists sought to illustrate that there was an alternative means for accomplishing the rationalizing result envisioned by the Civil Code Revision Office. They pointed out that the Civil law of Quebec already recognized an inchoate substance of the transaction principle similar to that of Article 9. Since 1964, the *Civil Code of Lower Canada* had imposed rigorous realization and enforcement controls in relation to certain immoveable title-security transactions under articles 1040a-

23. A good overview is provided by R.C.C. Cuming & J.S. Ziegel, "The Modernization of Canadian Personal Property Security Law" (1981) 31 *University of Toronto Law Journal* 249 and the literature cited. See also J.S. Ziegel, "The Future of Commercial Law in Canada" (1986) 20 *University of British Columbia Law Review* 1.

24. For a detailed review with bibliography see R.A. Macdonald, "Faut-il s'assurer qu'on appelle un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, 'la présomption d'hypothèque' et le principe de l'essence de l'opération" in E. Caparros, ed., *Mélanges Germain Brière* (Montreal : Wilson et Lafleur, 1993) at 527.

25. Civil Code Revision Office, *Report on the Civil Code. Volume I : Draft Civil Code* (Quebec : Éditeur officiel de Québec, 1978) at 257-299; *Volume II : Commentaries*, tome I, (Quebec : Éditeur officiel du Québec, 1978) at 348-376, 429-513, and 549-554.

1040e, and that these had been liberally extended by the courts.²⁶ In the event, however, the attempt to salvage the functional approach of Article 9 was unsuccessful.

Nonetheless, this evocation of articles 1040a-1040e induced the legislature to realize that transactions involving the deployment of title to generate a security right on property could be abusive if they were not regulated. Hence, the National Assembly chose to identify the most commonly deployed of these transactions and to subject them to various degrees of *a priori* control in a revised draft of the *Civil Code of Québec*: foreclosure agreements (giving-in-payment clauses) were deemed not written (article 1801); the seller's right to resolve a sale for the buyer's failure to pay the price (article 1743), the title-reservation device of instalment sales (article 1749), and the mortgage-like sale under a right of redemption (article 1756) were each required to be registered and made subject to the hypothecary regime at the point of enforcement.

After this first revision to the draft Code appeared, doctrinal theorists once again attempted to convince the legislature of the desirability of a full-fledged substance of the transaction principle. They observed that articles 1743, 1749 and 1756 of the proposed *Civil Code of Québec* were simply specific instances of the more general principle being advocated. These codal controls did not change the legal nature of the sale transaction, but merely rationalized regimes of publicity and enforcement when title in a contract of sale was being deployed as security. Theorists also drew attention to other transactions where title-type security could be taken — most notably, the finance lease and the trust. Their argument was simply that without the kind of a general functional principle being advocated, legal practice would continue to invent novel title-security devices that would escape the regulatory regime applicable to hypothecs.

The response of the National Assembly, and the ultimate reflection of this response in the *Civil Code of Québec* as enacted in 1991 was predictable. The legislature took the critical commentary to heart, but only in respect of the two identified transactions. It imposed a minor degree of regulation on the finance lease (article 1842), and it subjected the security trust to the hypothecary regime in the same manner as the instalment sale (article 1263). Because it did not really understand the purpose of a substance of the transaction principle, however, it not grasp either the rationale for its adoption or the manner in which it would have to legislate. Worse, because it did not really understand how the trust could be deployed as a security device, it failed miserably even in its attempt to regulate that transaction expressly. As a consequence, it is hard to establish today exactly what article 1263 of the Code means and what transactions it affects. Some now claim that the Code is simply irrelevant to the most common uses of the trust as security, with the result that the device is as unregulated as all the other sale transactions not explicitly made subject to the hypothecary regime.²⁷

26. See, in particular, the decision of a 9-member (*sic*) panel of the Quebec Court of Appeal in *Nadeau v. Nadeau*, [1977] C.A. 248.

27. See J.B. Claxton, "Financing of Stock-in-Trade and Capital Equipment in the Civil Code of Quebec" in *Conférence sur les sûretés réelles* (Cowansville : Éditions Yvon Blais, 1995); J.B. Claxton, "Trust as a Security Device" in *Le financement des affaires* (McGill University, Faculty of Law : Law and You Seminars, May 5, 1995).

Are there any general lessons about the potential contribution of doctrinal legal theory to commercial law in this second — legislative — moment that can be derived from the above example? I would claim that there are two.

In the first place, the failure of the Civil Code Revision Office to fully theorize what it was trying to accomplish with the presumption of hypothec permitted critics to undermine the whole idea of functional reorganization of security on property through an attack upon the specific proposal advanced by the Office. The error of the Office lay in its atavistic commitment to form and to essences (deeming all legal institutions to be hypothecs if deployed to secure the performance of an obligation) as a vehicle for achieving a functional objective (the integration of diverse legal devices deployed for a common purpose at the moment of their enforcement). Incompletely or incoherently theorized law reform proposals, however important and however necessary the underlying objectives may be for sane legal regulation, stand little chance of generating the broad acceptance necessary for legislative implementation. Worse, they tend to destroy the chances that analogous, and properly theorized, proposals will find legislative favour.²⁸

The second lesson is complementary to the first. The legislative process is often "a pig in a poke". Sometimes the trade-offs required to ensure passage of a statute mean that its policy objectives must be watered down or compromised. Legislatures need help in understanding that not all parts of a law reform proposal are of equal importance to the endeavour. The distinction between what is essential, and what can be left aside is, moreover, rarely self-evident. Bringing home to legislatures the ground upon which their choices about the design of a legal institution should rest, and the implications of these choices presupposes a careful analysis and theorizing of its forms, functions and limits of the institution in question. This "theorizing of the essential" is the stock-in-trade of doctrinal legal theory.²⁹

III. PRACTITIONERS

The final dimension of the contribution of doctrinal legal theory to commercial law that I should like to discuss concerns the manner in which the private ordering of everyday commercial contractual practice is shaped by doctrinal synthesis: "What, if anything, does legal theory have to do with the law office activity of busy commercial practitioners"? I have selected two examples, one drawn from the Civil law and one from the Common law, that come immediately to mind. I will discuss the latter briefly, before passing to the former.

As noted, over the past thirty years Canadian Common law jurisdictions have witnessed the gradual rationalization and modernization of security over personal property. During this period, however, the contractual transformation of the diversity of security agreements being deployed — chattel mortgages, conditional sales, hire-purchase

28. On this point generally, see R.A. Macdonald, "Recommissioning Law Reform" (1997) 35 *Alberta Law Review* 831.

29. For an excellent example of such theorizing see T. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge: Harvard University Press, 1986).

agreements, finance leases, assignments of *choses* in action, etc. — has proceeded much more slowly than their legislative transformation into the concept of a security interest. Upon the coming into force of *Personal Property Security Acts* a uniform regime governing the constitutive formalities, publicity, enforcement and rank of these different contractual forms of security was, in principle, created. But this legislation did not abolish any forms of security previously in use : it merely provided that any transaction which in substance created a security right would be subject to the regime established by the statute.

The practical result was hardly surprising. Most lawyers continued to deploy their traditional security agreement precedents, simply modifying them where necessary to take advantage of, or to conform to the requirements of *Personal Property Security Acts*.³⁰ In other words, no new documents and forms entitled "Security Agreements" were immediately drafted by commercial lawyers. Several reasons for this reaction may be suggested. One could be found in the provisions of the federal *Bankruptcy Act*, which maintained the distinction between ownership and security, even when a creditor was clearly deploying title to generate a security right. A hire-purchase agreement would thus open the door to a better result in bankruptcy (keeping the collateral out of the bankrupt's estate) than would the chattel mortgage or any new-fangled security interest. But this potential bankruptcy advantage does not fully explain why precedents for a generic Security Agreement began to emerge only in the late 1980's. After all, nothing prevented creditors from inserting into any form of security document various clauses specifically governing the location of title and risk of loss during the currency of the agreement and prior to default.

I believe that the failure to develop generic Security Agreements can be traced in large measure to a failure of doctrinal legal theory. To my knowledge, no Common law legal scholar attempted to theorize the new security interest as a distinct legal concept. A scan of text and treatise commentary on the various *Personal Property Security Acts* across Canada reveals no synthetic effort to state the nature and essential characteristics of security.³¹ This type of endeavour is, by contrast, routinely found in Civil law secured transactions treatises.³² Without adequate theorizing, the *Personal Property Security Act* reforms came to be understood like those of any other Common law enactment : as statutory barnacles upon the common law. Rather than serving as legislative guideposts to be exploited in the rationalization of contractual practice in commercial law, the opportunities presented by *Personal Property Security Acts* were discounted and the

30. See J.S. Ziegel & D. Denomme, "How Ontario Lawyers View the Personal Property Security Act : An Empirical Survey" (1992) 20 Canadian Business Law Journal 90, for a study of the reaction of the Ontario legal profession to the P.P.S.A.

31. See, for example, R.C.C. Cuming & R. Wood, *British Columbia Personal Property Security Act Handbook* (Toronto : Carswell, 1994); R.H. McLaren, *Secured Transactions in Personal Property in Canada*, 2nd ed. (Toronto : Carswell, 1989); C. Walsh, *New Brunswick Personal Property Security Act* (Fredericton : New Brunswick Geographic Information Corporation, 1995); J.S. Ziegel & D. Denomme, *Ontario Personal Property Security Act : Commentary and Analysis* (Aurora : Canada Law Book, 1994).

32. For the best example, see J. Mestre, E. Putnam & M. Billiau, *Traité de droit civil (sous la direction de Jacques Ghestin) [:] Droit commun des sûretés réelles : théorie générale* (Paris : L.G.D.J., 1996).

statute was perceived simply as requiring additional clauses to be built into existing precedents.

A similar and equally compelling case for theorizing a new legal institution is now present in Quebec. The National Assembly decided not to incorporate a comprehensive substance of the transaction principle in the *Civil Code of Québec*. But it did identify various institutions — the right of resolution in sale, the instalment sale, the sale with a right of redemption — which, when deployed to secure the performance of an obligation, usually would have to be enforced as if they were security. Among the transactions so identified was, as already noted, the security trust (article 1263).

What is of present interest is the reaction of notaries and advocates in Quebec to the possibilities opened up by the security trust. At the time the *Civil Code of Québec* came into force professional cant had it that the generalization of the concept of hypothec to cover moveable as well as immoveable property, universalities as well as individually identified property, and future as well as present property was sufficient to solve all the legitimate security concerns of lenders. This, of course, was wishful thinking.³³

The codal regime contained a number of sub-optimal facets for lenders and vendors. To begin, it provided for a plethora of non-consensual *ex post* prior claims (for example, government tax claims) that would outrank pre-existing consensual security. It also denied persons not carrying on an enterprise the capacity to grant a hypothec over a universality of property (for example, a stock portfolio). And it did not permit such persons not carrying on an enterprise to grant hypothecs over moveable property unless they delivered custody of the property to their creditor. These were significant drawbacks to the hypothecary regime that immediately set leading counsel for lenders on a quest for alternative security techniques.³⁴

Among the possibilities was the security trust : that is, the transfer of secured assets to a trust, for administration by a trustee subject to the terms of the loan and security agreements signed by debtor and creditor.³⁵ Such a technique served to withdraw the assets from the debtor's estate, and therefore render the government's tax claims nugatory against these assets. In addition, since there were no restrictions on who could set up a trust, this permitted persons not carrying on an enterprise to grant security both over a universality of property and over moveable property without having to give up physical custody. All in all, very useful advantages to the security trust regime in a commercial context. To take one illustrative example, the security trust would permit the chief shareholder or manager of a business enterprise to grant collateral security upon his or her

33. See the analysis in R.A. Macdonald, "Change of Terminology? Change of Law?" (1992) 23 *Revue générale de droit* 357.

34. These drawbacks and their consequences are rehearsed in D. Pratte, *Priorités et Hypothèques* (Sherbrooke : Éditions Revue de droit, Université de Sherbrooke, 1995).

35. The literature on the security trust is now beginning to develop. See, generally, J.B. Claxton, *Security on Property and the Rights of Secured Creditors* (Cowansville : Éditions Yvon Blais, 1994) at 217-244; L. Payette, *Les sûretés dans le Code civil du Québec* (Cowansville : Éditions Yvon Blais, 1994), at #133, 134, 792, 793, 997.

stock portfolio, deposit certificates, law insurance policies, and the like — most of which could not in that context, be hypothecated.³⁶

In 1993, just prior to the coming into force of the *Civil Code of Québec*, I was asked by several Montreal commercial law firms to give tutorials on the new security regime. For reasons just identified, I stressed the utility of diverse non-regulated title security devices, and advocated the selective deployment of the security trust device. In a public lecture that year I developed the security trust hypothesis in some detail.³⁷ As in 1983 when a new interpretation of section 178 security under the *Bank Act* was advanced, professional audiences were highly sceptical of, if not hostile to, the suggestion.

Three main reasons sustained this scepticism. First, leading commercial lawyers claimed that their clients were risk-averse lenders who would not be willing to take a chance on an unknown and unproved "professorial theory". Second, they feared that judges would likely not understand the new device and would, therefore, be disinclined to give them a sympathetic hearing if a case were ever to come to litigation. Third, whatever they thought of the long-term potential of the security trust, they took the idea as not being sufficiently well worked out in its quotidian particulars as to provide guidance for the drafting of workable security agreements. Because they themselves were uncertain how to proceed, the security trust idea was, at that point, a dead letter.

The key questions troubling commercial practitioners were the following : who owns the property in question? who controls its disposition? how much control over the activity of the trustee can be stipulated in the trust agreement, and how much may be reserved to the discretion of the creditor after the trust has been established? how would a security trust be realized and enforced? what representations and warranties would be required in the security agreement? These eminently sensible questions amounted to nothing other than a plea for a more complete doctrinal theorizing of the institution.

Four years later, the situation in Quebec is quite different. The security trust is now appearing in a variety of contexts.³⁸ Several Montreal firms have developed their own security trust precedents. Indeed, over the past four years I have had the privilege of working with major lenders and their counsel in developing this novel institution of secured credit. This has involved my participating in the exercise of thinking through the practical requirements of a security trust agreement and helping to draft precedents for its deployment in different lending contexts. My major role, however, has been to theorize the security trust, and to write studies and other essays illustrating its forms, techniques,

36. M. Deschamps, "La fiducie pour fins de garantie" in *Contemporary Utilization of Non-Corporate Vehicles of Commerce* [:] *Meredith Memorial Lectures, 1997* (Montreal : McGill University, Faculty of Law, 1998).

37. See R.A. Macdonald, "Title Transactions, the Security Trust and Other Heresies" in *Financing and Financial Planning Under the New Civil Code of Quebec* (McGill University, Faculty of Law : Law and You Seminars, October 29, 1993); see also, for a further iteration, R. A. Macdonald, "The Security Trust" in *Les fiducies dans le Code civil du Québec : une réforme radicale* (Montreal : Institut Wilson et Lafleur, May 25, 1995).

38. See, for example, J.B. Claxton, "The Corporate Trust Deed Under Quebec Law : Article 2692 of the Civil Code of Québec" (1997) 42 McGill Law Journal 797.

purposes, and limits.³⁹ What is more, as a teacher of commercial law who does not actually plead, I find myself often being asked to address judicial continuing education seminars and even to provide more focused doctrinal commentary to judges on the fundamental character of the security trust.

The point of this review has, of course, not been to preach the virtue of the security trust. Rather it has been to illustrate two lessons about the contribution of doctrinal legal theory to everyday legal practice. What are these lessons?

First, the example shows how legal theory can provide the impetus and rationale for changes to law office practice. By developing a more complete theorization of the security trust, legal scholars have now made it possible for commercial lawyers to use the device in those lending contexts where it is most appropriate. This theorization has helped to overcome the uncertainty of technique bothering practitioners and the lack of familiarity with the institution among the judiciary. It has also contributed to reassuring, through the confidence of their counsel, risk-averse lenders and vendors. Just as at the moment of adjudication and the moment of legislation, doctrinal legal theory can make a significant contribution to commercial law at the point of contract-drafting and client counselling.

The other lesson is equally important. There is a central role and a significant need for theorists to take existing professional practices and precedents and to bring to bear upon them the insights of careful doctrinal examination and elaboration. Theorizing legal practice is just as important as theorizing legal artifacts like cases and statutes. This is especially true in fields such as commercial law, where predictability through detailed management of the future using well-understood contractual forms is a high-order value. Careful doctrinal theory serves a basic stabilizing role in any legal system. Indeed, the central contribution of legal theory to this third moment in the life of the law is its capacity to bring to consciousness the implicit understandings, habits and practices that make a dynamic commercial law possible, and to organize them into a workable and coherent normative pattern.

CONCLUSION

In concluding this brief exploration of the role of what I have called doctrinal legal theory in commercial law I should like to emphasize three points. I have already alluded to the first two of these.

To begin, it is important to be clear about the different forms and functions of theoretical speculation in law. I have chosen to speak of only one such form — perhaps that which might be seen by some of my other colleagues in the academy as barely qualifying as theory at all. This form is doctrinal legal theory directed to developing the conceptual structure and implications of legal rules and institutions. I believe that

39. For the most recent and detailed of such efforts, see R.A. Macdonald, "The Security Trust : Principles and Perspectives" in *Contemporary Utilization of Non-Corporate Vehicles of Commerce*[:] *Meredith Memorial Lectures, 1997* (Montreal : McGill University, Faculty of Law, 1998).

doctrinal legal theory makes an invaluable contribution to Canadian commercial law, and that the examples I have given to illustrate its various functions could be repeated hundreds of times over in other domains.

But let me clearly state my belief that other forms of legal theory — what I have previously called external critique or high theory — are equally important in helping each of us to see the broader social implications of the law. The legal devices that we create through legislation, that we litigate before the courts, and that we invent in our contractual and counselling practices are not value-neutral. High theory keeps us focused on these values and enables us to maintain a critical posture towards our own activity. Eddie Veitch may have been intending to tease me when he said that my pedagogical idea would not work in theory. He nonetheless spoke a truth that bears repeating. Abnegation of theory invariably leads to the triumph of bad theory; and bad theory — be it about phlogiston, or eugenics, or human psychology, or the economics of secured lending — invariably leads to worse practices.

My second concluding point is closely connected to the first, although somewhat less sublime. Since theory pervades all human activity, we have a obligation as lawyers and judges to come to a better understanding of our own theoretical positions. If ignorance is no excuse for litigants, it is even less of an excuse for professionals. I do not, of course, mean that lawyers must be experts in social theory, in law and economics, or in any other theoretical extroversion. My ambition has been simply to show, using three relatively concrete examples, that even in such a practical field as commercial law the need for theory — in the instance, doctrinal legal theory — cannot be discounted. The organization of legal knowledge, the formulation of legal argument and the justification of judicial decisions are fundamentally dependent on theory.⁴⁰

Finally, I would claim that one of the signal contributions that doctrinal legal theory can make to commercial law lies in its capacity to help judges, legislators and practitioners come to a better understanding of their own role in, and responsibility for, producing a body of mercantile law that is just, effective, efficient and accessible to all Canadians. Legal theory in commercial law, like legal theory in other fields, reveals just how much discretion inheres in any regime of rules.⁴¹ Concomitantly, it drives home to professional participants in the great social-political experiment we call the Rule of Law their inescapable responsibilities towards those who seek justice.

40. There is an enormous literature on these (excuse the expressions) epistemological and ontological points. Among the more interesting articles published in law reviews are C.D. Stone, "Towards a Theory of Constitutional Law Casebooks" (1968) 41 *Southern California L. Rev.* 1; W.L. Twining, "Is Your Textbook Really Necessary?" (1970) 11 *Journal of the Society of Public Teachers of Law* 81; A. Jolowicz, ed., *The Division and Classification of the Law* (London : Butterworths, 1970); A.W.B. Simpson, "The Rise and Fall of the Legal Treatise : Legal Principles and the Forms of Legal Literature" (1981) 48 *University of Chicago Law Review* 632; and A.W.B. Simpson, "The Legal Treatise and Legal Theory" in E. Ives and A. Manchester, eds., *Law, Litigants and the Legal Profession* (London : Stevens, 1983).

41. For a nice exploration of the theme see F. Schauer, *Playing by the Rules : A Philosophical examination of rule-based decision-making in law and in life* (Oxford : Clarendon Press, 1991).

In my current position as President of the Law Commission of Canada I hope also to be able to contribute to this quest for justice. I trust that the Law Commission can find an appropriate theoretical equilibrium in its studies and research. It will have succeeded if it effectively explores both the kinds of considerations I have set out here as falling within the domain of doctrinal legal theory, and those that are encompassed by kinds of higher theory that my co-panellists have so eloquently presented today.