

TABLE OF CONTENTS

<i>Foreword</i>	VII
<i>Preface and Acknowledgments</i>	XIII
<i>About the Authors</i>	XVII
<i>Table of Abbreviations</i>	XXXVII

PRELIMINARY CHAPTER COMPARATIVE LAW AND CANADIAN BIJURALISM

Introduction	1
I. Contribution to the Study of Comparative Law	2
II. Contribution to the Study of Canadian Bijuralism	13
A. Analytical Framework	18
1. Necessity Criterion	18
2. Exclusion Criterion	21
B. Illustrations	26
1. The <i>DIMS</i> Decision	27
2. The <i>AYSA</i> Decision	29
Conclusion	33

CHAPTER 1 INTRODUCTION TO QUEBEC CIVIL LAW

Introduction	35
I. Historical Development of Quebec Civil Law	35
A. Law in New France	36

B. Conquest and Development of Mixed Private Law	38
C. Codification of Civil Law in 1866 (<i>Civil Code of Lower Canada</i>)	41
D. Private Law since Codification	45
E. Recodification of 1991 (<i>Civil Code of Québec</i>)	50
II. Formulation of Civil Law	55
A. Authoritative Statement of the <i>Jus Commune</i>	55
B. Style of the Civil Law	61
C. Vocabulary and Concepts of the Code	73
D. Interpretation of Codified Law	77
III. Major Principles of the <i>Civil Code of Québec</i>	89
A. Democratic Process	89
B. Flexible Document	91
C. Reflection of Quebec Society	92
D. Adaptation of the Law to Social Change	96
Conclusion	99
Selected Bibliography	101

CHAPTER 2 THE LAW OF PROPERTY

Introduction	103
I. Historical Overview of the Law of Property	104
A. From Roman Law to Feudal Law	105
B. Law in Canada under the French Regime	107
C. Law in Canada under the English Regime	110
D. Rejection of Feudal Law and Codification of Civil Law	113
II. General Principles	116
A. Patrimony	117
1. Trusts	119
2. Patrimonial and Extrapatrimonial Rights	120

3. Movables and Immovables	121
B. Right of Ownership	123
1. Attributes of the Right of Ownership	124
2. Characteristics of the Right of Ownership	127
3. Special Modes of Ownership	129
(a) Undivided Co-ownership	129
(b) Divided Co-ownership of Immovables	131
(c) Superficies	133
4. Dismemberments of the Right of Ownership	135
(a) Usufruct and Use	137
(b) Emphyteusis	140
(c) Servitude	142
(d) Innominate Dismemberments	145
III. Specific Elements	147
A. Possession and Acquisitive Prescription	147
B. Land Registration	151
C. Protection of the Environment	160
Conclusion	163
Selected Bibliography	164

CHAPTER 3 THE LAW OF TRUSTS

Introduction	167
I. General Overview	169
A. The Quebec Trust before 1994	169
B. The Quebec Trust after 1994	172
II. Civilian Concept of “Trust”	173
A. Trusts and Patrimonies	173
B. Trusts in Civil and Common Law Jurisdictions	176
C. Trusts in Domestic Law	179

D. Trusts in International Law	180
III. Classification of Trusts	182
A. General Classification	182
B. Personal Trusts	185
C. Private Trusts	187
D. Social Trusts	193
IV. Administration of Trusts	196
A. Settlor	199
B. Trustee	201
1. Powers	202
2. Duties	203
(a) Prudence and Diligence	203
(b) Loyalty	204
(c) Impartiality	206
C. Beneficiary	207
1. Right to the Benefits of the Trust	207
(a) Personal Rights	208
(b) Transferable Rights	208
(c) Certain Rights	209
2. Right of Supervision	210
V. Modification of Trusts	210
A. Modification by the Trustee	211
B. Modification by the Court	213
1. Modification of Trusts Generally	213
2. Modification of Social Trusts Specifically	215
VI. Duration and Termination of Trusts	216
A. Duration	216
1. Duration of Personal Trusts	216
2. Duration of Private and Social Trusts	217

B. Termination	217
1. Termination by the Occurrence of a Specific Event	217
2. Termination by the Settlor, the Trustee, or the Beneficiary	219
Conclusion	221
Selected Bibliography	222

CHAPTER 4 THE LAW OF CONTRACTS

Introduction	225
I. Contracts in the Civil Law Tradition	228
A. Contracts and Obligations	228
1. Place of Contracts within the Law of Obligations. .	230
2. Classifications of Contracts	233
3. Object and Cause	235
B. Governing Principles	240
1. Autonomy of the Will	241
2. Suppletive Law, Imperative Provisions, and Public Order	243
3. Contractual Justice and Good Faith	246
4. Flexibility and Solidarity	251
II. Overview of the Law of Contracts	253
A. Formation and Validity	253
1. Formal Definition	253
2. Substantive Requirements	256
(a) Error	256
(b) Fraud	258
(c) Fear	258
(d) Incapacity	259
(e) Lesion	261

(f) Indeterminacy	261
3. Nullity	263
(a) Absolute Nullity	263
(b) Relative Nullity	265
4. Abusive and Illegal Clauses	266
B. Effects on the Contracting Parties	268
1. Sources of Contract Terms	268
(a) Express Terms	268
(b) Other Sources of Contract Terms	270
2. Interpretation of Express Terms	271
3. Intensity of Contractual Obligations	272
4. Impossibility of Performance	274
5. Transfer of a Real Right	275
C. Performance and Remedies	277
1. Voluntary Performance	277
2. Default	278
3. Remedies for Nonperformance	279
(a) Specific Performance	279
(b) Resolution or Resiliation	281
(c) Restitution of Prestations	282
D. Effects on Third Persons	283
1. Stipulation for Another	285
2. Voluntary Assignment	286
Conclusion	288
Selected Bibliography	289

CHAPTER 5

THE LAW OF EXTRACONTRACTUAL CIVIL LIABILITY

Introduction	291
A. Levels of Liability	295

B.	Purposes of Civil Liability	296
C.	Regimes of Civil Liability	297
I.	Bases of Extracontractual Civil Liability	300
A.	Individual Subjective Liability Based on Fault	300
B.	Individual Objective Liability Based on Risk	301
C.	Compensation and Warranty Regimes	302
II.	Factual Basis of Extracontractual Civil Liability	303
A.	Personal Act	304
1.	Imputability	304
(a)	Children	305
(b)	Persons Not Endowed with Reason	306
(c)	Legal Persons	307
(d)	State	308
2.	Civil Fault	310
(a)	Determining Fault	310
(b)	Appraising Fault	313
B.	Act of Another	314
1.	Liability of Persons with Parental Authority	315
2.	Liability of Custodians, Educators, or Attendants. .	316
3.	Liability of the Custodian of an Incapable Person of Full Age	318
4.	Liability of the Principal	319
C.	Act of a Thing	322
1.	Liability for the Act of a Thing	322
2.	Liability for the Act of an Animal	324
3.	Liability for an Immovable in Ruin	326
4.	Liability for a Safety Defect in a Thing	327
III.	Injury in Extracontractual Civil Liability	330
A.	Concept of Injury	331
1.	History	331

2. Types of Injury	332
(a) Bodily Injury	332
(b) Material Injury and Moral Injury	334
(c) Dualist Nature of Moral Injury: <i>Pretium Mortis</i> and <i>Solatium Doloris</i>	335
(d) Specific Injuries and Novel Injury	337
B. Criteria for an Injury to be Compensable	338
1. Directness of the Injury	338
2. Certainty of the Injury	339
(a) Concept of “Certainty”	340
(b) Concept of “Loss of Chance”	340
3. Legitimacy of the Injury	342
4. Assignability of the Injury	344
IV. Causation in Extracontractual Civil Liability	344
A. Determining the Causal Connection	345
1. Sufficient Causation and Reasonable Foreseeability	346
2. Immediate Causation	347
B. Proving and Assessing the Causal Connection	348
1. Proof of Causation	349
2. Role of Causation in Assessing the Injury	349
(a) Involvement of Fault by the Victim	350
(b) Involvement of Multiple Faults by Third Persons	351
V. Reparation in Extracontractual Civil Liability	354
A. Compensatory Reparation	355
1. Principle	355
2. Exception: Punitive Damages	355
(a) Origin and Objectives of Punitive Damages	356
(b) Terminology of Punitive Damages	357

(c) Enabling Provisions	358
(d) Application of Punitive Damages under the <i>Quebec Charter</i>	359
(e) Autonomous Nature of Punitive Damages	361
(f) Criteria for Assessing Punitive Damages	362
B. Reparation in Full	365
C. Final Reparation	366
VI. Justification in Extracontractual Civil Liability	367
A. Force Majeure	367
B. Acts of a “Good Samaritan”	369
C. Self-Defence	370
D. Provocation	370
E. Necessity	371
F. Order of the Law (or a Superior Authority)	371
Conclusion	371
Selected Bibliography	372

CHAPTER 6 PRIVATE INTERNATIONAL LAW

Introduction	375
I. General Theory, Underlying Principles, and Methods	381
A. Conflict of Laws	383
1. Alternative Methods for Resolving Conflicts of Laws	384
(a) Rules of Necessary Application	384
(b) Substantive Rules of Private International Law	386
2. Classical Method of Conflicts Resolution	387
(a) Characterization	387
(b) Renvoi	388
(c) Escape Clause	389

(d) Changes in the Substantive Foreign Law	393
(e) Changes in the Connecting Factor	394
B. International Jurisdiction	396
1. Rules Designed to Avoid a Denial of Justice	397
(a) Forum of Necessity	397
(b) Interim Measures	399
2. Rules Designed to Avoid Forum Shopping and Parallel Proceedings	400
(a) <i>Forum Non Conveniens</i>	401
(i) Content of the Doctrine in Quebec Civil Law and Ontario Common Law	404
(ii) Different Methodological Approaches	406
(b) <i>Lis Alibis Pendens</i>	418
(c) Power to Issue Injunctions or to Order Provisional Measures	422
(d) Related or Ancillary Jurisdiction	423
C. Effect of Foreign Decisions	424
1. Powers of Quebec Courts in Recognition Proceedings	426
(a) No Power to Review	426
(b) No Requirement of Compliance with Quebec Choice of Law Rules	426
2. Requirements for Foreign Decisions to Have Effect in Quebec	427
(a) Indirect International Jurisdiction of the Foreign Authority	428
(i) Express Rules	430
(ii) Scope of the Mirror Principle	430
(b) Final Nature of Foreign Decisions	433
(c) Not Contrary to Procedural and Substantive Public Policy	433
(i) Adherence to Procedural Public Policy	433

(ii) Adherence to Substantive Public Policy . . .	434
(d) <i>Lis Pendens</i> or <i>Res Judicata</i>	434
II. Special Rules	435
A. Rules of International Jurisdiction Relating to Personal Actions of a Patrimonial Nature	435
1. General Rules	435
2. Validity and Scope of Forum Selection Clauses . . .	438
3. Submission	446
4. Consumer Contracts	448
B. Choice of Law Rules Applicable to Contractual Obligations	450
1. General Rules	450
(a) Rules Relating to the Form of Contractual Obligations	451
(b) Rules Relating to the Substance of Contractual Obligations	451
(i) Choice of Law: Subjective Connection	451
(ii) No Choice of Law: Objective Localization . .	452
2. Specific Rules	455
(a) Specific Rules Relating to Contracts of Sale . . .	455
(b) Specific Rules Relating to Consumer Contracts	456
C. Law Applicable to Extracontractual Obligations	459
1. General Framework and Historical Developments	459
2. Position Adopted in Quebec Law	462
(a) General Rules	462
(b) Special Forms of Liability	465
(i) Manufacturer's Liability	465
(ii) Raw Materials Originating in Quebec	466

Conclusion	466
Selected Bibliography	467
TABLE OF LEGISLATION	471
TABLE OF CASES	503
ANALYTICAL INDEX	521