Les Cahiers de droit

The Co-existence of Legal Systems in Quebec: « Free and Common Socage » in Canada's « pays de droit civil »

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Volume 20, numéro 1-2, 1979

URI : https://id.erudit.org/iderudit/042317ar
DOI : https://doi.org/10.7202/042317ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Brierley, J. E. C. (1979). The Co-existence of Legal Systems in Quebec: « Free and Common Socage » in Canada's « pays de droit civil ». *Les Cahiers de droit*, *20*(1-2), 277–287. https://doi.org/10.7202/042317ar

Résumé de l'article

Bien que le système français de tenure seigneuriale au Québec ait mérité une attention toute particulière des historiens, l'histoire de la tenure anglaise de « franc et commun socage », introduite en 1774 et qui règne même aujourd'hui dans la zone dite des Cantons de l'Est, n'est pas moins singulière. Est-ce que dans l'*Acte de Québec*, après avoir établi à l'article 8 l'ancien droit français, on a voulu introduire tout le système anglais du droit des biens lorsqu'on a mentionné, à son article 9, que la concession des terres pourrait se faire selon la tenure anglaise ? Ou au contraire a-t-on voulu tout simplement exclure lapplication des incidents de la tenure française en faisant appel à l'équivalent anglais d'une tenure libre ? L'*Acte constitutionnel* de 1971 n'a pas résolu cette question, confiant cependant à la législature locale le soin d'adapter la tenure anglaise dans sa « nature » et dans ses « conséquences » aux conditions locales.

Les autorités britanniques ont, semble-t-il, opté pour la première interprétation, puisqu'en 1825 une loi impériale édictait que le droit anglais des biens s'appliqueraient dans les cantons. La réaction locale, sous la forme de législation, en 1829, révèle l'équivoque ressentie par la population locale: après avoir validé pour le passé les transactions accomplies selon les formes françaises, la loi de 1829 établit *pro futuro* la validité des transactions immobilières selon les règles anglaises ou les formes françaises. Ce mélange de règles de fond et de forme anglaises et françaises — une véritable coexistence de systèmes juridiques sur un même territoire — semble avoir semé la confusion chez les justiciables et les hommes de loi durant les 25 années suivantes. Même dans le cas où la loi anglaise de 1825 a établi le droit anglais pour l'avenir, a-t-elle voulu déclarer aussi que le droit anglais existait dans le territoire québécois depuis 1774 ? Voilà une thèse qui pourrait se défendre d'après le sens grammatical de cette loi ainsi que celle de 1829.

On semblait indécis au Québec sur cette question avant les décisions célèbres des années 1850 dans les arrêts *Stuart v. Bowman* et Wilcox v. Ce dernier a décidé enfin que le droit anglais des biens n'a pas pu être introduit dans les cantons avant 1825 et que toute interprétation contraire frise l'absurdité. Le jugement du juge en chef Lafontaine, aussi acceptable qu'il soit sur le plan politique, ne semble pas toutefois s'accorder avec le sens littéral des lois en question. Mais enfin que pouvait-on faire ? Une loi de 1857 de l'Assemblée législative a finalement opté pour l'application de lois canadiennes dans tout le territoire québécois et cette solution, après l'abolition de la tenure française en 1854, semble avoir été acceptée par ces mêmes milieux qui, dans les années précédentes, ont été agités par la question. L'uniformité de notre droit commun ayant été établie sur le sol québécois, la perspective d'une codification à la française s'ouvrait et devint réalité, comme on le sait, quelques années plus tard.

The Co-existence of Legal Systems in Quebec: « Free and Common Socage » in Canada's « pays de droit civil »

John E.C. BRIERLEY *

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Introduction

The seigneurial system as a form of landholding in Quebec has had a remarkable history. Established here in the earliest times of our history, it survived into the 19th century and the process of its abolition carried over even into the 20th century. It has, deservedly, been a subject of special interest for historians, whether social, legal or economic, and even geographers, because of the significant impact it has had on many aspects of Quebec development.

No less singular, but certainly less significant in its long term effects, is the history of English land tenure, free and common socage, introduced in Quebec in 1774 to govern primarily that vast zone of Quebec territory now known as the "Eastern Townships". This area, at that time, extended from the back of the lands *en seigneurie* on the southern side of the St. Lawrence River to the American border and consisted of unconceded, and therefore undeveloped (or "waste") lands, vested in the Crown.

The anomaly — as we now may term it — of the condition of the "township lands" lay in this, that in some particulars English law prevailed

therein (although it seems not always to have been operational) making it a kind of enclave within the greater Quebec territory in which the French *droit civil*, maintained in 1774, continued to apply. There was, in effect, a "co-existence" of legal systems, functioning independently, within the single unit which Canada (until 1791), Lower Canada (until 1840) and then Canada East (until 1867) was within the evolving political system. The implantation of the English tenure system (1), as a measure of imperial policy from 1774 to 1825 and the Quebec responses (2) from 1829 to 1857 will be successively examined.

1. Implantation of English tenure in Quebec: 1774–1825

Students of Quebec legal history are familiar with the difficulties surrounding the question whether or not English private law was introduced in the 1760's and, if so, to what extent. The major documents of the period, extending from the Conquest to the *Quebec Act*, do, certainly, suggest that it was imagined to have been introduced, whether validly or not. Not the least among these documents is the *Quebec Act* itself, the second recital in the preamble of which acknowledges the unsatisfactory character of the "Provisions" made by the Proclamation of 1763 in respect of the civil government of Quebec[1]. Section 8 of the celebrated Act provided of course that "in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of *Canada*, as the Rule for the Decision of the same". It is however the provision immediately following, section 9, which is the primary source of the controversial history of free and common socage tenure in Quebec, for it stated:

> Provided always, That nothing in this Act contained shall extend, or be construed to extend, to any Lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, His Heirs and Successors, to be holden in free and common Soccage.

"Free and common socage", as understood in English law at the time, was a non-military tenure the outstanding characteristic of which was that it involved some service which was absolutely certain and fixed and which, in the vast majority of cases, took the form of a money payment, usually nominal. It had, in England, long been the main or "residuary" tenure and, stripped of its medieval incidents by the middle of the 17th century, was that which most closely corresponded to the notion that landholding was simply a form of property rather than a matter of public law[2]. As

1. 14 Geo. III, c. 83 (U.K.). As good a summary as any is found in R. COUPLAND, *The Quebec Act* Oxford, Clarendon Press, 1925.
2. On the history of this tenure, HOLDSWORTH, *History of English Law*, London, Methuen & Co. Ltd., Sweet and Maxwell, vol. 3, pp. 29 et s.; especially at pp. 54 ff. as to the

such, it approximated the free tenure of French law known as *franc aleu roturier*[3]. It was natural, therefore, for the British authorities to make use of this form of tenure in its new Canadian possessions, as it had traditionally done in its American possessions for some time past[4].

Section 9 of the *Quebec Act* having provided for free and common socage tenure was, however, later found to be ambiguous. Did it intend to exclude the operation of "the laws of Canada" (established in section 8) in the free and common socage lands, thereby opening the way for English private law, or some part of it, to apply therein (whether English law was or was not in force prior to the Act)? Or was it rather intended to do no more than to exclude from such lands the operation of the French seigneurial system in favour of the English tenure, thereby leaving in full operation in socage lands the "ancient laws" of Canada? The first interpretation may be described as the "broad" view of the question and corresponds to saying that at least English property law was an incident of the English tenure, whereas the second, the "narrow view", implies that the English rules as to property were separable from the tenure. While the broad view seems to follow upon a plain reading of sections 8 and 9 of the Act, and was indeed later to be explicitly endorsed by British authorities, it was in fact the narrow view which came, in Quebec itself, to prevail with the passage of time — and when all the implications of the contrary position became evident as a matter of practice.

The issue, so formulated, does not appear to have arisen immediately after 1774 because, for some time, land grants continued to be made by the British authorities within the seigneurial system (excluding however any grant of judicial power). It was given greater focus, however, by the *Constitutional Act*, 1791[5], which provided in section 43 that:

> (...) in every Case where Lands shall be hereafter granted within the said Province of *Lower Canada*, and where the Grantee thereof shall desire the same to be granted in Free and Common Soccage, the same shall be so granted; but subject nevertheless to such Alterations, with respect to the Nature and Consequences of such Tenure of Free and Common Soccage, as may be established by any Law or Laws which may be made by His Majesty, His Heirs or Successors, by and with the Advice and Consent of the Legislative Council and Assembly of the Province.

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incidents of the tenure (fealty, relief, aids, wardship and marriage, escheat and forfeiture). The account does not differ substantially from that of BLACKSTONE'S *Commentaries* (ed. Tucker), vol. 3 (1803), at pp. 85–89. See also G.C. CHESHIRE, *The Modern Law of Real Property* 9th ed., London, Butterworths, 1962, at pp. 22.

3. F.J. CUGNET, *Traité de la Loi des Fiefs*, Québec, Brown, 1775, p. 34 commenting upon article 68 of the *Coutume de Paris*. *Adde* J. DECLAREUIL, *Histoire générale du droit français des origines à 1789*, Paris, Recueil Sirey, 1925, p. 380.
4. W.R. VANCE, "The Quest for Tenure in the United States", 33 *Yale L.J.*, 248 (1923–24).
5. 31 Geo. III, c. 31 (U.K.).

In providing for legislative authority in the local legislature to alter the "nature" and "consequences" of free and common socage tenure, section 43 may be taken as reinforcing the view that English property law, if not the whole body of English law, was intended to apply to lands so granted. Since there was little or nothing left of the medieval incidents attaching to free and common socage by that time, it seems more probable to view the provision as intending to allow for the alteration of English property law, introduced or re-introduced by section 9 of the *Quebec Act*. That "English property *law*" was indeed considered by the imperial authority to be an incident of the English *tenure* (over and above its now obsolete medieval incidents) is demonstrated by its passage of the *Canada Tenures Act* in 1825[6] before the provincial authorities took advantage of the power given them under section 43 of the 1791 Act.

The 1825 Act, in addition to laying down a mechanism for the conversion of the French tenures into those of the English form, expressly stated that free and common socage lands (then granted or to be granted) were governed by "the Law of England". Section 8 provided as follows:

> (...) Be it therefore declared and enacted, that all lands (...) holden in free and common soccage, may and shall be (...) held, granted, bargained, sold, aliened, conveyed and disposed of, and may and shall pass by descent, in such manner and form, and upon and under such rules and restrictions, as are by the Law of *England* established and in force in reference [thereto] (...) or to the dower or other rights of married women in such lands (...).

The enactment is much more explicit than the provisions of 1774 or 1791 in spelling out the implications of socage tenure. At the same time, it reaffirmed the authority of the local legislature to enact "any such Laws and Statutes as may be necessary for the better adapting the before mentioned rules of the Law of England (...) to the local circumstances and condition of the said Province (...) and the inhabitants thereof." The imperial position was thenceforth clear: English property law in relation to alienations, inheritance and dower was in force in the free and common socage lands of Lower Canada but that law could be modified by local legislation. As the Select Committee reporting to the House of Commons stated, a few years later[7], the 1825 Act "put its own interpretation of these Statutes [i.e. those of 1774 and 1791] beyond the reach of further dispute". But much local response in Quebec, on the part of the legislative and judicial authorities, did not acquiesce in this seemingly fixed purpose.

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6. 6 Geo. IV, c. 59 (U.K.).
7. *Report from the Select Committee on the Civil Government of Canada* (Reprinted by the Order of the House of Assembly of Lower Canada), 1829.

2. Quebec responses: 1829-1857

Local response to the introduction of English property law by the parliament of Westminster came in legislation of 1829, *An Act for rendering valid, conveyances of lands and other immoveable property held in free and common soccage within the Province of Lower Canada, and for other purposes therein mentioned*[8]. This response was not so much an attempt to *adapt* the rules of English property law (as the legislature of Lower Canada was authorized to do under the 1825 Act) to local circumstances and conditions as it was to provide for a measure of *co-existence* of the French and English law within the territories affected. And, probably because of this thrust in the legislation, it was reserved for royal assent, which was only given 11 May 1831 and then signified by proclamation on 1 September 1831[9].

In the eyes of the local authorities, the law as framed in the British Act of 1825 was obviously at variance with what had been local practice because sections 1 and 3 of the 1829 Act retroactively validated operations respecting free and common socage lands which had *not* observed English forms and rules ("Sales, conveyances and other transfers", "mortgages and hypothecs, and all priviledged claims"). Section 2, significantly, provided *pro futuro* that either the English "rules and restrictions" *or* the French notarial forms "according to the laws and usages of Lower Canada" shall henceforth be "equally good, valid and binding in Law" for all land transfers. Section 6 extended the rules of equal partition "according to the old Laws of this Country" to socage lands forming part of estates opening before the Act (unless the heirs had agreed otherwise) thus preventing the play of the English law rule of primogeniture[10]. Section 4 enacted that "mortgages and hypothecs, and all priviledged claims" thereafter created in socage lands would be so according to the "forms, laws and usages" of the province provided the lands affected were "specially set forth and described". This latter provision was indeed an adaptation of the rule of English law since the Canadian law of the time provided that hypothec extended generally over all the lands of a debtor upon his acknowledgment of an indebtedness in a notarial deed[11].

8. 9 & 10 Geo. IV, c. 77 (Low. Can.).
9. Confirmed by 1 Wm. IV, c. 20 (U.K.).
10. *Anderson v. Forsyth*, 20 Jan. 1833, reported as "No. 5" of the Appendix at 2 L.C.J. xlviii, applied this provision, thereby allowing equal partition under French law rather than enforcing primogeniture under English Law. Freedom of willing and English testamentary forms had of course been introduced in section 10 of the *Quebec Act*, 1774 in the whole territory.
11. *Cf.* H. des RIVIÈRES BEAUBIEN, *Traité sur les lois civiles du Bas-Canada*, Montréal, Duvernay, t. III, 1833, pp. 264-265.

It is no wonder that the legislation of 1825 and 1829, which created a *mélange* of English and French substantive law, making available French notarial forms for transactions to be rooted in English substantive law and yet presumably leaving in place whatever local procedures were used in the practice of the local courts, created confusion in the minds of the public and legal profession alike for the next quarter century. The question which came to be particularly litigated in the courts however was that of the co-existence of the two systems in time. Because the 1829 Act had not expressly dealt with the validity of those transactions involving socage lands which, before the Act of 1825, had observed English forms, were they, in the light of that Act or earlier enactments, to be viewed as valid or invalid? Did English or French law apply to them? The question could not arise in respect of voluntary partitions (section 1 and 6 of the 1829 Act retroactively validated those accomplished in French form) but it could and did in respect of other rights in property with which the 1829 Act did not purport to deal or which had been accomplished according to the French law.

The view which utimately prevailed in the courts tended to be restrictive of the introduction of English law. Initially, however, a wider approach was taken: Reid C.J. in the 1830 decision in *Paterson v. McCallum* [12] found that, upon the true construction of sections 8 and 9 of the *Quebec Act*, "the same law as governs lands in free and common soccage in England, should govern lands similarly situated here". He held therefore that a notarial deed of 1816 constituting a general hypothec on the socage land of a debtor was ineffective as a mortgage under English law. And while he recognized that a contrary view had prevailed in practice (*viz.*, that the laws of Canada had been construed to extend to free and common soccage lands), he was comforted in his conclusion by noting that the 1825 Act (which he did not apply as such, because he failed to see in the hypothec in question such an "alienation" as the Act contemplated) was nevertheless "declaratory" – i.e. it constituted a statement of what the law had always been — and that, after its enactment, "if any doubts existed, they must be removed". French law, in other words, on that construction, did not apply in socage lands as of 1774.

Therein of course lay the pith of the problem. It was one of pure statutory interpretation. Strangely enough one must wait for the Court of Appeal of the 1850's to pronounce upon the matter in the two celebrated

12. *Stuart's Reports* 429. The cause of action and litigation had arisen before the legislation of 1829–31 and so its subject matter – the validity of a notarial hypothec on socage lands – was not saved by section 5 of the Act.

cases of *Stuart v. Bowman*[13] and *Wilcox v. Wilcox*[14]. Did the English statute of 1825 provide for the future only or did it articulate what the state of the law had always been since 1774? Vanfelson J., for the court of first instance in *Stuart*, found it to be an "absurdity" to view section 9 of the *Quebec Act* as having introduced "all English law" (although that on its face is what it appeared to have done). He was further of the view that the 1825 Act introduced English law only on the matters therein mentioned and only from its own date. In appeal the judges were divided on these points. Rolland J. and Panet J. found that the 1825 legislation was not declaratory and that section 9 of the *Quebec Act* was not sufficiently explicit to have introduced the whole body of English law. On the other side Aylwin J. (finding "not a shadow of a doubt") and Mondelet J. (expressing it, for his part, "a subject of regret") found the 1825 Act to be declaratory of the law as it was in 1774[15]. The Court of Appeal in 1857, by a majority, and reversing the court below, held squarely and clearly in *Wilcox v. Wilcox*, in respect of rights of dower arising under a marriage before 1825, that the 1825 Act (which included dower rights as understood in English law within its scheme) was wholly prospective and that the *Quebec Act* had not introduced the incidents of English real property law. It thereby was able to sustain the claim for dower under French law.

The judgment of Lafontaine C.J. in *Wilcox* is as comprehensive on the matter as one would expect of a judge who believed that his decision would be the last word in the matter[16] and that the issue would be relegated, as he put it, to "l'histoire de notre législation" in the face of the supervening legislation of 1857 which regularized the anomalous position of socage land. He resumes the well-known arguments respecting the significance of the change in sovereignty, the Proclamation of 1763 and the Ordinance of 1764, in order to demonstrate that English law could not have been introduced before 1774. His treatment of the *Quebec Act* relies upon the doctrine of absurdity developed in *Stuart* in regard to section 9.

Two of his remarks do deserve some comment. He argued, subsidiarily, that had English law been introduced in 1774 the Crown would

13. (1851) 2 L.C.R., 369 and, in appeal, (1853) 3 L.C.R., 309.

14. (1857) 2 L.C.J., 1.

15. The technical point turns upon the use of the words "Be it therefore declared and enacted" and the fact that the preamble enunciated doubts on the construction of the previous law.

16. It wasn't. *Magreen v. Aubert* (1857) 2 L.C.J., 70 (S.C.) followed upon *Wilcox* by several weeks. The opinion of Lafontaine C.J. does however form the major part of the substance of our Quebec historians' treatment of the matter: R. LEMIEUX, *Les origines du droit franco-canadien*, Montréal, C. Théorêt, 1901, p. 386; G. DOUTRE and E. LAREAU, *Le Droit civil canadien suivant l'ordre établi par les codes, précédé d'une histoire générale du droit canadien*, Montréal. A. Doutre et Cie, 1872, t. I, pp. 354, 685.

have had to make all land grants in free and common socage by virtue of the 1660 statute [17] establishing that tenure as the norm, whereas, in fact, he points out, some were made *en seigneurie* and their validity has not been questioned. It is at least questionable, however, to say that while on the one hand the statute of 1660 did on its face bind the Crown, it follows on the other that socage tenure in English law (regarded as it arguably was, by that time, as a matter of property rather than public law) did not carry English property law as one of its incidents in those parts of the province where such grants were validly made.

Lafontaine C.J. did not, moreover, disdain from citing, in support of his conclusion, the testimony of James Stephen, legal counsel to the Colonial Office, before the Select Committee of 1828 [18] to the effect that the use of the term "free and common soccage" in 1774 and 1791 was only in contradistinction to the other ancient form of "tenure in chivalry" — that is to say, to indicate only that the principle of French law was "invaded" only so much as was necessary to give effect to the policy that land grants were to carry only such services as were certain and definite. Stephen's further observation, which the Chief Justice accepted, on the collateral point that the 1825 Act did not contain any "retrospective language", was however (and this his lordship omitted to mention) not the finding of the Select Committee itself which did most definitely view the Act as declaratory.

But these are, in the end, small points. One cannot but conclude that the decision, from a policy point of view, and after so many years of uncertainty, was sound even though the legal argumentation in support thereof, masterful as it is in its presentation, was somewhat defiant of the plain meaning of the text of section 9 of the *Quebec Act.* But the alternative, as Lafontaine himself admitted, would have been total confusion in the private law of the province. He was moreover, it must be remembered, dealing with an issue in respect of which the final and general solution had at that very time been provided by the provincial statute appropriately entitled *An Act for settling the Law concerning Lands held in Free and Common Soccage in Lower Canada* [19]. This enactment laid the issue finally to rest: French law was thereafter to govern socage lands as it did the rest

17. 12 Car. II, c. 24. The Chief Justice makes no mention of the 1290 statute *Quia Emptores*, 18 Edw. I, c. 1, which prohibited the practice of sub-infeudation in England and would also have conflicted with grants *en seigneurie*. Both statutes were, presumably, not viewed in 1774 as part of the public law of England which was certainly introduced into Lower Canada.

18. It was to Stephen that the acts of the two Canadian provinces were referred for his opinion "in point of law".

19. 20 Vict., c. 45 (Prov. Can.).

of the territory (section 4) and French law was stated to "*have* governed lands held in Free and Common Soccage" in matters other than those in view in the 1825 legislation (i.e. alienation, descent and rights depending upon marriage, section 5). By 1857 of course the onerous aspects of the French seigneurial system itself had been abolished by the great Act of 1854[20]. It instituted the free French tenure of *franc aleu roturier* as the general rule. Lands in free and common socage and lands in *franc aleu* thus existed side by side, the first by virtue of imperial legislation and the second by local legislation. The two tenures, although different in name and in origin, were the same in nature. No part of Quebec territory being any longer affected by French seigneurial law, the path was open to take up the position that the substantive law of property, the *droit civil*, was to be everywhere the same, whatever the tenure of the land, and the private law ready for redaction as a civil code.

Conclusion

Quebec's land tenure system has probably been unique in North America in this respect, that English property law, for a limited period and in a restricted but important number of instances, was established, concurrently with French law, not as an amalgam (which the *droit civil* had even then become by virtue of the superimposition of portions of English law) but as a co-existing and independent body of law. As a measure of imperial policy intended to promote colonization and render attractive settlement in Lower Canada by English-speaking persons who would feel more naturally connected with the English forms of tenure, it was unquestionably a failure, although other factors (such as climate, the lack of roads, abusive practices in the land granting itself and land speculation) may well have been more significant in the story of the slow development of the Townships than the matter of its property system[21]. As a measure of legislative policy, it sowed not only legal confusion for a period of at least 30 years but a degree of misapprehension in some quarters that took on political ramifications in the struggles between the local Legislative Council and Assembly and the rivalries that developed between the English and commercial classes on the one hand and the French population, and the Church, on the other[22].

20. *An Act for the abolition of feudal rights and duties in Lower Canada*, 18 Vict., c. 3 (Prov. Can.).

21. See in general F. OUELLET, *Histoire économique et sociale du Québec 1760–1850*, Montréal, Fides, 1966; I. CARON, *La colonisation de la province de Québec. Les Cantons de l'Est 1791–1815*, Québec, 1927.

22. *Cf.* the interesting study by F. OUELLET, "L'abolition du régime seigneurial et l'idée de propriété", *Hermès*, 1954, nº 14, p. 22.

These considerations undoubtedly go a long way in explaining why the local authorities took so long, in effect until 1857, to take advantage of the facility to modify the impact of the advent of English property law. In the 1850's, however, conditions permitted a bolder solution: the abolition of English property law in the socage lands altogether, but an abolition that stopped short of an abolition of the form of tenure in free and common socage itself which still is, in an unstated manner, part of the law of Quebec today[23].

23. Free and common socage tenure, as such, is mentioned only incidentally in the *Civil Code* (article 2084) and not at all in the statutory instruments dealing with crown lands since Confederation in 1867; *cf.* J. BOUFFARD, *Traité du domaine*, Québec, Le Soleil, 1921, p. 18: "Depuis l'abolition de la tenure [seigneuriale] par la loi de 1854, la tenure du franc et commun soccage est la seule permise pour la concession des terres de la Couronne".