

Book Review of "The Construction Hypothec" by David H. Kauffman (with the collaboration of Guy Gilain)

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Construction lien legislation in the nine common law legal systems of the provinces of Canada was generally inspired by Maryland's *An Act concerning the territory of Columbia and the city of Washington*¹ of 1791, the first mechanics' lien legislation in North America. That early enactment arose out of the desire of Thomas Jefferson and James Madison to stimulate and encourage the rapid building of the City of Washington as the permanent seat of the government of the United States. Ontario, followed by other provinces, adopted similar legislation almost 100 years later.² Over the many years since then, judges in the common law Canadian provinces have typically sought guidance and authority from their judicial colleagues in both their own and other provinces in their quest to interpret and apply this rather specialized legislation, and to create an organized and rational body of judicial precedent.

By way of contrast, construction lien enabling legislation in the province of Québec differs significantly from those of the other provinces, as it is founded upon the civil law tradition codified in the Civil Code of Québec, which was originally promulgated in 1866 and reformed in 1994. The workman's privilege, as well as its successor construction hypothec, under the Civil Law of Québec traces its origins to Roman law, passed down through the law of France that existed before the Napoleonic Code. The Québec lien, flowing from its Roman law origins, is considered to be part of the inherent civil law of Québec and not a creature of statutory laws.³ So it can be said with some assurance that he who seeks to analyze and opine upon the Québec legislation is venturing upon ground which is somewhat untrod outside of that province.

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¹Laws of Maryland, c. 45, passed December 19, 1791.

²*An Act to establish Liens in favour of Mechanics, Machinists and Others*, 36 Vict., c. 27.

³Georges-Michel Geroux, *Le privilège ouvrier*. Montréal: Éditions Albert Lévesque, 1933, p. 32.

David Kauffman,⁴ one of the leading construction law practitioners in the province of Québec, has ventured upon that journey, and, in collaboration with his law partner, Guy Gilain, has created an academic work of originality and substance – “The Construction Hypothec”.

This book is one of the few major texts on construction law in Québec since the Reform of the Civil Code in 1994, and the first major text in English on that subject in the Province of Québec since W. Marler’s work, “The Law of Real Property”, which was published in 1932. In a recent book review in the Montreal Gazette,⁵ Kathryn Leger observed that the Kauffman/Gilain text is “*the first work to explain in depth how legal rights in the Québec building business are different from other jurisdictions in North America following reforms made to the Québec Civil Code in 1994*”.

The only criticism, if one exists, is that the book was published at this time only in English (but with the promise of a future French edition). Our expectation, as reviewers, is that lawyers and members of the construction industry will nevertheless appreciate the opportunity to access this specialized work, particularly those who, although from outside of the jurisdiction, are interested in how the legislation might impact upon their business dealings in the province. As Kauffman writes in his Preface, “*I have been invariably asked during the course of my practice by others more familiar with the language of Shakespeare than Molière whether texts exist in English that describe construction liens or the construction industry in the Province of Québec. Alas, there are precious few. In some small measure, this book may help fill that gap.*”

In this regard, we note that David Kauffman, in his June 2006 article entitled “Construction Projects in Québec”,⁶ wrote that “*(P)lanning for a construction project in Québec appears daunting because of the French culture, language and civil law traditions that make Québec so unique.*” In his survey article, Kauffman walks the reader through the various business and legal considerations of those who might want to conduct business in Québec. Kauffman and Gilain’s “The Construction Hypothec” will go far in demonstrating that, insofar as liens in Québec are concerned, the “daunting” aspect of the construction hypothec is only an illusion which is quickly dispelled by the quality and reader-friendly nature of their recently published text.

Wikipedia, the “Free Encyclopedia” on the internet, comments that one of the “cultural” differences between common law and civil law jurisdictions is that, in civil law jurisdictions, scholarly commentary is given significant weight by

⁴Mr. Kauffman has been the Quebec Editor of Construction Law Reports since 1985.

⁵March 28, 2008.

⁶See 2006/2007, Lexpert-CCCA Directory.

courts. If that is true, then Messrs Kauffman and Gilain should take pride in the legitimate expectation that the courts of Québec, in seeking an authoritative interpretation of the law in this area, will undoubtedly seek out and quote from their treatise with alacrity and respect.