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# The Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System

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# THE QUEBEC EXPERIENCE: CODIFICATION OF FAMILY LAW AND A PROPOSAL FOR THE CREATION OF A FAMILY COURT SYSTEM

Claire L'Heureux-Dubé\*

*L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit, d'établir des principes féconds en conséquences et non de descendre dans le détail des questions qui peuvent naître sur chaque matière.*

PORTALIS\*\*

## INTRODUCTION

Although at different periods and under different circumstances, both the Louisiana and Quebec French civil-law codes were born from the same mother and grew up similarly in a common law environment,<sup>1</sup> always striving to preserve their roots. Given that background, the Quebec experience in the codification of its civil law is of interest to Louisiana, if only out of curiosity for the fate of its only sister in North America.

Except for the ten-year period of 1763 to 1773, Quebec has continuously remained subject to the laws of France as those laws existed between 1663 and 1763.<sup>2</sup> In France, the French Revolution of 1789 was to facilitate the codification of France's civil laws. It culminated in the promulgation on March 31, 1804, of the French civil code, *Le Code*

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\*\* Discours préliminaire prononcé le 24 Thermidor, an VIII, as cited in O. Kahn-Freund, C. Levy & B. Rudden, *A Source Book on French Law* 75 (1st ed. 1973).

1. Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in *Judicial Decisions and Doctrine* 1, 10 (1974); Boulton, *Aspects des rapports entre le droit civil et la "Common Law" dans la jurisprudence de la Cour suprême du Canada*, 53 *Can. B. Rev.* 738 (1975).

2. Edicts creating the Conseil Souverain. 1 Edicts, *Ordonnances Royaux* at 37 (Quebec 1854). Canada had been a French possession under French laws since 1663. See the edicts creating the Conseil Souverain, April 1663, under Louis XIV, conferring to such Conseil the power to "connaître de toutes les causes civiles et criminelles, pour juger souverainement et en dernier ressort selon les lois et ordonnances de notre Royaume." Canada converted to the laws of England at the signing of the Treaty of Paris in 1763 with the Proclamation Royale of October 7, 1763, and General Murray's Ordonnance of September 17, 1764. Ten years later, however, L'Acte de Quebec, 14 Geo. III, ch. 83 (1774), which reunited Canada under one government, was to reinstate French civil laws in Quebec while in 1791 the Constitutional Act dividing Canada into two provinces, Lower Canada and Upper Canada, restated that Lower Canada was to retain its French laws, and decreed English laws applicable to Upper Canada. See *The Property and Civil Rights Act*, Que. Rev. Stat. ch. 367 (1970) ("In all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as they stood on the 15th day of October 1792."); see also P.B. Mignault, *Le Droit Civil Canadien* (Whiteford & Theoret eds. 1895).

Napoleon,<sup>3</sup> a product of Roman and customary laws, royal legislation, and new laws adopted since the Revolution. In Quebec, however, the codification of the French civil laws applicable to Quebec did not occur until some fifty years later, and it came in a very different way.

#### THE CIVIL CODE OF LOWER CANADA: 1866

Sir Georges Etienne Cartier, then Attorney General and Prime Minister of Canada, is "credited with having conceived and carried through the project of codification," with the firm conviction that codification was necessary in order to "coordinate the existing law, to render all of it accessible to both the English and French languages" and that the Quebec code be modeled after the Code Napoleon.<sup>4</sup> The purpose was not to elaborate a new code inspired by ancient laws and jurisprudence, but rather to collect existing laws and give them a coherent meaning, a concise form. In the words of Professor Paul André Crépeau, the drafters of the 1866 Civil Code of Lower Canada

were instructed essentially not to reform, but to reformulate the law in such a manner as to transform it from an "archaic" legal system into a "modern" legal system, following the example of France and of so many other countries of Europe and America which had already adopted their own codes. The security of a single and ordered legislative enactment was to replace the uncertainty created by a multiplicity of sources that were widely dispersed.

However, the legislature specifically ordered that it was the law that was in force at that time that was to be codified, and that it was to be done along the same lines and according to the same plan as the French Civil Code. The entirety of the basic institutions of our private law as it then existed was to be regrouped into a coherent and organic whole, expressed in clear and simple terms.

The aim of the codification was thus put into a context in which the determination to preserve the then existing law overrode any desire for change. As no need was felt to question traditional values, real innovations were few and far between.

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3. Loi contenant la réunion des lois civiles en un seul corps de lois sous le titre Code civil des Français (Loi du 30 Ventome, an XII, decretée le 21 mars 1804 et promulguée le 31 mars 1804).

4. Brierley, *Quebec's Civil Law Codification: Viewed and Reviewed*, 14 McGill L.J. 521, 530-31 (1968). For a full discussion of political as well as technical factors leading to codification, see P. Crépeau, *La renaissance du droit civil canadien*; A. Morel, *La codification devant l'opinion publique de l'époque*; see also P. Boucher & T. Morel, *Le Droit dans la Vie familiale, Livre du Centenaire du Code civil (I)* (1970).

The purpose was to construct a Code which, embodying the past, would serve as a defense against outside influences which threatened the integrity of the Civil Law; it would guarantee the survival of a legal system that was distinctive but exposed due to its isolation within a continent in which the Common Law held sway. Regarded, like the French Civil Code, as the embodiment of Justice and Reason, it seemed inconceivable that its principles could be shaken by the vicissitudes of life. It was believed that the Civil Code would escape the effects of the passage of time.<sup>5</sup>

This does not mean that existing laws were *always* adopted without modification. Amendments were proposed by the redactors and, in many instances, retained. Furthermore, the model of the Code Napoléon was followed, and substantive reform departed from it in many cases because of the diversity of sources which, by that time, had impregnated the Lower Canada civil laws—the English substantive law had been imported in some measure, and domestic legislation had been enacted from time to time. In the final analysis, the Civil Code of Lower Canada could be but the product of the social and economic circumstances of its time: “*autoritarisme, individualisme et libéralisme.*”<sup>6</sup>

THE REPORT ON THE QUEBEC CIVIL CODE:  
THE CIVIL CODE REVISION OFFICE—1955-1978

*Historical Background*

In order to better understand the spirit with which the revision of Quebec's civil laws was undertaken, it is necessary to appreciate the political, social and economic texture of Quebec at that particular time in its history. In 1955, in Quebec, what was to later become known as the Quiet Revolution was well under way. Prime Minister Maurice Duplessis (1936-1939 and 1944-1959) and his conservative government were gradually heading towards their downfall, which was to lead to the take-over by Premier Jean Lesage in 1960, an era which was to be among the most exciting of Quebec's political history, a predecessor to the advent of separatism. Separatism took a concrete form with the election of Rene Levesque as Premier of Quebec in 1976.

Quebec's closely knit society, preserved so far by political and religious conservatism from being permeated by the emergence of attractive philosophical trends enhancing equality, individual freedom and personal power of the individual over the state,<sup>7</sup> could no longer escape the

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5. Civil Code Revision Office, 1 Report on the Quebec Civil Code: The Draft Civil Code at xxiv-xxv (1977) [hereinafter cited as Report].

6. Crépeau, Introduction to Les enjeux de la revision du Code civil at 14 (1979) (under the direction of André Poupert, Montreal: F.E.P.).

7. C.B. Macpherson, La theorie politique et l'individualisme Possessif de Hobbes & Locke 971 (1971).

economic, political and social change of the world around it, particularly with the advent in Quebec of the "affluent society" or the economic growth which followed the election of a liberal government.

During the twenty-year period from 1950 to 1970 in particular, Quebec emerged from its lethargy. The change was rapid and dramatic, stemming from pressures of Quebec's significant groups.<sup>8</sup> Almost all social institutions were brought in question. It was the beginning of a stronger labour movement, encouraged by the universities and their professors in the newly developed field of social sciences. The educational system was revolutionized along the lines of modern thinking.<sup>9</sup> The church itself was not to be spared: its powerful imprint on Quebec's French Canadian population (close to ninety-five percent Roman Catholic) was losing ground. Of course, other realities played an important role in bringing about a shift in the moral values of the Quebec society. These included the entrance of married women into the labour force, mass access to formal education, urbanization, and the advent of the social welfare state. Traditions were profoundly shaken.<sup>10</sup>

In those times of upheavals, the Civil Code of Lower Canada could not go unchallenged. Criticism of the system of values it carried was voiced more and more frequently, and demands for adjusting the scales of justice to a modern and pluralistic society became more pressing.<sup>11</sup>

These events led to a political mandate to reform Quebec's code of civil laws, many of which were out-of-date in their basic philosophy or ill-suited for tackling problems arising from modern life. Even legislative innovations attempting to solve the most urgent problems, often hastily put together, and judicial interpretation had not been able to achieve the extensive reform necessary to restore to the Civil Code its primary function: "that of governing relations between citizens in accordance with the norms, concepts and techniques of our time. In short, the Civil Code

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8. G. Pelletier, *Les années d'impatience* (1983).

9. Rapport de la Commission royale d'enquête sur l'enseignement dans la Province de Québec, Volume 1—Structures supérieures du système scolaire (1963); Volume 2—Structures pédagogiques du système scolaire (1964). The Commission had been created in 1960. 9-10 *Eliz. II*, Que. Stat. ch. 25 (1960-61).

10. L. Dion, *La prochaine révolution* (1973); M. Rioux, *Kinships, Recognition and Urbanization in French Canadian Society* 376 (Carleton Library no. 18, 1964); G. Rocher, *Le Québec en mutation* 25 (1973).

11. *La Révision du Code civil*, Cours de perfectionnement du Notariat 335-54 (1977); Baudouin, *Le Code civil québécois: Crise de croissance ou crise de vieillesse*, 44 *Can. B. Rev.* 391 (1966); Crépeau, *Civil Code Revision in Quebec*, 34 *La. L. Rev.* 921 (1974); Crépeau, *Centenaire du Code civil du Québec*, 44 *Can. B. Rev.* 389 (1966); Dumford, *The Landlord's Obligation to repair and the Recourses of the Tenant*, 44 *Can. B. Rev.* 477 (1966); Lilikoff, *Le Code civil et l'autonomie du droit*, 44 *Can. B. Rev.* 443 (1966); Rinfret, *La révision du Code civil*, 15 *R. du B.* 313 (1955); J. Turgeon, *De la révision du Code civil québécois*, 29 *Can. B. Rev.* 70 (1951); Conseil général du Barreau, *Modification du Code civil: situation juridique de la femme mariée*, 6 *R. du B.* 202 (1946) (a comment).

had to be made to reflect the society of Quebec in the latter part of the twentieth century."<sup>12</sup>

Thus, in 1955, the Quebec legislature entrusted the general revision of the Civil Code of Lower Canada to a jurist;<sup>13</sup> that revision was to serve as a basis on which a final draft of a new Civil Code would be prepared. The Quebec Civil Code Revision Office (C.C.R.O.) got its main impetus, however, in 1965 with the nomination as sole commissioner of Professor Paul André Crépeau of Montreal's McGill University.<sup>14</sup>

### *Objectives*

The spirit and objectives of the 1955 revision of Quebec's civil laws bore no relation to the objectives of the 1866 codifiers. The historical background which presided over both differed drastically, as did the mores and system of values of Quebec society at those two moments in its history, one hundred years apart.

No one has stated the goals of the codification better than the mastermind of the reform, Professor Paul André Crépeau, despite the affinity with the 1866 codification indicated by the legislator in 1955.

The task of revision could not be approached in the same spirit as that which guided the first codification. In comparison with what was done a little more than a century ago, it seemed to us that the situation called for a complete reversal in the objectives to be achieved. The obsolescence of the Civil Code required that priority be given to reforming the institutions of the Civil Law, and that there be undertaken, in the light of experience and of comparative law, a systematic examination of the entire Code, with a view to removing the traces of a vanished past and to bringing the law into harmony with contemporary reality.

To be sure, this rethinking of the fundamental principles of the Code led to changes being proposed in the traditional rules of the Civil Law that are at times profound.<sup>15</sup>

The Commissioner further defined these objectives as follows:

Un premier objectif visait à résoudre les conflits d'interprétation doctrinale ou judiciaire du Code civil.

. . . .

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12. 1 Report, *supra* note 5, at xxvii.

13. An Act respecting the Revision of the Civil Code, L.Q. ch. 47 (1954-1955) (assented to on February 10, 1955). Its work truly started only in 1962 with the nomination of M. Andre Nadeau, Q.C. After his nomination to the Quebec Superior Court, he was replaced by Professor Paul Andre Crépeau, Q.C., of McGill University.

14. October 1, 1965.

15. 1 Report, *supra* note 5, at xxvii.

Un deuxième objectif concernait l'interprétation au Code civil de la législation, dite statutaire, en matière de droit civil.

. . . .

Le troisième objectif—et le plus important—obligeait à une réflexion critique, à la lumière de l'expérience et des leçons du droit comparé, sur les raisons, les politiques législatives qui avaient présidé, au dix-neuvième siècle, à l'élaboration du Code civil.<sup>16</sup>

### *Plan and Method*

The redactors of the 1866 Code had closely followed the plan of the Code Napoleon. After a preliminary title dealing with "promulgation, distribution, effect, application, interpretation and execution of the laws in general,"<sup>17</sup> the Civil Code of Lower Canada was divided into four main sections: Book First—Of persons; Book Second—Of Property, of Ownership and its Different Modifications; Book Third—Of the Acquisition and Exercise of Rights of Property; and Book Fourth—Commercial Law (this last book corresponding to the French Code de commerce). It contained 2714 articles. The C.C.R.O. departed from that tradition in order to effect a more rational grouping of matters and to respect the autonomy of each of Quebec's fundamental private law institutions.

As submitted by the Minister of Justice to the Quebec National Assembly on June 10, 1978, the Draft Civil Code contained 3288 articles divided into nine books; it eliminated the former preliminary title, integrating its dispositions into the Interpretation Act and Book Ninth on private international law.<sup>18</sup> Those books were entitled: Persons (I); Family Law (II); Succession (III); Property (IV); Obligations (V); Evidence (VI); Prescription (VII); Publicity of Rights (VIII); and Private International Law (IX).

The monumental task of achieving "un corps de lois vivant, moderne, sensible aux préoccupations, attentif aux besoins accordé aux exigences, d'une société québécoise aujourd'hui en pleine mutation, à la recherche d'un équilibre nouveau,"<sup>19</sup> was viewed primarily as a collective effort of reflection on our fundamental private law institutions. This involved the participation of and consultation with professionals and laymen alike on the various aspects of the reform. More than 150 professionals participated regularly as members of more than fifty committees, and a number of other individuals participated as consultants or as research or resource persons on an *ad hoc* basis.

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16. Crepéau, *supra* note 15, at 6.

17. Civ. Code Lower Can.; preliminary title.

18. 1 Report, *supra* note 5.

19. 1 Report, *supra* note 5, at xxvi (French ed.).

The method chosen is described by Professor Crépeau in the foreword to the *Report on the Quebec Civil Code*, and as it is the key to the success of that unique undertaking, the foreword warrants reproduction *in extenso*.

The first stage of consultation consisted of setting up study committees responsible for submitting drafts or reforms in particular areas of the Civil Law.

The committee was the key to the reform. Consisting generally of three to seven jurists—judges, lawyers, civil servants, and professors—it was able to count on the constant collaboration of research assistants; it was able to commission special studies, and to consult experts—jurists and others, and to interview individuals or organizations that might be affected by a particular reform; and finally, it prepared a report comprising a draft reform accompanied by explanatory notes both French and English.

The second stage of consultation involved outside participation. Its main purpose was to submit the committee reports to the free and unrestricted appraisal of interested persons and organizations. Thus, each of the forty-seven reports of the committees of the Office was printed in about 2,000 copies which were distributed to government departments, courts, universities, professional organizations, unions, women's associations, political groups, religious bodies, social agencies, banking institutions, and news agencies, and also to an increasing number of individuals who on all sides showed an interest in the reform of the Code, and finally, to foreign civil and comparative law experts. Each was invited to submit observations and criticisms in writing by a certain date.

Where the subject-matter was appropriate or the nature of the observations warranted it, public study or information sessions were held to enable members of a committee to understand more fully the ideas of the authors of briefs, and even to enable authors of brief, to discuss among themselves the various legislative options in question. This method sometimes produced excellent results because it made it possible to realize that opposing interests are not always irreconcilable, that agreement could often be reached, or that a diversity of opinions did not always result from ill will, but most often from legitimately opposed interests. When these consultations were completed, the committee resumed study of its report in the light of the observations, comments and criticisms, and prepared the final reports which it submitted to the Office.

The third stage of consultation consisted in coordinating the work of the study committees. Obviously, where every Commit-



tee, as it had the right to do, freely presented its legislative options, there could result—and this was a good thing—conflicts in legislative policy or terminology. In effect, it would be surprising if, in these days, a hundred and fifty jurists, representing the various sectors of the profession, belonging to different generations and coming from every corner of Quebec, each having his own political, social, religious or moral views, were to arrive at unanimity. Thus steps had to be taken to ensure the coordination of the work. A Coordinating Committee was set up, to which difficult cases of conflict in legislative policy were referred. A Reading Committee was established with responsibility for style and consistency in the vocabulary. Where necessary, final arbitration was brought to bear by the President of the Office.

Thus was conceived and written the Draft Civil Code which the National Assembly of Quebec will be called upon to examine and, if it approves, to adopt.<sup>20</sup>

### *Main Features*

Although the focus here is on the Quebec Code of Family Law as it stands today, it was conceived as an integrated part of the whole reform of civil laws; Family Law revision is a tributary of the basic philosophy which inspired the C.C.R.O. Thus, the reports of the C.C.R.O. on Family Law and Family Courts will be freely employed in approaching and discussing the subject. The Draft Civil Code of Quebec was an extensive reform in the civilian tradition of conciseness and clarity, an effort to update Quebec's civil laws into line with the mores and techniques of modern times. It was achieved through a collective and systematic rethinking of our basic institutions.

All this involved increased powers of intervention by the courts, even in contractual matters, so that injustices could be rectified in cases of undue hardship due to circumstances or abuse.

The dominant theme of the reform is a marked concern for the human person over the protection of property, stemming from a desire to recognize "the role of the human person, along with affirmation and protection of human dignity" as the cornerstone of private law relationships.<sup>21</sup> Equally important was the principle of equality before the law of consorts, parents, and children, whatever the circumstances of their birth. The rights of children to affection and security were stressed, as were their best interests in all decisions concerning them. The protection of the family unit was another strong concern, although recognition of *de*

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20. *Id.* at xxxiv-xxxv.

21. *Id.* at xxix.

*facto* unions seemed inevitable. Fundamental human rights are expressed in positive terms rather than negative standards of behavior.

In the contractual field, contracts were divided into three categories: employment, services, enterprise. Contractual arbitration with respect to both present and future disputes would now be valid. Contract rules, while affirming the principle of freedom in legal relationships, were tempered by the desire to protect the consumer of goods and services and avoid abuses resulting from contractual imbalance.

In undertaking the modernization of the law, new concepts such as trusts, hypothecs on movable property, and the removal of all privileges were to be retained. Modern techniques were recognized in the centralization of civil status acts as well as registration of real rights. And the law of evidence underwent certain changes in order to put increased emphasis on testimony, and permit the disallowance of illegally obtained evidence.

The list of more specific and detailed proposals for reform could go on and on. Each of the proposals put forward by the C.C.R.O. is substantiated and explained in commentaries submitted with the *Report*, which also includes reference to jurisprudence and doctrine.

### *Implementation*

The C.C.R.O. *Report on the Quebec Civil Code* was presented to the National Assembly on June 20, 1978, to serve as the basis on which a final draft of a new Civil Code was to be prepared.<sup>22</sup> Considering the wide range of proposed reform and related studies, it was considered necessary to spread the enactment of its main parts out over a period of time.<sup>23</sup> To date, only that part of the Draft Civil Code relating to the reform of family law has been the object of legislation,<sup>24</sup> although other parts are now before the legislature for study and eventual embodiment in legislation.<sup>25</sup>

Although embodied in a Civil Law Code, the Family Code in Quebec was seen as a separate code, one in need of urgent and pressing reform. It was dealt with by the legislature on a priority basis, independently of other civil law reform, as a whole, and with parliamentary debate limited to that area of the law. This, in some measure, does alleviate some of the criticism associated with codification of family law.

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22. See *supra* note 13.

23. Bill 89 (assented to December 19, 1980); An Act to Establish a New Civil Code and to Reform Family Law, Que. Stat. 1980, ch. 39 (1980) (partially in force April 2, 1981) (followed by An Act to provide for the carrying out of the Family Law Reform and to amend the Code of Civil Procedure, Que. Stat. ch. 17 (1982) (enacted June 11, 1982)).

24. Que. Stat. ch. 17 (1982).

25. Bill 106, An Act to add the Reformed Law of Persons to the Civil Code of Quebec, and Bill 107, An Act to add the Reformed Law of Successions to the Civil Code of Quebec,

## CODIFICATION OF FAMILY LAW

Book Second of the Quebec Civil Code, entitled "The Family," was assented to on December 19, 1980, and has been only partially in force since April 2, 1981. It contains only 259 articles, although correlative amendments to the Civil Code of Lower Canada and transitory measures were also necessary. The Quebec Family Code is divided into five titles: Marriage (I); Divorce (II); Filiation (III); The Obligation of Support (IV); and Parental Authority (V). The Family Code was inspired by the same basic philosophy of protection of the dignity of the human person and was developed by the same method of collective reflection as was the revision of the entire Code of Civil Laws.

## THE CIVIL CODE OF QUEBEC: BOOK TWO—THE FAMILY

*Historical Background*

Outmoded by today's reality and the prevailing trends of contemporary thought, family law had gone through a *crise de vieillissement* in its fundamental assumptions.<sup>26</sup> The Civil Code of Lower Canada reflected "not only religious and political influences, but also the conditions of a social world long past."<sup>27</sup> Its treatment of the family rested fundamentally on the principles of marital and paternal authority, dependence and obedience of the wife, and insolubility of marriage and a view of the extended family prevalent at the time of the 1866 codification.<sup>28</sup>

Shaped by historic forces, the traditional family, until recently, was a close-knit, although extended unit devoted to the common interest of its members. It was, as a rule, stable and of lifelong duration. Meulders-Klein has described the traditional family in a few words:

Que ce soit dans le cadre d'une société sans classe, simple et homogène, ou dans le cadre plus vaste et plus complexe d'une société de classes, antique, féodale ou même bourgeoise, la famille traditionnelle postule la soumission à des valeurs ou intérêts communs et ne tolère guère que l'union conjugale et la stabilité familiale soient livrées aux tribulations de la subjectivité individuelle.

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have undergone first reading December 17, 1982, and a study by a Parliamentary Commission, April 12-14, 1983.

26. Baudouin, *La famille face à un code moderne—Le droit dans la vie familiale*, in R. Boucher & T. Morel, *supra* note 4, at 50.

27. Elkin, *The social milieu and problems of matrimonial relief*, in R. Boucher & T. Morel, *supra* note 4, at 143.

28. Baudouin, *supra* note 26; Crépeau, *Le droit familial du Québec: Réalités nouvelles et Perspectives d'avenir*, 51 *Can. B. Rev.* 169 (1973); Civil Code Revision Office, 2 Report on the Quebec Civil Code—Commentaries at 109 (1977) [hereinafter cited as Commentaries].

Conversely, the modern family, nuclear in dimension and of increasingly short duration, is based on the free will of the parties. It is oriented towards equality and its partners are free to pursue individual happiness. The state is assumed to play a neutral, if not a supportive role.<sup>29</sup>

Demands for reform became more pressing.<sup>30</sup> In fact, "under the pressure of the requirements of a society undergoing change . . . a body of civil law legislation"<sup>31</sup> had been developing on the fringe of the Code. From 1897 to 1980, no less than eleven statutes were enacted in the field of family law alone, some of them effecting major reforms as regards, for instance, the capacity of married women, matrimonial regimes, and the age of majority.<sup>32</sup> Most of these reforms were brought about as a result of pressure from women's groups, whose awareness was stimulated in 1968 by the Divorce Act.<sup>33</sup> Eventually, however, piecemeal legislation and judicial interpretation proved insufficient to provide the profound transformation of the basic assumptions of the 1866 Code that was required. It was necessary to bring the law in harmony with reality, to bridge the gap between law and life.

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29. L'Heureux-Dubé, *Family Law in Transition: An Overview*, in *Family Law—Dimensions of Justice* 301-02 (R.S. Abella & C. L'Heureux-Dubé eds. 1983) [hereinafter cited as *Family Law*].

30. Baudouin, *Le Code civil québécois: Crise de croissance ou crise de vieillissement*, 44 *Can. B. Rev.* 391 (1966); Baudouin, *De certaines réformes nécessaires du droit québécois*, 2 *Ottawa L. Rev.* 363 (1968).

31. 1 Report, *supra* note 5, at xxv, xviii.

32. See An Act to abolish the continuation of community, to create legal usufruct in certain cases, and for that purpose to amend articles 1323 to 1337, inclusively, of the Civil Code, 60 *Vict. ch.* 52 (1897) (assented to January 9, 1896); An Act to amend the Civil Code respecting successions, 5 *Geo. V, ch.* 74 (1915) (assented to March 5, 1915); An Act respecting adoption 14 *Geo. V, ch.* 75 (1924) (assented to March 15, 1924); An Act to amend the Civil Code and Code of Civil Procedure respecting the civil rights of women, 21 *Geo. V, ch.* 101 (1930-1931) (assented to March 11, 1931); (*Civ. Code Lower Can. arts.* 1425a-1425i, 1389a, 1389b); An Act to amend the Civil Code, 9 *Geo. VI, ch.* 66 (1945) (assented to June 1, 1945) (*Civ. Code Lower Can. art.* 1279a); see also *Que. Stat. ch.* 48, art. 3 (1954-1955) (removing the name of the married woman from the list of persons declared incapable of contracting and adding article 986a which provides for the limited capacity of married women); *Que. Stat. ch.* 66 (1964) (hailed Bill 16 at the time, proclaiming the full capacity of the married woman); *Que. Stat. ch.* 82 (1968) (the solemnization of civil marriages); *Que. Civ. Code art.* 129; *Que. Stat. ch.* 77 (1969) (Act respecting matrimonial regimes); *Que. Civ. Code arts.* 1266c-1266z; *Que. Stat. ch.* 62 (1970) (certain rights granted to natural children and their parents); *Que. Stat. ch.* 85 (1971) (the age of majority lowered to 18, and provision made for the legitimation of adulterine children through their parents' subsequent marriage); *Que. Civ. Code arts.* 246, 324).

33. The Divorce Act, *Can. Rev. Stat. ch.* D-8 (1970) (assented to February 1, 1968, in force July 2, 1968, *Can. Stat. ch.* 24 (1967-1968)). The Divorce Act was to make matrimonial relief accessible to Quebec couples on grounds other than adultery and otherwise than by an act of Parliament. Quebec Family law, which still considered marriage as indissoluble, nevertheless adopted legislation providing for the financial consequences of divorce. *Que. Stat. ch.* 74 (1969).

According to Professor H. R. Hahlo,

The factors which led from the old to the new order, culminating in the reforms of the post-World War II period, are common knowledge. They are industrialization and urbanization; the diminishing influence of the Church in setting standards of positive morality; the weakening of family bonds and the emergence of the liberated individual from the cocoons of family and group; the stress on the rights to self-expression and self-fulfilment; and the rapid increase in the number of working wives, two-income families and one-parent families. Most of all, it was "women's liberation", the hard-won recognition of women's legal equality.

The pivotal point in the evolution of a new kind of marriage was the shift in the divorce laws of Western jurisdictions from fault to failure; from the matrimonial offence (adultery, cruelty, desertion) to irretrievable marriage breakdown as the main, if not the only ground of divorce.<sup>34</sup>

### *Objectives*

The family law reform had two basic objectives: equality between consorts and between parents and equality of children before the law, whatever the circumstances of their birth. With these goals firmly set, the C.C.R.O. went about the task of adapting "family institutions to the realities faced by modern Quebec families and, where necessary, to simplify them."<sup>35</sup>

Because it felt that "no real family law reform can be imagined without first acquiring an overall concept of the subject and co-ordinating its different aspects into a logical whole,"<sup>36</sup> the C.C.R.O. disregarded constitutional problems and included some provisions on matters falling clearly within federal jurisdiction (*i.e.*, divorce) in an attempt to fully realize these objectives. Still other provisions "raise[d] special problems as to legislative authority," but most were within provincial jurisdiction.<sup>37</sup> To implement these objectives, the C.C.R.O. also proposed conflict resolution procedures and other measures for the conciliation of family disputes and the protection of the interests of the children in all decisions concerning them. This brings us to the more detailed examination of the main features of the reform.

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34. Hahlo, *The Changing Face of Marriage and Divorce*, in *Family Law*, *supra* note 29, at 273.

35. 2 *Commentaries*, *supra* note 28, at 112.

36. *Id.* at 110.

37. *Id.*; see also jurisprudence cited *id.* at 218; Baudoin, *La répartition des compétences législatives au Canada en matière de mariage et de divorce*, 4 R.G.D. 66 (1973). The provisions relating to divorce, Que. Civ. Code bk. 2, tit. 2, have not come into force due to the constitutional problem involved.

*Substantive Reform: Main Features*

The draft Family Code proposed by the C.C.R.O. was made up of 370 articles divided into four main sections and subdivided into chapters as follows:

## BOOK TWO—THE FAMILY

## Title One—Marriage

## Chapter I—Promises of marriage

## Chapter II—Conditions required for contracting marriage

## Chapter III—Opposition to marriage

## Chapter IV—The solemnization of marriage

## Chapter V—Proof of marriage

## Chapter VI—Nullity of marriage

## Chapter VII—Effects of marriage

## Section I —Rights and duties of consorts

## Section II —The family residence

## Section III —General provisions

## Chapter VIII—Matrimonial regimes

## Section I —General provisions

## Section II —Partnership of acquests

## § - 1 Composition of the partnership of acquests

## § - 2 Administration of property and liability for debts

## § - 3 Dissolution and liquidation of the regime

## Section III —Community of property

## § - 1 Community of moveables and acquests

## I—Assets and liabilities of the community of moveables and acquests

## II—Administration of the community of moveables and acquests, and effect of the acts of consorts

## III—Dissolution of the community

## IV—Acceptance of the community

## V—Partition of the community

## VI—Renunciation of the community and its effects

## § - 2 Principal clauses that may modify the community of moveables and acquests

I—The community reduced to acquets

II—The right to take back free and clear what was brought into the community

III—Clauses by which unequal shares in the community are assigned to the consorts

IV—Community by general title

§ - 3       Reserved property

Section IV —Separation as to property

§ - 1       Conventional separation as to property

§ - 2       Judicial separation as to property

Chapter IX—Dissolution of marriage

Chapter X—Separation as to bed and board, and divorce

Section I   —General provision

Section II  —Agreements in cases of *de facto* separation

Section III —Grounds for separation as to bed and board and for divorce

Section IV  —Conciliation

Section V   —Provisional measures

Section VI  —Accessory measures

Section VII —Effects of separation as to bed and board and of divorce

*Title Two—Filiation*

Chapter I—Filiation by blood

Section I   —Establishment of filiation

Section II  —Disavowal and contestation of paternity

Section III —Proof of filiation

Section IV  —Effects of filiation

Chapter II—Adoption

Section I   —Conditions for adoption

Section II  —Placement for adoption and judgments

Section III —Effects of adoption

Section IV  —Confidentiality, offences, and penalties

*Title Three—The Obligation of Support*

*Title Four—Parental Authority*

The Family Code that was eventually adopted, however, differs markedly from the Family Code that appears in the Draft Civil Code

submitted by the C.C.R.O. The draft Family Code was the object of a number of changes resulting from either parliamentary debate or, as was more often the case, from different—and at times divergent—policy decisions by the legislature. Many of these changes were unexplained and served only to frustrate the goal of modernizing the law to reflect contemporary society or to confuse the law rather than clarify it. Three prominent examples can be used to illustrate the problems resulting from many of the changes.

First, the C.C.R.O. had devoted an entire chapter to the promises of marriage in an “attempt to resolve certain contradictions in doctrine and jurisprudence relating to the effects of broken engagements.”<sup>38</sup> The Quebec Civil Code simply omitted that chapter without any explanation.

Next, acknowledging the fact that an increasing number of couples choose to live together on a continuing and open basis in a *de facto* union rather than going through marriage,<sup>39</sup> and that in doing so some couples encounter a number of legal situations with which courts had to deal,<sup>40</sup> the C.C.R.O. had proposed a minimum regulation “to offer solutions to the legal problems such unions inevitably create, and to regulate the rights and duties of *de facto* consorts with regard to third parties and, to some extent, with regard to each other.”<sup>41</sup> Minimum rules were deemed necessary for the protection of the consorts, their children and property, although no constraints or obligations that such couples were seeking to avoid were imposed out of respect for individual freedom. These rules concerned the obligation of support as long as the consorts live together (article 338 of Book Two), contributions towards household expenses (article 49 of Book Two), and the presumption of paternity of the *de facto* husband (article 266 of Book Three). While social and fiscal legislations in particular, and even the Civil Code of Lower Canada itself, had some provisions giving effect to the *de facto* unions,<sup>42</sup> the same legislature dropped all reference to *de facto* unions from Bill 89, introducing family law reform, on the grounds that it was inopportune to institutionalize or regulate a way of life freely chosen by the parties.<sup>43</sup>

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38. 2 Commentaries, *supra* note 28, at 123.

39. J. Eekelaar & S. Katz, *Marriage and Cohabitation in Contemporary Societies* (1980).

40. *Therrien v. Granville*, 1976 S.C.R. 777; *Beaudoin-Daigneault v. Richard*, Supreme Court of Canada, Feb. 2, 1984.

41. 2 Commentaries *supra* note 28, at 113.

42. Social Aid Act, Que. Stat. ch. 63, § 1d (1969); Quebec Pension Plan, Que. Stat. ch. 64 (1965); (Canada) Pension Act, Can. Rev. Stat. ch. P-7 (1970); Automobile Insurance Act, Que. Stat. ch. 68, art. 7 (1977); An Act to establish the Regie du logement and to amend the Civil Code and other legislation, Que. Stat. ch. 48 (1979); Heleine, *Le Concubinage, institution à la merci des politiques législatives des différents départements ministériels*, 40 R. du B. 624 (1980).

43. Une autre application concrète du principe de la liberté des individus dans le choix de la forme d'organisation de leur cellule doit également exister à l'égard de l'union de fait. Lors de la Commission parlementaire de la Justice sur la réforme



The third example concerns accessory measures upon divorce. Although these rules have not become effective because of the constitutional problem involved,<sup>44</sup> they form part of Book Two—The Family, assented to by the Legislative Assembly on December 19, 1980. In the Draft Civil Code the C.C.R.O. has proposed the following articles:

Art. 337. Divorced consorts and persons whose marriage has been annulled owe each other support, unless the court decides otherwise.

Art. 256. The court, in granting a divorce or subsequently, may, according to the circumstances, declare extinguished the right of the former consorts to claim support from each other.

The articles actually adopted in Book Two—The Family read as follows:

Art. 560. Divorce extinguishes the right which the spouses had to claim support unless, on a motion, the court, in granting a divorce, orders one of the spouses to pay support to the other or reserves the right to claim support.

Art. 561. The court may reserve the right to claim support only if, on granting the divorce, it is unable to rule equitably as to such right, either because one spouse is prevented by exceptional circumstances from availing himself of his right, or because it has been established that the existing state of the needs and means of the spouses is likely to change in the near future.

In no case may the right to claim support be reserved for a period of over two years.

Art. 562. If the court grants support to a spouse, it is payable as a pension.

The court may replace or complete the alimentary pension by a fixed sum payable immediately or by instalments over a period of not more than three years.

Art. 563. The order awarding support may be reviewed by the court whenever new facts so justify.

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du droit de la famille en mars 1979, la plupart des mémoires soumis demandaient aux législateurs de respecter cette volonté des couples non mariés de distinguer leur choix de formule de vie par rapport au mariage. Il y a donc paru opportun de ne pas intervenir à l'égard de ce mode de vie librement décidé; il n'y a donc pas lieu de l'institutionnaliser ou de le réglementer.

23 *Journal des débats* 208 (Dec. 4, 1980). However, conclusions drawn by the C.C.R.O. from the "memories" and varied comments it received were to the effect that "most of them favoured introducing some regulations . . . the extent of regulation is highly controversial." 2 *Commentaries*, supra note 28, at 113.

44. Bk. 2 arts. 538-571. See Bill 89, § 80.

However, no order awarding a fixed sum may be reviewed even in the case of unforeseen change in the means or needs of the parties.

Art. 564. Except in the case of fraud, the right of a spouse to claim support is extinguished *pleno jure* at the expiry of the period during which the right has been reserved if it has not been exercised.

Art. 565. Where the court has awarded support or reserved the right to claim support, it may at all times after divorce declare the right to support extinguished.

Art. 633. Spouses, and relatives in the direct line, owe each other support.

The C.C.R.O. felt that there was no need to alter the law as it then existed—it contained flexible as well as equitable provisions, subject to the limits laid down by jurisprudence—<sup>45</sup> and that it was necessary to remove doubts as to the power of judges to declare all rights of support extinguished.<sup>46</sup> The Government took the opposite view, without stating any reasons for its departure from the course proposed by the C.C.R.O.<sup>47</sup>

Only the substantive changes brought about by the enactment of Book Two — The Family will be discussed, and the differing proposals made by the C.C.R.O. will be referred to only when they are useful to enlighten discussion of the substantive changes actually made. The focus will be on the amendments of a fundamental nature and the provisions enacted to implement these amendments. The most fundamental of the substantive changes in the family law are to be found in its adoption of the principles of equality between both consorts and parents and equality between children, whatever the circumstances of their birth, and its adoption of special measures to prevent or redress inequalities.

#### EQUALITY BETWEEN CONSORTS AND PARENTS

The recognition of full equality between both consorts and parents as one of the two basic principles of the revision of Family Law, in line with the provisions of the Quebec Charter of Rights,<sup>48</sup> was the culmination of over one hundred years of evolution in legislation relating to family law. Only one hundred years ago, article 174 of the Civil Code of Lower Canada expressed with assurance the authority of the husband over his wife: "A husband owes protection to his wife, a wife obedience to her

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45. *Shafran v. Shafran*, 1970 C.A. 1174, *aff'g* 1969 R.P. 101 (S.C.).

46. *Guay v. Dadoury-Guay*, 1973 C.A. 720.

47. 23 *Journal des débats* (Dec. 4, 1980).

48. Charter of Human Rights and Freedoms, Que. Rev. Stat. ch. C-12 (1977) (in force June 25, 1975; Que. Stat. ch. 6 (1975)).

husband." Under that Code, "[e]quality of the spouses was . . . illegal. [However,] [t]he Civil Code now embodies the opposite rule: the husband and wife are equal and they do not have the right to give up this equality."<sup>49</sup>

### *The Long Road to Equality*

Article 986 of the Civil Code of Lower Canada listed married women as incapable of contracting, alongside minors and interdicts. In a fundamental reform in 1931, the married woman was given the entire administration, under any matrimonial regime, of the proceeds of her salary, but the reform did not go as far as to render married women fully capable of exercising their civil rights.<sup>50</sup> A great step forward for married women—or so it was thought—came on December 16, 1954, when the legislature removed the married women from the list of persons declared incapable in article 986, and adopted article 986a.<sup>51</sup> It reads: "The capacity of married women to contract like their capacity to appear in judicial proceedings is determined by law." However, this amendment did not erase other provisions of the Code creating real incapacities for the married woman.<sup>52</sup>

These incapacities were linked to a great extent to the matrimonial regime of community as to property, the legal regime applicable in the absence of a marriage contract which governed in the great majority of cases the financial arrangements between spouses. As head of the community property regime, the husband detained all the powers of an administrator, even over property *propre* to his wife.<sup>53</sup>

Further proposals for reform were subsequently enacted in Bill 16 of 1964<sup>54</sup> and were hailed as one of the great monuments to the emancipation of the married woman. Still, however, this newly acquired capacity was given "under reserve only of restrictions arising from the matrimonial regime and from the law."<sup>55</sup> The next step could not avoid dealing with such matrimonial regime, "given the intimate link which exists between the question of married women's legal capacity and that of the various legal regimes."<sup>56</sup>

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49. Mayrand, *The Quebec Civil Code: New Steps Towards Equality in Family Law*, in *The Cambridge Lectures* 4 (July 1983).

50. Que. Stat. ch. 101 (1930-1931) (adding Civ. Code Lower Can. arts. 1425-1425i).

51. Que. Stat. ch. 48, art. 3 (1954-1955).

52. *Duchesneau v. Cook*, 1955 S.C.R. 207; *Comtois*, 59 R. du Notariat 117, 119 (1956-1957).

53. See Civ. Code Lower Can. arts. 1298, 1272 as they existed prior to Que. Stat. ch. 48 (1954-1955).

54. Que. Stat. ch. 66 (1964).

55. Civ. Code Lower Can. art. 177 (as it existed in 1964).

56. Civil Code Revision Office Report on the Legal Position of the Married Woman 5 (1968).

Four years later, the Minister of Justice was handed the C.C.R.O.'s *Report Committee on Matrimonial Regimes*.<sup>57</sup> It became law the following year<sup>58</sup> as Title Four of Book Third of the Civil Code of Lower Canada, entitled "Of Marriage Covenants and of the Effect of Marriage upon the Property of the Consorts"; it has now become Chapter VII of Book Two — The Family of the Quebec Civil Code. Apart from the modification of the technique of compensation and the clarification of certain characterizations of the property of consorts, the revision of that part of the Code was mainly aimed at reflecting the principles of equality between consorts. It may be in order to have a glimpse at its principal features.

In Quebec, then as now, no rigid and uniform matrimonial regime is imposed on married persons. The law allows the consorts to choose, by contract, the system best suited to their particular needs and provides appropriate guidelines. In the absence of such choice by the spouses, however, the so-called legal regime applies.

In 1866, the legal regime consisted of a community of moveables and acquets with the husband as chief administrator and head of the family unit. Marital and paternal authority flowed logically from this regime and, as a necessary corollary, dependence of the wife both as a person and in the management of her affairs as well as of those of the community between her and her husband. This state of affairs sheds some light on the reluctance of the legislature to grant married women full legal capacity: What would happen to the head of the community, on which stands not only the whole philosophy but even the workability of the legal regime of community as to property? Hence, full capacity of the married woman came only with the complete reform of the matrimonial regimes.

Although it realized that the conventional regime of separation as to property was favored by an increasing number of consorts and that a legal regime of community as to property might be doomed, the C.C.R.O. nevertheless remained convinced that separation as to property could result in real prejudice for one of the consorts, even with built-in burdensome safeguards. In Quebec, it was normal at that time for the wife to devote all her time to the care of the family; under a separate property regime, the wife in all of these cases would receive no share in the wealth ac-

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57. Civil Code Revision Office, *Report on Matrimonial Regimes* (1968) [hereinafter cited as *Matrimonial Regimes*]. The C.C.R.O. on *Matrimonial Regimes* was then chaired by Notary Roger Comtois, later to become dean of the Faculty of Law of the University of Montreal (1978-1981); other members included Professor Louis Baudouin and Notary Andre Lesage (both now deceased) and M. Louis Marceau, Q.C., formerly dean of the Faculty of Law, Laval University (1959-1969) and now a judge of the Federal Court of Appeal of Canada.

58. Act respecting matrimonial regimes, Que. Stat. ch. 77 (1969) (now Que. Stat. ch. 39 (1980) (articles 463-524, as modified)).

cumulated by the husband, and which she herself had often made possible, upon the dissolution of the marriage. Given the fact that more than fifty percent of the married women in Quebec are now part of the paid work force,<sup>59</sup> one may question the validity of this concern, particularly when more than fifty percent of the couples today prefer to marry under the conventional regime of separation as to property.<sup>60</sup>

In any event, the C.C.R.O.'s rationale in proposing the partnership of acquests as the legal matrimonial regime was expressed in the following terms:

Would it not be more suitable to promote between two persons so intimately united in the pursuit of a common objective, a certain community of interest from the time of the marriage without, however, attempting to create a confusion, even partial, of their patrimonies? If it were possible to organize a matrimonial system which would, at the same time, respect the autonomy, equality and independence of the two consorts, and permit each to participate, at the dissolution of the regime, in the gains realized in the course of its duration, would we not have a standard formula achieving the desired objective and capable of rallying, as it should, the support of the majority? These objectives are fundamentally reflected in the proposed legal regime, *the partnership of acquests*.

9. This regime of *partnership of acquests* is drawn: on the one hand, from the legal regime adopted in Sweden (the Marriage Code of June 11, 1920), Denmark (law of March 18, 1925), Norway (law of May 20, 1927), the Federal Republic of Germany (law of June 18, 1957); and, on the other hand, from the regime of participation in acquests of the 1932 French draft. But it differs from them on a certain number of important points.<sup>61</sup>

However, the partnership of acquests recommended by the C.C.R.O. possessed a number of unique characteristics described as follows:

During the marriage, each consort retains the entire control of his patrimony, and remains fully responsible for his debts: the autonomy of each is complete, save for the obvious need that each contribute, according to his means, to the needs of the household. There is, therefore, no difficulty as to management.

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59. 44,790 according to Statistics Canada, Active Population Series (Dec. 1980).

60. Rivet, *La popularité des différents régimes matrimoniaux depuis la réforme de 1970*, 15 C. de D. 613, 642 (1974). According to statistics from the Quebec Department of Justice, there were 41,000 marriages in 1981, of which 53% chose the partnership of acquests, and 47% the separation as to property. This, of course, does not account for the couples living in *de facto* unions (statistics are not available) who, in the absence of a partnership contract—which is mostly the case—do not fall under the matrimonial regime.

61. *Matrimonial Regimes*, supra note 57, at 6-7.

If by chance one of the consorts entrusts the administration of his property to the other, the latter will be subjected to the general rules respecting the contract of mandate, under which the mandatary is obliged to render an account, save as to fruits received which under an old rule article 1424 of the Quebec Civil Code, that the draft renders applicable to all regimes new article 182, will be presumed to have been consumed for the needs of the household. It is only on the dissolution of the regime (by death, separation from bed and board, separation of property) that a part of the patrimony of each consort will become subject to partition: that part which will have been made up of the proceeds of his work during the course of the regime. Thus property possessed before marriage or acquired subsequently by gratuitous title will not be subject to partition, nor will the fruits and proceeds of this property, nor effects of a personal character such as souvenirs or tools, implements or other things used in a trade or a profession; but all other property that has not been established by legal proof to be private property will be subject to partition. And it is in value, and not in kind, that this partition will take place if it is so preferred by the consort who is the holder of the patrimony or his heirs.

11. The technical structure of this new regime will be set forth in greater detail in the commentaries on the recommended texts, but it can immediately be seen that, during its existence, it offers all the advantages of separation of property, to which Quebec consorts seem more and more attached. Without doubt the mode of liquidation designed for carrying out the partition of the acquets at the moment of dissolution will produce some difficulties; but these are much curtailed and the fact that the partition may be affected in value will forestall the breaking up of assets which is at times so injurious. In any event, these technical inconveniences of implementation will incontestably be less than those under any other regime, save of course pure and simple separation of property which, in short, is equivalent to the absence of a regime.<sup>62</sup>

This vision of the past, perhaps a little too long, seemed essential to grasp the full dimension of the reforms which the Civil Code of Lower Canada has undergone in the long march towards equality of the married woman in the management of family affairs and in the upbringing, maintenance, and education of the children of the marriage. The Quebec Civil Code does achieve equality for the married woman in law, although equality in the realm of everyday life within the family is beyond its reach. Even though "*le Code s'arrete au seuil des sentiments*,"<sup>63</sup> however, equality

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62. Id. at 13-15 (footnote omitted).

63. M.T. Meulders-Klein, *Famille, droit et changement social dans les sociétés contemporaines*, in VIII<sup>e</sup> Journées d'études juridiques Jean Dabin at 751 (Brussels 1978).

in the realm of everyday family life is a desirable objective—true equality breeds respect and consideration for the other, something no law can achieve. Nevertheless, several provisions of the Quebec Civil Code insure the equality of the married woman in the eyes of the law; these provisions are examined below.

### *The Surname of the Married Woman*

For the woman married after April 2, 1981,<sup>64</sup> Article 442 of the Quebec Civil Code provides: "In marriage, each spouse retains his surname and given names, and exercises his civil rights under this surname and these given names." This is a departure from the long-standing tradition, sanctioned by law in Quebec and shared with a number of western countries, according to which the wife assumed the husband's surname upon marriage, although she still had the right to use her maiden name. One obvious advantage of the new rule is that it eliminates the controversy surrounding the name of a divorcee. And while the new rule is linked to the principle of equality of the spouses, it is also consistent with another rule proposed by the C.C.R.O.: unchangeability of the names save under exceptional circumstances and by petition to the Registrar of Civil Status under the Change of Name Act.<sup>65</sup>

A number of questions—questions which the courts have not yet been asked to answer—may arise in connection with the new rule. The first and most obvious such question concerns the sanctions that should be applied in case of an infraction: Can a contract entered into under the husband's name by a woman married after April 2, 1981, be annulled for that reason alone? Will the resolution depend on the good or bad faith of the woman, or on that of the other party? Could the other party obtain the annulment of the contract if it is proven that the "false" name was used fraudulently to induce the passing of a contract which could not have otherwise been consented to according to the rules governing contracts?<sup>66</sup> Does the married woman designated under the name of her husband have any recourse? Could she ignore legal proceedings instituted against her under her husband's name? After divorce, is a woman married before April 2, 1981, entitled to keep her former husband's surname, particularly if she has always been known or has practiced her profession under that name? And many other questions may eventually arise!

It is suspected that the solutions will be governed by principles firmly engraved in our civil laws for infractions of a legal obligation, and that this newly found "nominal" equality will not be used to render some "more equal" than others. While the problems may be more theoretical

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64. Que. Civ. Code art. 79.

65. Que. Stat. ch. 77 (1965); see 2 Commentaries *supra* note 28, at 6-7.

66. See Que. Civ. Code art. 993.

than real as regards the married woman, however, the opposite may be true where the surname of the children is concerned.

### *The Surname of the Children*

The immemorial tradition required the child to bear his father's name, but tradition and equality did not seem to "*faire bon ménage*" [*i.e.*, make for good housekeeping] to the legislature, although it did to the C.C.R.O. Perceived as a sign that pregnancy is still a woman's domain, the surname of the child has now become a choice for both parents (or perhaps for the judge in case of disagreement).<sup>67</sup>

Article 56.1 of the Civil Code of Lower Canada states: "A child is assigned, at the option of his father and mother, one or more given names, and the surname of one parent or a surname consisting of not more than two parts, taken from the surnames of his father and mother." Nothing compels the parents to choose the same surname for all of their children, however. The C.C.R.O. had not given in to such a concept of equality. The choice was a political one; the problems which may develop as a result will be practical ones.

### *The Residence and Domicile of Spouses*

When the husband had the right to choose the family residence and the wife had the obligation to follow him wherever he thought fit to reside,<sup>68</sup> no problem arose as to the family residence or as to the domicile of the married woman. Old article 83 of the Civil Code of Lower Canada had in effect provided that a married woman not separated as to bed and board had no other domicile than that of her husband. According to article 444 of the Quebec Civil Code, however, "[t]he spouses choose the family residence together," and article 441 provides that "[t]hey must live together" (one of the rights and duties of spouses). New problems have arisen with this new situation, however.

Since domicile<sup>69</sup> was a determining factor in establishing the jurisdiction of Canadian courts<sup>70</sup> until the adoption of the concept of "habitual residence" as suggested by the C.C.R.O.,<sup>71</sup> and is still a determining factor in establishing the jurisdiction of the courts of other countries, it is important to determine the domicile of the married woman, particularly in private international law. When spouses live together in the same residence, the domicile of the husband and wife poses no problem.

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67. See *id.* art. 448.

68. See *Civ. Code Lower Can.* art. 175.

69. *Domicile* was defined as the place where a person had his principal establishment. See *id.* art. 79.

70. See *Que. Code Civ. P.* arts. 68-75.

71. See 1 Report, *supra* note 5, art. 60, at 65.



However, some difficulty may arise when the spouses, while not separated nor divorced, have two residences and live either together in one or the other or in separate residences. It is quite possible then for spouses living together to have two distinct residences, and the domicile of each spouse will be the residence where each has his principal establishment or, eventually, his habitual residence.

There are some exceptions to this rule that the domicile of each spouse is the residence where that spouse has his principal establishment or habitual residence, however. For example, the matrimonial regime that applies to consorts without a marriage contract is determined by the law of the matrimonial domicile of the consorts, and the jurisprudence at present defines the matrimonial domicile of such consorts as the domicile of the husband at the time of marriage.<sup>72</sup> The C.C.R.O. (Book Nine of the Draft Code, not yet enacted) proposes that where consorts married without a marriage contract have no common domicile at the time of their marriage, their matrimonial regime be governed by the law of "their first common domicile, or, in the absence of such a domicile, by the law of their common nationality, or, in the absence of one and the other, by the law of the place where the marriage was solemnized."<sup>73</sup>

#### *Equal Rights and Duties of Spouses*

Embodied in a series of articles under the main title "Effects of Marriage,"<sup>74</sup> Section 1, entitled "Rights and Duties of Spouses," reads as follows:

Art. 441. The spouses have identical rights and obligations in marriage.

They owe each other respect, fidelity, succour and assistance.

They must live together.

Art. 442. In marriage, each spouse retains his surname and given names, and exercises his civil rights under this surname and these given names.

Art. 443. The spouses together take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom.

Art. 444. The spouses choose the family residence together.

Art. 445. The spouses contribute towards the expenses of the marriage in proportion to their respective means.

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72. 76 R. du N. 37 (1973); see also 2 Commentaries, *supra* note 28, at 94; statutes cited *supra* note 32.

73. 1 Report, *supra* note 5, art. 26, at 598; see also 2 Commentaries, *supra* note 28, at 978-79.

74. Que. Civ. Code bk. 2, tit. 1, ch. 6.

Each spouse may make his contribution by his activity within the home.

Art. 446. A spouse who enters into a contract for the current needs of the family also commits his spouse for the whole, if they are not separated as to bed and board.

However, the non-contracting spouse is not responsible for the debt if he had previously informed the other contracting party of his unwillingness to be committed.

Art. 447. Either spouse may give the other a mandate to represent him in acts relating to the moral and material direction of the family.

This mandate is presumed if one spouse is unable to manifest his intention for any reason or if he is unable to do so within the proper time.

Art. 448. If the spouses disagree as to the exercise of their rights and the performance of their duties, they or either of them may apply to the court, which will decide in the interest of the family after fostering the conciliation of the parties.

Two points should be made at the outset in regard to these articles. First, these new provisions are imperative, whatever the matrimonial regime. Article 440 declares that "[i]n no case may spouses derogate from the provisions of this chapter, whatever their matrimonial regime." This makes for a true "primary regime" governing all consorts, even with respect to household expenses, although the C.C.R.O. would have made an exception to allow spouses more independence and freedom to make such arrangements as their particular situation might warrant. In the words of the Minister of Justice at the time Bill 89 was passed, it appeared more in harmony with the principles of equality and collegiality not to make exceptions to the rule of public order insofar as contributions to the household expenses are concerned.

The second point deals with the conflict resolution process, a process made necessary by the equality of the partners. As recognized in the *Report*, recourse to the courts is far from the ideal solution, even when that recourse is to a family court with conciliation facilities and is available only as a last resort. Faced with no other viable alternative, however, the C.C.R.O. chose the slight disadvantages of full equality of the consorts over the less obvious advantages and unacceptable predominance of one of the spouses over the other, hoping that spouses would attempt to reconcile their differences in the best interest of the family rather than face court proceedings.<sup>75</sup> If one takes equality seriously, one must accept its consequences. Nevertheless, this new legislation does not seem to have

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75. 2 Commentaries, *supra* note 28, at 147.

spurred any litigation since its effective date that was not already being dealt with by the courts in suits for separation as to bed and board or divorce.

Finally, solidary liability as to the debts incurred for the current needs of the family was imposed on the consorts. The C.C.R.O. had rejected this concept on the following basis:

Contrary to a frequently-stated opinion, it cannot be said that joint and several liability supports equality between consorts. It seems rather to threaten the contribution in kind introduced in Article 47. A consort who contributes to the expenses of the marriage by his activity in the home might find himself liable for all the debts contracted by his spouse when he has no income to meet them.

It was therefore considered preferable for the contracting consort to commit himself personally and to commit his spouse only in proportion to that spouse's means.<sup>76</sup>

Nevertheless, the legislature concluded that such solidarity did not threaten the contribution in kind and a spouse obliged to pay had his recourse against the other. It adopted solidarity between the consorts with respect to debts incurred for the current needs of the family on the grounds that third parties had no means of ascertaining the contribution of each spouse to the current needs of the family and might therefore refuse credit to the family to its disadvantage. Moreover, the spouse who does not want to be held liable can announce his will to the third party.<sup>77</sup>

### *Parental Authority*

For almost one hundred years, authority over the children was vested in the father alone—only in his absence or incapacity was the mother considered a proper substitute to exercise this authority. Male domination persisted until 1977, when articles 242 and following of the Civil Code of Lower Canada were adopted.<sup>78</sup> New article 648 of the Quebec Civil Code only confirms the provisions of those articles in the following terms:

The father and mother exercise parental authority together.

If either parent dies, is deprived of parental authority or is unable to express his will, the other parent exercises parental authority.<sup>79</sup>

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76. *Id.* at 140-41.

77. *Journal des débats (Commissions)* 8, B-3893 (1969).

78. *Que. Rev. Stat.*, ch. C-72, art. 4 (1977).

79. The C.C.R.O. had proposed to insert the following in the book "On Persons": "Every child is entitled to the affection and security which his parents or those who act

In only one circumstance can parental authority be exercised by one parent alone: In the case of the marriage of a child under age, the consent of one parent is sufficient.<sup>80</sup> Should difficulties arise as to the exercise of parental authority in situations other than those described in the second paragraph of article 648, the matter can be referred to the court by one of the parents.<sup>81</sup> In fact, the court even has the power, in the interest of the child and for serious cause, to totally or partially deprive either one or both parents of their parental authority;<sup>82</sup> those rights may be restored on account of new circumstances, save in cases of adoption.<sup>83</sup> In all decisions in which a child is concerned, however, whether the decisions are made by parents or courts, the child's best interest and respect for his rights must be the determining factors.<sup>84</sup>

The rule of the best interest of the child is as widely accepted as it is known. However, what constitutes the best interest of the child remains the difficult question. The limits of such a rule may pose problems when the legitimate interests of the parents or of one of them may have to be weighed against those of the child.

Can parents renounce parental authority in favour of a third person? The Code only makes provision in article 649 for the power of parents to delegate the custody, supervision and education of their children.<sup>85</sup> Since the parents are under a legal obligation to exercise their authority in the best interest of the child, it is doubtful that they could free themselves of that obligation or their liability for the damage caused by their minor children<sup>86</sup> by such a renunciation, although a delegation of authority in accordance with article 649 of the Quebec Civil Code might facilitate exoneration.

It should be noted here that the age of majority in Quebec was lowered from twenty-one to eighteen in 1971.<sup>87</sup> In addition, the Quebec Civil Code raises the age of marriage from twelve for girls and fourteen for boys

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in their stead are able to give him, in order to ensure the full development of his personality." 1 Report, *supra* note 5, bk. 1, tit. 2, ch. 2, art. 24, at 9.

80. Civ. Code Lower Can. art. 119 (modified by Que. Stat. ch. 74, art. 1 (1969); *id.* ch. 85, art. 1 (1971)).

81. Que. Civ. Code art. 653.

82. *Id.* art. 654.

83. *Id.* art. 658.

84. Civ. Code Lower Can. art. 30.

85. Que. Civ. Code art. 649.

86. Article 1054 of the Civil Code of Lower Canada provides in pertinent part:

[One] is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things he has under his care;

The person having parental authority is responsible for the damage caused by the child subject to such authority.

The corresponding articles of the Louisiana Civil Code are articles 2317 and 2318.

87. Que. Stat. ch. 85, art. 1 (1971).

to eighteen for both girls and boys, with a possibility of dispensation by a judge, for serious reasons, between ages sixteen and eighteen.<sup>88</sup>

#### EQUALITY BETWEEN CHILDREN

Under former legislation, a child born out of wedlock had no family except perhaps his mother, whose name alone he was entitled to bear. He could not inherit in intestate or ab intestate successions of his natural father or mother.<sup>89</sup> And although there is complete freedom of testation in Quebec, the use of the word "child" in testamentary successions was not sufficient to include illegitimate children unless they had been so specified.<sup>90</sup> If, in addition, the illegitimate child had the misfortune to be born out of an adulterous or incestuous relationship, his natural parents could not even make donations to him other than those of an alimentary nature.<sup>91</sup>

Even before the enactment of the new Quebec Civil Code, in answer to pressures resulting from, among other things, a well-publicized case, some rights were conferred upon natural parents and the children then designated as illegitimate. In 1970, article 1056 of the Civil Code of Lower Canada was amended to provide for a right of action by the natural child against the person responsible for the death of his father or mother and by the natural parents against the person responsible for the death of their natural child. But it was only with the advent of the new Quebec Civil Code that equality of such children was to be fully recongnized: "All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth."<sup>92</sup> There is one restriction on the rights granted illegitimates with respect to inheritance, however; such a child will be entitled to succeed his natural father or mother only in estates opened since the adoption of the Quebec Civil Code.<sup>93</sup>

In addition, since natural children are now viewed as equal to children born of married parents, the Quebec Civil Code has eradicated even the terms "natural" or "illegitimate," "incestuous," and "adulterous." All are now simply "children."

There will always be children who are treated differently from others, however. As a consequence of the freedom of will, a father, for instance, is entitled to disinherit a child, a legitimate child; so can he disinherit a natural child. More delicate is the question whether a will to "the

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88. Que. Civ. Code arts. 402-403.

89. See Civ. Code Lower Can. arts. 624a, 624b, 625 (declaring that children inherit from their parents).

90. Mayrand, *Adoption et successibilité*, 1950 R. du B. 407, 442.

91. See Civ. Code Lower Can. art. 768 (repealed by Que. Stat. ch. 39, art. 35 (1980)).

92. Que. Civ. Code art 594.

93. Que. Stat. ch. 39, art. 72 (1980).

children of my marriage" will be found in breach of public policy, given the wording of article 594 of the Quebec Civil Code, or for that matter, in breach of the Charter of Rights and Freedoms where discrimination on the basis of "status" is prohibited.<sup>94</sup> One could argue that freedom of will implies the ability to make such distinctions between children as the testator wishes and that the language of article 594 is not directed at distinctions drawn in specific, individual cases but at distinctions drawn by the law at large, and in that sense can be interpreted as discriminatory.

#### SPECIAL MEASURES IN CASE OF INEQUALITIES

Equality all around has been proclaimed. Equality in law is not necessarily equality in fact, however. In order to prevent or redress the injustices which might result from *de facto* inequalities, it was felt necessary to provide some mechanisms.

Two of these special measures will be dealt with here: (1) the protection of the family residence and household furniture in the interest of the family; and (2) the compensatory allowance, which stems from the economic dependence of one of the consorts.

#### *The Protection of the Family Residence and Household Furniture*

Under the old regime of community of property, a husband common as to property could not sell, alienate, or hypothecate any immovable property of the community and furniture in use by the household without the consent of his wife.<sup>95</sup>

The Quebec Civil Code considerably extends this rule by including in the prohibition the lease of the dwelling used as family residence and by making the rule applicable to both consorts whatever their matrimonial regime.<sup>96</sup> The technique consists in the registration of a declaration of residence in the first case and the notification to the lessor in the second.

In addition, in case of separation as to bed and board or the dissolution or annulment of the marriage, the court may even transfer from one spouse to the other the ownership of the household furniture used in the family residence or the lease of the principal family residence.<sup>97</sup> As a compensation for the contribution to the enrichment of the patrimony of the other, the court may also award to either spouse a right of ownership or habitation of the immovable used as the principal residence of the family, except that in the event of separation as to bed and board a right

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94. Charter of Human Rights and Freedoms, Que. Rev. Stat. ch. C-12, art. 10 (1977); The (Canada) Constitution Act, 1982—The Charter of Rights and Freedoms art. 15.

95. See Civ. Code Lower Can. art. 1292.

96. Que. Civ. Code arts. 449-454.

97. Id. arts. 457-458.

of habitation only may be awarded.<sup>98</sup> In the first case, the award is made according to conditions determined by the court, which may include payment of any balance in cash or by instalments.<sup>99</sup>

These measures follow the report of the C.C.R.O. to the Minister of Justice in 1971, who at the time felt that the need to deal with the growing problems stemming from the new Divorce Act of 1968 and the introduction of the partnership of acquests as the new legal matrimonial regime was a matter of some urgency. Under the old community property regime and since June 1964,<sup>100</sup> the family residence could not be disposed of without the consent of both spouses; however, this was no longer the case under either the partnership of acquests or the separation as to property conventional regimes, after their adoption, and it had become usual for husband in anticipation of divorce to sell the family home during the divorce proceedings, at the time of divorce, or shortly thereafter. Thus, the wife and children, already distressed by the divorce, were often forced to give up the stability and convenience of a home they sometimes had been living in for a number of years. This often brought disastrous consequences, particularly for the children. It was in response to the problems created by such inadequacies in the law that the protection of the family residence seemed necessary.

The protection adopted covers not only the immovable of a residential nature at which the consorts have established their principal residence, but also the dwelling rented for such purpose and the household furniture garnishing such principal residence. It is embodied in the following articles:

Art. 449. Neither spouse may, without the consent of the other, pledge, alienate or remove from the principal family residence the household furniture used by the family.

Art. 450. If a spouse has not consented to an act concerning any household furniture used in the principal family residence, he may apply to have the act annulled, unless he has ratified it.

However, no act by onerous title may be annulled if the other contracting party was in good faith.

Art. 451. Neither spouse, if the lessee of the principal family residence, may, without the written consent of the other, sublet it, transfer it or terminate the lease where the lessor has been notified, by either of them, that the dwelling is used as the principal residence.

If the other spouse has not consented to the act, he may apply to have it annulled, unless he has ratified it.

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98. *Id.* art. 459.

99. *Id.* art. 460.

100. An Act respecting the legal capacity of married women, Que. Stat. ch. 66 (1964).

Of course, difficulties could arise in cases where a consort owns a multiple dwelling in which an apartment is used as the principal family residence. The line was drawn for immovables with fewer than five dwellings. Special rules apply to those with more than five dwellings. These are reflected in articles 452 and 453 of the Quebec Civil Code.

Art. 452. Neither spouse, if the owner of an immovable with fewer than five dwellings that is used in whole or in part as the principal family residence, may, without the consent of the other, alienate the immovable, charge it with a real right or lease that part of it reserved for the use of the family.

Unless he has ratified the act, the spouse who has not consented may apply to have it annulled if a declaration of residence has been previously registered against the immovable.

Art. 453. Neither spouse, if the owner of an immovable with five dwellings or more that is used in whole or in part as the principal family residence may, without the consent of the other, alienate the immovable or lease that part of it reserved for the use of the family.

Where a declaration of residence has been previously registered against the immovable, the spouse who has not consented to the deed of alienation may require the acquirer to lease to him the premises already occupied for residential purposes on the conditions governing the lease of a dwelling; under the same condition, the spouse who has not consented to the act of lease may apply to have it annulled, unless he has ratified it.

As regards third parties, a registered declaration of residence is the mechanism which implements the protection: "The declaration of residence is made by both spouses or by either of them. Where the declaration is made by the spouse of the owner of the residence, he must notify the latter immediately."<sup>101</sup>

Article 456 provides for a court authorization in cases where the consent of one spouse is unobtainable or his refusal is not justified by the interest of the family.

Art. 456. Either spouse may be authorized by the court to enter alone into any act for which the consent to the other would be required, provided such consent is unobtainable for any reason, or its refusal is not justified by the interest of the family.

The authorization is special and for a definite time; it may be amended or revoked.

But the law goes much further, allowing the court, under conditions it

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101. *Id.* art. 455.



determines and whatever the matrimonial regime of the parties,<sup>102</sup> to award the consort who is not the owner or the surviving spouse: (1) the ownership or use of the household furniture, in the event of separation as to bed and board or the dissolution or annulment of marriage;<sup>103</sup> and (2) a right of ownership or habitation of the immovable used as the principal family residence in case of dissolution or annulment of marriage in case of separation as to bed and board, or a right of habitation as compensation for his or her contribution to the enrichment of the patrimony of the other.<sup>104</sup> A judgment awarding such rights is equivalent to title, with the same effects.<sup>105</sup>

This, of course, had given rise to a number of legal problems. In particular, in cases of divorce, when the interest of one of the spouses is to sell the principal residence and the interest of the other is to retain possession and ownership of the residence, it has forced bargaining and the conclusion of separation agreements which, in practice, often result in the sharing between consorts of the net proceeds of the sale. In cases of bankruptcy, it has raised the problem of the entitlement of the trustee to proceed with the sale of the principal family residence.<sup>106</sup> The net result is that between consorts the provisions of matrimonial regimes have become more or less "*lettre morte*."

Is the registration of a declaration of residence a real right? A right *in rem*? Since personal rights are not subject to registration, what is the effect of such registration? At what time should the declaration be registered? At the time of purchase? What is the sanction if an act is made in breach of those regulations? Is the act an absolute or relative nullity? Who can invoke it? Do articles 452 and 453 prohibit the sale of a multiple-dwelling immovable in the absence of the consent of one of the consorts if the dwelling used as principle residence is excluded? Is there no right of sale? Can the immovable be mortgaged?

These and a number of other questions are still unanswered, and will no doubt be a source of litigation for years to come. But much of the litigation, it seems, will be brought on by the provisions relating to the compensatory allowance.

### *The Compensatory Allowance*

The provision establishing the compensatory allowance reads as follows:

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102. Id. art. 460.

103. Id. art. 458.

104. Id. art. 459.

105. Id. art. 462.

106. See Camille Charron, *La residence familiale, gage des creanciers de son proprietaire*, 43 R. du B. 774 (1983); Vezina, *La residence familiale et la faillite du proprietaire*, 42 R. du B. 828 (1982).

Art. 559. The court, in granting a divorce, may order either spouse to pay to the other, as consideration for the latter's contribution, in goods or services, to the enrichment of the patrimony of the former, an allowance payable immediately or by instalments, taking into account, in particular, the advantages of the matrimonial regime and marriage contract.

The compensatory allowance may be paid, wholly or in part, by the granting of a right of ownership, use or habitation in accordance with articles 458 to 462.

This article is an important expansion on the theory of unjust enrichment to remedy inequalities in the facts.

One final element must be established before the court can order payment of a compensatory allowance: There must be an enrichment of one spouse and an unrecompensed contribution of the other. This requirement gives rise to a number of questions: When can the claim be made after divorce? From what moment does the determination take place? What if the fortune is lost at the time of claiming? Can one renounce the compensatory allowance by marriage contract? Is such right to a compensatory allowance transmitted to the heirs of the consort? In addition, the words "goods" and "services" are extremely comprehensive, raising further questions: Must the contribution be a direct one or is it sufficient that it did contribute indirectly to the enrichment of the other? How should such compensatory allowance be paid? Would the debtor have an option or choice as to the methods of payment? What criteria will prevail in order to determine the methods of payment?

As for the debtor of such compensatory allowance, the Civil Code of Lower Canada provides:

Art. 735.1 The heirs or legatees discharge, in the same manner as for all other debts and liabilities of the succession, the allowance awarded to the surviving spouse as compensation for his contribution, in goods or services, to the enrichment of the patrimony of the deceased spouse.

The allowance is fixed taking into account, particularly, the advantages allowed to the surviving spouse by the matrimonial regime, the marriage contract and the succession; the allowance is payable immediately or by instalments.

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The compensatory allowance may be paid, wholly or in part, by the awarding of a right of ownership, use or habitation, in accordance with articles 458 to 462 of the Civil Code of Quebec.

Art. 2261.2 The application by a surviving spouse for the fixing of the allowance due to him as compensation for his contribution to the enrichment of the property of his deceased spouse is prescribed by one year from the death of the spouse.

A long list of problems will confront the courts in the application of the articles recognizing the compensatory allowance; the purpose here, however, is not to try to resolve these problems, but only to underline the complexity of the new reform. Equality before the law and in the application of the law to various fact patterns raises difficult, if not at times insoluble, problems, and at the very least requires that courts be prepared to deal with such problems in the best interests of all concerned. The C.C.R.O., conscious of its responsibility in this regard, did not envisage such reforms without at the same time suggesting a reform in the courts dealing with family law, particularly in light of the emphasis in the new Civil Code on the conciliation of issues between consorts. To this end, the C.C.R.O. proposed that integrated family courts be created.

#### FAMILY COURTS

Convinced that a reform of substantive family law would be incomplete and less effective without a reorganization of the judicial system in such matters, the C.C.R.O. set up a committee in June, 1970, to study the expediency of instituting a family court in Quebec. On February 3, 1975, the committee submitted its report to the Commissioner. The Report on the Family Court was presented to the Minister of Justice in June, 1978, at the same time the Report on the Quebec Civil Code was submitted by the C.C.R.O. In the foreword to the C.C.R.O. Report on the Quebec Civil Code, Professor Crépeau expressed the following view:

The success of the reform will, of course, depend upon the doctrinal and judicial interpretation given it; it will also depend on the setting up of a Family Court dispensing justice in a manner that recognizes the special characteristics of family disputes. . . <sup>107</sup>

#### *Objectives*

The committee was composed of representatives of the Quebec Departments of Justice and Social Affairs as well as members of committees of the C.C.R.O., judges, lawyers, and law professors. It held thirty-two full meetings and consulted specialists in many fields, such as psychiatrists, psychologists, social workers, marriage counsellors, probation officers, lawyers and judges. It also attended the meetings of other law reform bodies in Canada, and some of its members visited the family courts of Toledo, Ohio and Detroit, Michigan. In short, the committee studied a number of diverse proposals submitted by various bodies and individuals.

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107. I Report, *supra* note 5, at p. xxxvi.

The committee was familiar with the substantive changes in family law proposed by the C.C.R.O., as well as the C.C.R.O.'s analysis of existing family problems in Quebec and its appraisal of the social and judicial services available to Quebec families and the inadequacies in the administration of family justice. It concluded that current solutions were partial, inappropriate, and even contradictory due to the division of jurisdiction, the rigidity of the adversary system, the lack of coordination, and inadequate collaboration between psychosocial and legal family services. Promoting an overall approach to family problems, the committee put forward the creation of an integrated family court in the following terms:

The present system of administering family justice leaves much to be criticized. To compensate for its deficiencies and ensure that comprehensive, effective and dynamic justice is provided, the organization and role of the courts which hear family matters must be redefined to:

1. humanize and personalize the legal process in family matters;
2. make the legal system and auxiliary court services accessible and efficient;
3. reach settlements which take the interest and rights of each family member into account;
4. create an atmosphere favorable to calm and dignified settlement of family conflicts;
5. appraise the conflict in all its aspects and identify the underlying problems;
6. prevent permanent breaks, whenever possible, and promote conciliation of the parties in conflict;
7. enforce court decisions more efficiently;
8. promote self-assessment of the court system with a view to making changes in structure and substantive law, when necessary;
9. make the Court open to the community so as to obtain the interest and the confidence of the general public.

#### THE CREATION OF A FAMILY COURT

The Committee believes that the best means of attaining these goals and adequately meeting the needs of the population is to establish a Family Court dedicated to finding solutions and making decisions in the best interests of the family concerned rather than sanctioning one person's rights with no concern for the consequences this may have for those of others.

Thus the Family Court would have both social and legal functions.

In its social capacity, the Family Court would work through its specialized auxiliary services to evaluate conflicts submitted to it; it would offer aid and assistance to re-unite the family, where possible, or at least to reduce any harmful effects an inevitable break-up might have; it would ensure that children involved in proceedings obtain the care and supervision necessary for their development within the family, or, if they must be withdrawn from the family, treatment equivalent to that to which they were entitled from their parents.

When no settlement is possible out of court, the Family Court would exercise its delicate judicial function, attempting to maintain, while respecting the rule of law, a fair balance between the interests and rights of each person involved in the conflict.

To fully assume its social and legal responsibilities, the Family Court must:

1. be essentially a court of justice;
2. be presided over by specialized judges;
3. have integrated jurisdiction in all matters inherent to family law;
4. be provided with specialized auxiliary services;
5. be able to function under procedure better adapted to new behavioural science techniques and to the specific nature of family problems.<sup>108</sup>

After first discussing the advantages of an administrative body over a court of justice, the committee ultimately concluded that "the legal system remains the best means of ensuring impartiality and respect of individual rights."<sup>109</sup> However, the committee did recommend a number of changes in the existing court system to enable it to administer family justice in the best possible way. The committee first recommended that "A Family Court be created in the Province of Quebec with jurisdiction in all family matters, presided over by [sic] specialized judges, assisted by specialized auxiliary services and governed by procedural rules specifically adapted to the nature of family conflicts."<sup>110</sup>

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108. Civil Code Revision Office, Report on the Family Court 32-34 (1975) [hereinafter cited as Family Court] (footnotes omitted).

109. *Id.* at 36.

110. *Id.* at 249 (citations omitted).

*Jurisdiction of the Family Court*

The committee was most concerned with the fact that, in Quebec, family law was applied by five different courts: (1) the Superior Court (a court of original jurisdiction); (2) the Court of the Sessions of the Peace (concerned with refusal to support, incest, abandonment of children, corruption of children, and assault, whether between consorts or between parents and children); (3) the municipal courts (particularly of the City of Montreal, with a specialized jurisdiction in family conflicts); (4) the Social Welfare Court (now the Youth Tribunal, whose jurisdiction extends not only to minors in need of protection and delinquents, but to adults contributing to the delinquency of minors); and (5) the Provincial Court (in certain matters of family law). Each of these courts operated with its own rules of procedure, and some of them had overlapping jurisdictions. This presented many disadvantages, not the least of which was the lack of unity of philosophy in dispensing family justice. The multiplicity of procedures, the possibility of contradictory judgments, uncertainty as to jurisdiction, and loss of time and money for the litigants were sources of problems and frustration.

This unsatisfactory state of affairs, underlined on many occasions in the past,<sup>111</sup> led the committee to recommend the creation of a unique court with integrated jurisdiction over all family matters, a court headed by specialized judges, operating under flexible rules of procedure especially adapted to those types of conflicts and supplemented with all the necessary specialized auxiliary services. *Family matters* was to be defined to include all personal and financial relations between consorts and between parents and children, whether these relations existed within the framework of a legal family or a *de facto* union. This was in accord with the substantive reforms in family law proposed by the C.C.R.O. recognizing *de facto* unions and the full rights of children, regardless of the circumstances of their birth.<sup>112</sup> Penal matters and matters relating to members of the family should also be within the competence of the family court because they are closely related to family matters. If this were the case, all conflicts or matters arising within a family, whether between parents, parents and children, or involving children, could be dealt with by the same court. Although these matters might be handled in different administrative sections of the court (civil or penal), the same auxiliary services would be available and the matters would be disposed of by or under the same judges and imbued with the same philosophy and unity of direction.

The committee thus made the following recommendations as to the jurisdiction of the family court:

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111. See, e.g., Mathieu, *Le besoin d'une cour de la famille à Montréal*, 6 R. du B. 284 (1946).

112. *Family Court*, supra note 108, at 45.

2. THAT a Family Court be established with exclusive original jurisdiction in first instance in matters of family law.

3. THAT the Family Court include two administrative sections: a civil section and a penal section.

4. THAT the civil section of the Family Court have jurisdiction over the following matters:

A. *Relations between consorts:*

- marriage,
- separation as to bed and board,
- divorce,
- annulment or nullity of marriage,
- recourse in cases of disagreement between consorts,
- recourse for support,
- reciprocal execution of maintenance orders,
- dissolution of matrimonial regimes,
- judicial separation as to property,
- conventional modifications to matrimonial regimes,
- protection of the family residence.

B. *Relations between parents and children:*

- repudiation and contestation of paternity,
- judicial acknowledgment of paternity or maternity,
- lying-in costs,
- recourse for support following acknowledgment of paternity or maternity,
- adoption,
- custody of children,
- obligation to support children,
- legal dispensation by reason of age for marriage,
- parental authority,
- tutorship of persons of minor age.

C. *Other matters:*

- judicial youth protection,
- protection of incapable persons of full age,
- protection of the mentally ill,
- absence,

- relations between *de facto* consorts,
- civil status,
- changes of name made under the provisions of the Civil Code respecting correction of records and registers of civil status, and filiation, or under the *Adoption Act*,
- *habeas corpus* to recover custody of a child of minor age,
- the law on successions,
- any other matter attributed to the Family Court by special statute.

5. THAT the penal section of the Family Court have jurisdiction over the following matters:

A. *Offences committed by an adult:*

- refusal to support,
- incest,
- sexual intercourse with step-daughter or adoptive daughter,
- father, mother or tutor who causes defilement,
- corruption of children endangering morals,
- abandonment of a child,
- serious acts of violence between consorts or between parents and children,
- abduction of a female under the age of sixteen,
- abduction of a child under the age of fourteen,
- theft by consort, while living apart, of an object belonging to his spouse.

B. *Offences committed by a child:*

- *Juvenile Delinquents Act*,
- offences against provincial statutes or municipal by-laws committed by children under the age of eighteen.

6. THAT Section 168 Cr. C. (corruption of children endangering morals) be amended so that the mere fact of a consort living in *de facto* union in the presence of his children is not enough by itself to constitute a criminal act.

7. THAT the Family Court have the power to refer certain cases of juvenile delinquency according to the criteria of the *Juvenile Delinquents Act* to ordinary criminal courts, as well as cases of criminal offences over which it would have jurisdiction, if the gravity of the offences justified this, taking all the cir-



cumstances into account, and if the court considered that it could not deal adequately with the case with the means at its disposal.<sup>113</sup>

### *The Constitutional Problem*

Because of the constitutional rules which govern the organization and working of our judicial system, these recommendations were bound to raise various constitutional problems. Without entering into details, suffice it to say that there exists under the British North America Act, 1867 and The Constitutional Act, 1982 a division of powers between the federal government and the provinces with respect to judicial organization. The Federal Parliament has complete authority over its own judicial organization—the Supreme Court of Canada and the Federal Court—and it also has responsibility for the appointment, removal, salaries, pensions and allowances of all judges of superior, district and county courts.<sup>114</sup> Although provinces have the power to create and change their own judicial structure, determine the jurisdiction of such structures in provincial matters (civil or penal), appoint their own judges, and establish courts to apply criminal law, as well as the responsibility of the administration of justice in the province,<sup>115</sup> provinces do not have the power to give their own courts jurisdiction over matters which, at the time of Confederation in 1867, were similar or analogous to matters then within the jurisdiction of a Superior Court.<sup>116</sup> Since most of the body of family law was within the jurisdiction of the superior courts in 1867, it follows that provinces could not confer granted jurisdiction on all matters relating to family law on a provincially created family court. This has been and still is the major obstacle to the creation of family courts in Quebec.

Well aware of these impediments, the committee set forth several alternative proposals designed to meet the constitutional problems: (1) creation of a family court by the Province of Quebec with attribution by Parliament of federal jurisdiction, and adoption by Parliament of rules of procedure in federal matters as well as adoption by Quebec of rules of procedures in provincial matters (this would require cooperation between both levels of government); (2) appointment of judges by Quebec, on the condition that the family court be allotted full jurisdiction over family matters analogous to that exercised by the courts of superior jurisdiction in 1867; (3) conferral of jurisdiction by Quebec upon judges appointed by the Parliament of Canada; (4) appointment by the federal

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113. *Id.* at 249-52 (citations omitted).

114. British North America Act, 1867 §§ 96-101, in G. Wiktor & G. Tanguay, *Constitutions of Canada: Federal and Provincial* at A72 (1978).

115. *Id.* §§ 92(4), 91(27), 92(14).

116. See *Crevier & The Attorney General of the Province of Quebec*, 2 S.C.R. 220 (1981); *Re Residential Tenancies Act*, 1979, 1 S.C.R. 714 (1981); *Attorney General of Quebec v. Farrah*, 2 S.C.R. 638 (1978); *Tomko v. Labour Relations Board (N.S.)*, 1 S.C.R. 112 (1977).

government of family court judges, which would entail no constitutional problem.<sup>117</sup>

### *Structure*

When the framework within which such an integrated Family Court should be established was considered, the discussion focused upon which of three alternatives would be most conducive to accomplishment of the aims pursued: the creation of an autonomous court, the establishment of a special division within an existing court, or the integration of the Youth Tribunal into a more homogeneous court. The pros and cons of each of these structural solutions were discussed. It was felt that the "creation of a special division within an already existing court would probably lead to attainment of most of the results sought."<sup>118</sup> Under the present constitutional framework, this division would have to be set up within a court of superior jurisdiction, one in which judges are appointed by the Parliament of Canada,<sup>119</sup> with Quebec having complete freedom to designate such divisions as "Family Court."

This would be of great advantage to the litigants because it would solve the problem of split jurisdiction for them—they would know where to appear to press their claims. In addition, it would eliminate the delicate questions that arise with respect to the delimitation of jurisdiction if proper legislation were enacted, because "the Superior Court in Quebec is, at least in civil matters, the court of original general jurisdiction entrusted with all matters not expressly conferred upon another court."<sup>120</sup> Finally, fewer problems would arise with respect to the legal status of the court than would arise in the case of an "autonomous court."<sup>121</sup> Since Quebec's Report on the Family Court, a number of unified family courts with more or less integrated jurisdiction in family law matters have been created in Canada, each one offering special features.<sup>122</sup>

The Committee dealt further with the organization of the family court and the procedure before the family court, to fit the notion of an ideal family court with integrated jurisdiction under the authority of a single court of justice, independently of the options chosen for the structure of the proposed court.

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117. For a full discussion of those proposals, see *Family Court*, supra note 108, at 59-98.

118. *Id.* at 101.

119. *British North America Act, 1867* § 96, in G. Wiktor & G. Tanguay, supra note 114.

120. *Family Court*, supra note 108 at 102-03.

121. *Id.* at 103.

122. At present, there are unified family courts in Ontario (Hamilton), Saskatchewan (Saskatoon), and New Brunswick (St. John and Fredericton). See Canada Department of Justice, *Attempting to Restructure Family Law—Unified Family Courts Experiments in Canada* (Aug. 1983). Integrated family courts are also operating in British Columbia and Prince Edward Island, and another such project is likely to materialize in Manitoba in 1984.

Starting with the assumption that "[no] consolidation of family jurisdiction within a new court. . . having a well-defined identity would in itself guarantee the success of the proposed reform,"<sup>123</sup> the Committee stated:

If the Family Court is to succeed, this will depend greatly on the competence and dedication of its multidisciplinary team and on collaboration among the various services working with the Court.

For this reason, it is important that the persons called upon to work with it: judges, mediators, lawyers, and the professional workers attached to the specialized auxiliary services of the Family Court fulfil certain requirements, from the point of view of professional training and interest, according to the objectives pursued, that each one's duties be clearly defined, and that coordination techniques be set up to ensure the indispensable communication among the various elements of the Family Court, and also between the Court itself and the government authorities concerned.<sup>124</sup>

It went on to define the particular roles of each of the persons and services called upon to work within such framework.

#### *The Personnel*

The two-fold judicial and social role a Family Court judge would be called upon to assume, in the view of the Committee pointed to special care and consideration as to his selection. As a prerequisite (Superior Court judges in Canada are nominated during good conduct by the Federal authorities, and must have been members of the Bar for ten years), the Family Court Judge should be a jurist, whether a lawyer or a notary, and, in the opinion of most members of the Committee, a member of the Bar for at least ten years, chosen preferably among specialists in family law, and taking into account their interest in child and family matters.

The Committee suggested that once appointed, the judge be subjected to special training in order to familiarize himself with the court's philosophy and services. It also discussed the role of the Chief Justice of the Family Court who, in addition to his traditional administrative duties, would assume tasks of management, coordination and personnel training, as well as public relations.

One of the interesting features of the Report concerns the mediator, a figure unknown until now to our traditional court system. In formulating its recommendations in that respect, the Committee stated:

As a general rule, traditional courts have, until very recently,

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123. Family Court, *supra* note 108, at 115.

124. *Id.*

treated family disputes like any other dispute of a purely patrimonial nature. The system of proof and hearing of cases in particular has been strongly criticized for its slowness, inefficiency and formalism, and for the loss of time and money incurred by the parties, their attorneys, the judges and the witnesses, not to mention the many frustrations of the persons called to appear who must sometimes wait long hours before being heard. These criticisms are even sharper with regards to family cases, because of the nature of the conflicts.

At present, our courts are overflowing with applications for determination of domicile, child custody, support payments and the increase or reduction of those payments. Certain legal practitioners feel that approximately 75% of the work, in each district Practice Court consists in hearing such applications.

Considering these problems, the Committee has attempted to draw up a formula that would meet the following objectives:

1. humanization of the judicial process and encouragement of conciliation of disputes between consorts;
2. reduction of formalism resulting from formal hearings and the use of the adversary system when the person called to appear first encounters legal proceedings;
3. maximum use of the negotiating process specifically for provisional and accessory measures;
4. a more rational use of judicial services.

In various fields of law, both in Canada and abroad, experiments have been made in an effort to attain the goals mentioned above. Such is the case specifically for the investigation commissioner in labour relations, the Master in Ontario and the Referee in certain American family courts. These judicial officers are more easily accessible than traditional judges. If such cases are heard before these judicial officers, there is also the advantage that such hearings are less formal than those conducted before a judge; this encourages mediation of conflicts at a stage in the proceedings where there is no risk of harming the rights of the parties.

The Committee is of the opinion that the public should have new machinery at its disposal intended to encourage negotiation of family conflicts and more active participation of the parties in making decisions, specifically in matters of separation as to bed and board or of divorce. The mediator would assume this new function.<sup>125</sup>

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125. *Id.* at 122-24 (footnotes omitted).

As for the mediator's nomination, constitutional constraints were pointed out as well as the necessity to ensure his autonomy and permanency of tenure. The mediator should be a lawyer or notary specialized in family law, and have been practicing for at least five years.

The mediator's jurisdiction was set out as follows:

The mediator would take cognizance of provisional and accessory measures concerning separation as to bed and board, divorce, and annulment of marriage, with a view to promoting amicable settlements of disputes between parties if possible. He would also hear applications for homologation of agreements between consorts concerning child custody and support, so as to be sure that these arrangements respect the child's interest and that any support decided on by mutual agreement is sufficient for the children and for the consort entitled to support.

The mediator should have the power necessary to obtain information useful for clear, enlightened understanding of the various elements of the case. In this way, he could call the parties and any other persons designated by him, require that they file documents pertinent to the case, summon witnesses, and even order a social investigation if necessary, *proprio motu* or at the request of the parties. He would inform the parties of their right to be accompanied by their attorneys. There should be close cooperation between attorneys and the mediator to complete the record for the purpose of the hearing and to shorten it by admissions concerning the parties' income, the children's age and any other uncontested facts.

Following proof and hearing, the mediator would render an executory order which could be reviewed within ten days at the request of either party.

The mediator would also exercise the powers assigned to the prothonotary of the Superior Court in family matters.<sup>126</sup>

All through the Committee's report, the right to legal counsel for any person involved in legal proceedings before the Family Court was stressed, and this at every stage of the process:

The presence of a lawyer at the Family Court is in itself a guarantee of respect for the due process of law. He must play various, frequently incompatible roles in the discharge of his duties; each function, therefore, should be well defined and assumed by a different person. The duties of Crown attorney and of legal adviser to the Admission Service might be alternately performed by lawyers working with the Family Court, on condition,

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126. *Id.* at 125 (footnotes omitted).

however, that the performance of such duties be regulated so as to ensure that the persons before the courts be protected from all prejudicial indiscretion. It would therefore be of the utmost importance that no lawyer appointed to a case in the Admission Service be allowed to act as Crown attorney on the same case.

The lawyer's participation would prove even more valuable since he would be aware of the procedure and objectives of the Family Court and would work in conjunction with his specialized Court colleagues. He would not, however, assume any responsibility beyond his professional competence.<sup>127</sup>

Should the specialized auxiliary services form an integral part of the Family Court system? On this question, the Committee suggested a compromise solution between those who advocate that such services be completely independent of the court and others who considered that they should be integrated in to the Family Court:

The Committee considers that the Admission Service, the Investigation Service and the Collection Service are all essential to the Family Court. The same holds good for family counselling services and basic clinical services. The other services offered could be provided by community social services which should appoint an officer for liaison with the Court. These services should not be too widely separated geographically, however, so as to avoid reduction of their accessibility and availability.

The specialized auxiliary services attached to the Family Court should be administratively independent. In this respect, it should be emphasized that whatever means ensure that these specialized auxiliary services are provided for the Family Court, whether by the creation of a new body, by way of contracts for services with existing organizations or by the establishment of services directly attached to the court, these services must be administratively independent of judicial authority and responsible for keeping and managing their files and for access to these files according to the rules of confidentiality proper to each.

The specialized auxiliary services of the Family Court would include:

1. the Admission Service (Intake);
2. the Family Counselling Service;
3. the Investigation Service;
4. the Clinical Service;
5. the Probation Service and Child Services;

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127. *Id.* at 136.

6. the Support Collection Service.<sup>128</sup>

Defining the role of each of those services, the Committee stressed its accessibility and confidentiality, the quality and training of the personnel, the efficiency and coordination of all such services, as well as the duties resorting to each one. The overall concern was so stated:

Every professional called upon to participate in the administration of Family Justice would have to make his own contribution toward a smoother and more human settlement of family problems and toward more effective protection of the most vulnerable members of the family, especially minors.

If an overall approach is to be achieved in the understanding and settlement of family problems however, this contribution must be associated with a combined search for what is best for the persons concerned; this objective cannot be attained without close collaboration from each professional involved, or without the active participation of those brought before the courts.<sup>129</sup>

*Procedure*

Turning to the procedure before the Family Court, the assumptions underlying the changes recommended are to be found in the following extract of the *Report*:

Revision of substantive law and reorganization of the judicial structures are certainly two important aspects of the reform of family justice, but this reform would be incomplete unless accompanied by a re-examination of, and basic changes to, the rules of procedure intended to give effect to the law and assure proper functioning of the new forms. The task is to adapt the rules of procedure to the new philosophy of the Family Court so that efforts to promote amicable settlement of family conflicts and to reduce barren confrontation and antagonisms will have a chance of success.

The Committee has thus been led to propose certain changes in present procedure and to suggest adoption of new rules better suited to the special nature of family justice.

The main objective of the Committee was to ensure that the rules of procedure offered a better balance between the rigidity of the adversary system, which governs hearing of trials at the present time, and the degree of flexibility required to solve family problems in all their psycho-social and juridical aspects.

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128. Id. at 138-39 (footnotes omitted).

129. Id. at 174.

Flexible, non-contentious rules to promote negotiation and conciliation in quiet discussion are required while the problem is being examined, its causes analyzed and solutions studied. Once these efforts fail however, and the trial must take its normal course, then the adversary system must be scrupulously applied to ensure absolute respect for the rights of all parties.

The broad discretion that would be given the Court in matters of family law will moreover require submission of objective elements of proof to enable the Court to hand down a more enlightened decision, just as the special nature of family conflicts will impose limitations on the confidentiality of discussions and files.<sup>130</sup>

Principally in matters relating to child custody, support, protection of the family residence, and division of property as a result of separation as to bed and board, divorce or annulment of marriage, the Committee was of the opinion that the Family Court should handle all requests for help in matters within its jurisdiction, even in the absence of prior judicial proceedings, the objective being to put at the disposal of couples with marital difficulties services which might be of help in avoiding a worsening of the situation. This, of course, would be purely on a voluntary basis and as a service to the consorts, and would be mostly of an informative and consultive nature.

As to the rules of procedure themselves, in line with its objectives of facilitating the assessment of family problems and of promoting conciliation of disputes between consorts, the Report stresses the initial non-contentious approach, the more formal and adversary procedure to be resorted to only after attempts at conciliation have failed. The proposed two-step procedure is described as follows:

The initial motion for separation or for divorce would comprise a single request to the Court: namely that it investigate the viability or failure of the marriage. Incidental applications would be attached to this one; and any agreements between the two parties could also be annexed.

Only after the assessment interview and within ten days after deposit of a certificate attesting to the failure of conciliation efforts, would the applicant, if he wished to continue proceedings, furnish the Court and the opposite party with precise details of the application. Failing this, the defendant could ask for the details by way of motion, or submit his own defence or his cross action, for which the delays would have been suspended to permit the initial assessment interview.

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130. *Id.* at 195-96.



Should the initial assessment interview lead to a reconciliation or to further interviews with a marriage counsellor, submission of details of the application would be suspended until there had been deposited in the file a certificate of non-conciliation by the marriage counsellor, or a notice by one of the parties that it wished to terminate conciliation. Details of the application should then be supplied within ten days after service of this notice or of the certificate of non-conciliation. This delay would not be mandatory, and could be met at any time before filing of the defence; it could also be extended by the Court, unless the opposite party were to raise reasonable objections.<sup>131</sup>

Full disclosure of information at the outset seemed essential to provide the court and the auxiliary services with prime information in order to permit a rapid appraisal of the situation, avoid unnecessary steps, and establish the parameters of intervention by the court. If used systematically, the information form would facilitate the establishing of statistics and, more importantly, facilitate the results of the initial assessment interview.

Together with the intervention of the mediator, the initial assessment interview is the central point (the "pivot") of the whole Family Court concept. This interview would not prevent the court from ordering provisional measures in cases of urgency, but would delay the trial of issues on the merits.

In view of the importance of such a mechanism, the writer could not do better than reproduce at length the Committee's comments on the matter.

One interview would be mandatory, but family counselling could be continued by agreement of the parties. The goal of the Committee in proposing this initial interview is not to force a reconciliation of consorts at all costs. It is rather, on the one hand, to permit the marriage counsellor to make an appreciation of the viability of the marriage and the chances of reconciliation or mere conciliation of the parties, and on the other, to assure the parties, in this first step and from the outset of their contact with the judicial process, access to specialized assistance that would be necessary to assess the human problem they face, reduce the tension between them, mitigate the harmful effects of the conflict, and finally, afford them time for reflection conducive to the most harmonious solution of their differences.

If the parties wished to continue conciliation, dates might be fixed at the first interview for subsequent interviews or the parties might be referred to auxiliary services that could help them.

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131. *Id.* at 202 (footnotes omitted).

If conciliation were impossible, either because the parties have been separated for several years or because one of them cannot be located, or for any other reason, the initial interview would nevertheless clarify the situation and prepare the applicant for the judicial proceedings he has undertaken.

It has often been considered regrettable that in cases of family justice the first meeting of the parties should be before a court of law, in a formal framework little suited for considering and resolving problems of this nature. Introduction of the assessment interview would be designed to rectify this situation by encouraging a dialogue between the consorts, or at least permitting the applicant to explain his (or her) difficulties to a third person outside the conflict. It would also provide an opportunity to examine the problem in its human, as well as legal dimensions. The viability of the marriage and the best interests of the family, particularly of the children, would thus be brought into focus in considering steps to be taken.

It must be understood that no one should expect this assessment interview to provide genuine conciliation of the difficulties between the parties. This interview will rather serve to initiate a dialogue, relax the atmosphere, and open the way for study of the nature of the problem and a search for compromise solutions. It is to be hoped that after such an interview the Court's Family counselling Service, or the community social services, will continue the work begun during the assessment interview, and that the parties will be less hesitant to undertake long term therapy, if it seems appropriate.

The initial assessment interview would be mandatory, at least for the applicant, in that the case could not be inscribed for proof and hearing until the applicant had appeared before the Family counselling Service.

However, the same penalty could not be used with regard to the defendant, since merely by refusing to go to an assessment interview he could postpone the hearing of the case indefinitely.

The Committee also considered the possibility of ensuring the presence of the defendant at the initial assessment interview by the issue of a writ of *subpoena* or service of a Court order which, should the defendant fail to comply with it, would entail the usual penalties for contempt of court. However, this solution was rejected because it seemed too harsh. Nevertheless, it is hoped that through their competence, the marriage counsellors and family counsellors will encourage couples to use the services offered and that attorneys will urge their clients to take advantage of these services.

If, after the initial assessment interview, the couple were to refuse to continue the counselling, or if the defendant failed to appear at the interview, the marriage counsellor would file a certificate of non-conciliation with the Court. This certificate would indicate, aside from the date of the assessment interview, that both parties or only one of them appeared and that efforts toward conciliation were a failure; it would also include an opinion of the marriage counsellor as to whether the marriage was viable or whether it would be impossible for the parties to continue to live together in a satisfactory fashion. A copy of the certificate of non-conciliation would be forwarded to the parties who, within ten days after the filing of this certificate with the Court, would produce and serve the detailed allegations of their application.

If, on the other hand, the parties were to wish to continue the counselling, the marriage counsellor would set the dates for subsequent interviews or refer the couple to an appropriate community service. Either party could terminate the counselling on his own initiative, by serving notice to this effect on the other party and the counsellor. Service of this notice on the opposite party would institute proceedings on the issues.<sup>132</sup>

If the matter were not settled and the case filed for hearing, however, pre-trial conferences were considered to be of great value in circumscribing the issues, laying the ground-work for an agreement or compromise, and enabling the judge to ascertain that every effort had been made to negotiate accessory measures. Such pre-trial conferences were to be held before a judge other than the one called upon to hear the case.

At trial, a court-ordered expertise by experts assigned to the court would sometimes prove the only method to provide the court with the objective information needed for an assessment of the family situation, particularly as regards custody of children. Copies of the report would be made available to the parties unless the court ordered otherwise for exceptional reasons.

Professional secrecy, disclosure of expertise reports, confidentiality of court files and of hearings, appeals, publication of judicial reports, compiling of statistics, and even physical arrangements of the premises were also the subject of the Committee's discussion and recommendations. To avoid the necessity of going into details, the list of the Committee's ninety-three recommendations, in the appendix to this paper, will be sufficient to indicate the scope and dimension of the *Report*.<sup>133</sup>

These recommendations, for the most part, although more detailed,

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132. Id. at 205-08 (footnotes omitted).

133. See id. at 249-73, app.

do rejoin, for the essentials at least, the recommended code of procedure in family matters which forms part of the recently published *Family Law — Dimensions of Justice*.<sup>134</sup>

By the end of the day, the Report on the Family Court of the C.C.R.O. had stressed the urgent need for reform of the Quebec judicial system in family matters:

After pointing out the principal gaps in the present system and defining the prime objectives of the reform, the Committee has sought to elaborate the corrective action most likely to attain these objectives, bearing in mind the Quebec, Canadian and North American context in which the reforms will be carried out. It has constantly tried to establish close links between the reforms and the Court which will apply them.

. . . .

The Committee further believes that the proposed objectives can only be achieved through a modern administration of the judicial system and related services. This administration will not be truly effective unless it incorporates a means for self-assessment of the judicial system, based on statistical data, which will provide for continuous adaptation of the judicial apparatus and its auxiliary services to the ever-changing needs of the clients.

. . . .

The Quebec Family Court would certainly not be a panacea. It is to be hoped, however, that in a calm atmosphere, such a Court might promote the settlement of family conflicts and encourage better relations between members of the same family and, in the long run, contribute to an easing of the social climate.<sup>135</sup>

Although the government has not yet acted upon the recommendations of the Report and integrated family courts do not exist at present in Quebec, important steps have been taken to adjoin to the Quebec Superior Court's Family Division, both in Quebec and Montreal, auxiliary services of expertise in matters of custody of children and conciliation services. Originally seen as a pilot project, these services have now (since 1983) become a permanent feature of the court.

Given the constitutional problem that has been discussed, it is conceivable that an integrated family court such as the one envisaged by the C.C.R.O. may never see the day in Quebec as such, but it could inconspicuously be born without a name! The essential goal remains—that family matters be dealt with in keeping with the objectives of a true family

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134. See generally C. L'Heureux-Dubé, *supra* note 29.

135. Family Court, *supra* note 108, at 245-47.

justice, to give to the reform of substantive family law its true meaning and to insure its effectiveness in practice through the conflict resolution process.

#### CONCLUSION

From 1866 to 1980, family law in Quebec underwent a fundamental re-appraisal of its basic assumptions, in the process of modernization. In the words of Professor Crépeau:

The new Civil Code had to reflect the social, moral and economic realities of today's Quebec; it had to be a body of law that was alive and contemporary, and which would be responsive to the concerns, attentive to the needs and in harmony with the requirements of a changing society in search of a new equilibrium.<sup>136</sup>

But as Professor Crépeau also stresses:

Above all, there most certainly will be no real success unless there is awareness that reform is only one stage in the juridical life of a people and that the evolution of practice and mores must be followed with a view to the continual adaptation of the Civil Code to the new and ever changing needs of Quebec society.<sup>137</sup>

The Civil Code Revision Office's Report on the Quebec Civil Code, of which Book Second on Family Law is the first to have been legislated on so far, is a remarkable monument of its own in the true tradition of Civil Law. It is a tribute to the exceptional jurist who was entrusted with its realization, Professor Paul Crépeau. Unmistakably, the work bears the imprint of his erudition, broadness of mind, thorough knowledge of our civilian institutions, and particularly of his admirable dedication to the survival in Quebec of its most cherished heritage: its civil law. Carrying through the reform of the Quebec Civil Code in a true scholarly fashion, Professor Crépeau has contributed not only to a vigorous renewal of our civil law, but also to the culture of our people and to the judicial life of Quebec.

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136. 1 Report, *supra* note 5, at xxiv.

137. *Id.* at xxxvi.

## APPENDIX

*CIVIL CODE REVISION OFFICE, REPORT on the  
FAMILY COURT*

249-73, app. (1975)

*Summary of Recommendations**Chapter I: The Main Elements of the Problem*

Following a study of the current situation, the Committee has concluded that, as their structures and present concepts of family justice now stand, neither the Superior Court nor the Social Welfare Court, which hear most cases regarding children or families, adequately meets the needs of those called to appear before them.

*CHAPTER II: The Objectives of a Reform of Family Justice*

With the intention of promoting an overall approach in the understanding of family problems and the search for solutions to these disputes, the Committee on the Family Court recommends:

1. That a Family Court be created in the Province of Quebec with jurisdiction in all family matters, presided over by specialized judges, assisted by specialized auxiliary services and governed by procedural rules specifically adapted to the nature of family conflicts (p. 33 et s.).

*Chapter III: Jurisdiction of the Family Court*

2. That a Family Court be established with exclusive original jurisdiction in first instance in matters of family law (p. 47 et s.).

3. That the Family Court include two administrative sections: a civil section and a penal section (p. 48).

4. That the civil section of the Family Court have jurisdiction over the following matters:

*A. Relations between consorts:*

- marriage,
- separation as to bed and board,
- divorce,
- annulment or nullity of marriage,
- recourse in cases of disagreement between consorts,
- recourse for support,
- reciprocal execution of maintenance orders,
- dissolution of matrimonial regimes,

- judicial separation as to property,
- conventional modifications to matrimonial regimes,
- protection of the family residence.

B. *Relations between parents and children:*

- repudiation and contestation of paternity,
- judicial acknowledgment of paternity or maternity,
- lying-in costs,
- recourse for support following acknowledgment of paternity or maternity,
- adoption,
- custody of children,
- obligation to support children,
- legal dispensation by reason of age for marriage,
- parental authority,
- tutorship of persons of minor age.

C. *Other matters:*

- judicial youth protection,
- protection of incapable persons of full age,
- protection of the mentally ill,
- absence,
- relations between *de facto* consorts,
- civil status,
- changes of name made under the provisions of the Civil Code respecting correction of records and registers of civil status, and filiation, or under the *Adoption Act*,
- habeas corpus* to recover custody of a child of minor age,
- the law on successions,
- any other matter attributed to the Family Court by special statute (pp. 48 to 50).

5. That the penal section of the Family Court have jurisdiction over the following matters:

A. *Offences committed by an adult:*

- refusal to support,
- incest,
- sexual intercourse with step-daughter or adoptive daughter,
- father, mother or tutor who causes defilement,

- corruption of children endangering morals,
- abandonment of a child,
- serious acts of violence between consorts or between parents and children,
- abduction of a female under the age of sixteen,
- abduction of a child under the age of fourteen,
- theft by consort, while living apart, of an object belonging to his spouse.

B. *Offences committed by a child:*

- Juvenile Delinquents Act*,
- offences against provincial statutes or municipal by-laws committed by children under the age of eighteen (pp. 51 to 53).

6. That Section 168 Cr. C. (corruption of children endangering morals) be amended so that the mere fact of a consort living in *de facto* union in the presence of his children is not enough by itself to constitute a criminal act (p. 52).

7. That the Family Court have the power to refer certain cases of juvenile delinquency according to the criteria of the *Juvenile Delinquents Act* to ordinary criminal courts, as well as cases of criminal offences over which it would have jurisdiction, if the gravity of the offences justified this, taking all the circumstances into account, and if the court considered that it could not deal adequately with the case with the means at its disposal (pp. 53-54).

*Chapter V: Organization of the Family Court*

I. *THE JUDGE*

8. That, in principle, the judge of the Family Court be chosen from among lawyers who have been practising for at least ten years. Candidates should also possess personal and human qualities and aptitudes enabling them to act as conciliators.

Moreover, the Committee considers that any knowledge which a candidate has of disciplines complementary to family law, especially sociology, psychology, criminology or any experience acquired in various social services, should be taken into consideration (p. 118).

9. That one of the principal criteria in selecting candidates for the position of Family Court judge be specialization in Family Law or, at least, a considerable interest in problems related to children and families (pp. 118-119).

10. That the Chief Justice of the Family Court be consulted on the selection of candidates to act as judges of this Court (p. 119).



11. That it be possible for newly appointed judges, before they assume their duties, to acquaint themselves with the philosophy and operation of the Family Court and with the different services with which they will be called upon to collaborate (p. 119).

12. That continued training be ensured for the judges of the Family Court, and that to this end these judges attend national and international study sessions dealing with family law and with its application by the courts (p. 119).

13. That the remuneration of Family Court judges be sufficient to interest highly qualified jurists in assuming these duties (p. 119).

14. That, in addition to the duties traditionally conferred upon a Chief Justice, the Chief Justice of the Family Court participate in the administrative process of determining the standards and duties of the specialized auxiliary services of the Court.

To these ends, the Committee recommends that machinery be set up for consultation between the Chief Justice of the Family Court, on the one hand, and the directors of the various specialized auxiliary services of this Court, on the other (pp. 120-121).

15. That the Chief Justice participate in planning the Family Court's global budget (p. 121).

16. That the Chief Justice participate in the planning of training programmes intended for the professional personnel of the Family Court (pp. 121-122).

17. That the Chief Justice, acting as the official representative of the Family Court, make known the objectives and work of the Court to the departmental authorities concerned, to persons and organizations interested in family problems, and to the general public.

To this end, the Committee recommends that the Chief Justice be responsible for the transmission of periodic reports respecting significant data on the operation of the Family Court to the Departments of Justice and Social Affairs, and for publication of annual reports on the Family Court's activities (p. 122).

## II. *The Mediator*

18. That the office of mediator of the Family Court be instituted (p. 124).

19. That mediators take cognizance in first instance of provisional and accessory measures in matters of separation as to bed and board, divorce and annulment of marriage, and also that they perform the duties assigned to the Prothonotary of the Superior Court in family matters (p. 125).

20. That mediators be empowered to obtain all information useful

for a fair and enlightened appraisal of the various factors in each case (p. 125).

21. That any interested person be entitled to request the Court to review any decision rendered by the mediator, within ten days after such decision is rendered (p. 125).

22. That the mediator be appointed permanently by the Lieutenant-Governor in Council, and not subject to dismissal except for improper conduct or incompetence, following an inquiry made by the Court of Appeal (p. 126).

23. That mediators be chosen from among lawyers and notaries who have been practising for at least five years with specialization in family law, and that in the selection of candidates, account be taken of their personal qualities and their interest in family problems. Candidates' knowledge of the disciplines complementary to family law should also be taken into consideration (p. 126).

24. That a training and continuing education programme be made available to mediators to allow them to become better acquainted with the structure and workings of the Family Court (p. 127).

25. That the remuneration and fringe benefits offered to mediators be sufficient to attract competent jurists (p. 127).

### III. *The Lawyer*

The Committee acknowledges the right of every person, whether of full or minor age to be represented by a lawyer before the Family Court (p. 127 et s.).

26. That every person before the Court be entitled to retain the services of the lawyer of his choice, or to make use of the services provided under the *Legal Aid Act* if he is entitled thereto (p. 129).

27. That every child involved in proceedings before the Family Court be entitled to legal aid services if he so desires, if his parent so request and cannot meet the legal costs involved or if the judge, the mediator or the Admission Service assigns *proprio motu* a legal adviser or a lawyer to that child (pp. 129 and 132).

28. That the judge, the mediator or the Admission Service be bound to notify the persons concerned, within an appropriate time, of their right to representation by a lawyer and to the services of an attorney at the expense of the State if, by reason of destitution, they cannot pay the fees involved (pp. 131-132).

29. That every lawyer practising before the Family Court have sufficient knowledge of the objectives, philosophy and procedure of both the penal and the civil sections of that Court, and of the various means of readjustment and assistance offered to the persons concerned.

To this end, the Committee recommends that the law faculties in Quebec include in their curriculum courses covering the philosophy, organization and operations of the Family Court (pp. 132-133).

30. That every lawyer representing a client in a case be independent of the Family Court. The Committee believes it appropriate, however, to ensure that a liaison officer from the legal aid bureau be always present at the Family Court (p. 134).

31. That the Family Court have at its disposal the services of lawyers acting either as Crown prosecutors or as legal advisers attached to the Admission Service.

Although ideally it would be preferable that the duties of Crown prosecutors and of legal advisers attached to the Admission Service be assumed by different persons in order to avoid conflicts of interest, the Committee believes that these duties could be performed on a rotating basis by litigation lawyers practising before the Court, provided performance of these duties were carefully regulated in such a way as to avoid all indiscretion to the detriment of the persons involved in a case (p. 134 et s.).

#### IV. *Specialized Auxiliary Services*

32. That the Family Court be endowed with the specialized auxiliary services necessary for its proper operation. These services would entail:

1. the Admission Service;
2. the Family counselling Service;
3. the Investigation Service;
4. the Clinical Service;
5. the Probation and Child Services;
6. the Support Collection Service (p. 136 et s.).

33. That the specialized auxiliary services be administratively independent of judicial authority and responsible for the administration and care of their records and for access to them in conformity with the rules of confidentiality applicable to each of them, regardless of the means by which these services were ensured to the Family Court, whether by the creation of a new body, by way of contracts for services with already existing bodies, or by the establishment of services directly attached to the Court (p. 138).

##### 1. *The Admission Service*

34. That an Admission Service be created to analyse and assess cases which it is sought to submit to the attention of the Court, with a view to determining whether such cases should be referred to a judge, entrusted to a social service, or settled.

This Service should receive the parties, gather information relevant to the issues submitted to it, study with the persons involved the possibilities of out-of-court settlement, advise them as to the various services offered and, where need be, direct them to such services (pp. 140-141).

35. That the Admission Service intervene only after the persons concerned voluntarily agree to an analysis of their situation and to follow any recommendations which are made to them and consequently, that the Admission Service not be authorized to impose any measures without the consent of those involved, and that it be bound to inform them of their right to apply directly to the Court and of their right to be represented by a lawyer (p. 141).

36. That the Admission Service consist of a team of jurists, professional social workers, psychologists and the appropriate competent ancillary staff.

The professionals attached to the Admission Service should also possess such personal qualities and aptitudes as interest in the work of the Family Court, emotional stability, firm judgment, tact, and the ability to get along with people (pp. 149-150).

37. That the members of the Admission Service follow a training programme during which they would be introduced to the work patterns followed within that Service and to the philosophy of the Family Court, and would receive basic legal or psycho-social training related to their duties, according to their initial training (p. 150).

## 2. *The Family counselling Service*

38. That a Family counselling Service be set up at the Family Court to encourage reconciliation of consorts as far as possible, favouring conciliation of their differences, and to improve relations between them, especially when young children are involved, in order to ensure that such children develop in the most favourable circumstances.

The Family counselling Service would also intervene between children and their parents, upon reference from the Admission Service or from the judge, especially in cases involving youth protection, juvenile delinquency, judicial dispensation as regards the age of marriage, disputes between parents in the exercise of parental authority (p. 151 et s.).

39. That, in the initial stage, the objectives of family and marriage counselling be to allow the persons concerned to pin-point their problems and to seek out the real causes of their difficulties and, at a later stage, to induce these persons to resolve their conflicts and, where need be, direct them to the services equipped to provide the special assistance and care which their individual circumstances require (p. 152).

40. That the Family counselling Service be attached to the Family

Court, but autonomous in its operation and geographically separate from the Court itself, although not too far removed from it (p. 153).

41. That the Family counselling Service be available to every person who wishes to avail himself of it, even before proceedings are instituted. In cases of formal applications for divorce, separation as to bed and board or annulment of marriage, the petitioner should be compelled to attend a preliminary interview for assessment with the Family counselling Service, during which a family counsellor would assess the viability of the marriage and advise the client of the services offered (pp. 154-155).

42. That the Family counselling Service be made up of marriage counsellors with adequate specialized training in this field (pp. 155-156).

43. That henceforth our universities provide a training programme in marriage counselling and family counselling to prepare the personnel required to satisfy the needs of the population in this field, when the time comes (p. 156).

### 3. *The Investigation Service*

44. That the Family Court have an Investigation Service at its disposal to furnish the Court with objective factors to consider in the circumstances surrounding persons involved in disputes of a family nature (p. 157 et s.).

45. That, except in the cases expressly provided for by law, social investigation not be systematically required in either civil or penal matters, but that its use be left to the discretion of the judge or the mediator, who would order such an investigation either *proprio motu* or on application by the parties (pp. 159-160).

46. That in civil matters the Court resort to a social investigation only where the law encourages it to weigh the circumstances surrounding the parties when it renders its decision.

In penal matters, the social investigation report should not be delivered to the judge until he has pronounced judgment on the accusation (p. 159).

47. That the investigator have at least college training with specialization in social aid work or in a related field. Team leaders and service heads should have appropriate university training in social work (p. 160).

48. That the investigator not be entitled to consult the confidential files of the Court or of its services and, in particular, that he not have access to the files of the Admission Service or of the Family counselling Service (p. 161).

### 4. *The Clinical Service*

49. That the Family Court have at its disposal a Clinical Service consisting of specialists in psycho-social behavioural sciences and in medicine. This service would be responsible for carrying out any clinical assessments

required by the judge and for acting as adviser to the Admission Service, the Family counselling Service and the Probation Service (pp. 162-163).

50. That in the major urban centres, a Clinical Service be attached to the Family Court. In judicial districts where it is not necessary to provide a Clinical Service on a permanent basis, existing community resources should give priority to the Family Court with regard to the specialized professional aid required (p. 163).

#### 5. *The Probation Service and Child Services*

51. That the Family Court have a Probation Service responsible for supervising any child or adult on whom the Court has imposed probationary measures and for promoting the social rehabilitation of such person (pp. 163-166).

52. That the Probation Service have sufficient qualified personnel to enable the probation officer to accomplish his task efficiently and to carry out in-depth work with the young people and adults entrusted to him (p. 166).

53. That the probation officer have university training in either social work or psychology. That he possess certain personal qualities such as interest in the work of the Court, sound judgment, tact, emotional stability and the ability to work harmoniously with people. In addition, he should undergo a training period during which he would be initiated to the working methods of his Service, to the philosophy of the Family Court and learn certain legal concepts pertaining to his task. (p. 166).

54. That the probation officer receive a remuneration sufficient to attract highly qualified persons. The probation officer should be remunerated for any overtime work he must devote to his professional practice, or his working day should be planned on the basis of the particular needs of clients who cannot meet their probation officer during the daytime and with consideration for the great distances probation officers occasionally must travel (pp. 166-167).

55. That the Family Court be entitled to call upon a vast network of institutional services of various types designed to satisfy adequately all needs for reception, emergency assistance, observation, protective custody and re-education of children. These services should be obliged to submit to the Court periodically a written report regarding the progress of each child entrusted to them (p. 167).

#### 6. *The Support Collection Service*

56. That a Support Collection Service be set up in connection with the Family Court, responsible for ensuring, in cooperation with social aid services, immediate emergency assistance to persons entitled to support who are in need and, in cases where those owing support fail to pay,

to take action for payment of the support granted by judgment (pp. 169-170).

57. That when the person owing support fails to pay, the person entitled to support, if otherwise eligible for social aid, be paid the allowances to which he would be entitled under the standards of the *Social Aid Act* (p. 169).

58. That the Support Collection Service be subrogated in the rights of any person entitled to support (p. 170).

59. That the Support Collection Service be given the powers and personnel necessary for the accomplishment of its task and provided with modern working instruments to enable it to work quickly and efficiently.

The Collection Service should be entitled to conduct inquiries among information agencies and government services which should be legally obliged to supply the information required (pp. 171-172).

60. That the Support Collection Service staff include investigators, liaison officers from social aid services, lawyers, accountants and clerks (p. 172).

61. That the Support Collection Service be a distinct service attached to the Family Court and set apart from any existing service (pp. 172-173).

#### V. *The Coordination Committee*

62. That a Coordination Committee be set up consisting of the Chief Justice, the director of each specialized auxiliary service of the Family Court, a representative of the Department of Justice and one from the Department of Social Affairs (pp. 173-174).

63. That the Coordination Committee be assisted by a permanent secretariat responsible for following the progress of the Family court, for analysing statistical data pertaining to the activities of the Court, for compiling information and recommendations with respect to the administration of family justice, and for reporting to the members of the Committee (p. 174).

64. That the Coordination Committee act as a link between the Family Court, its specialized auxiliary services and the two Departments which are primarily involved in the administration of family justice. This Committee should also have the task of coordinating various administrative or legislative recommendations with regard to the Family Court, and of forwarding them to the competent authorities (p. 174).

#### *Chapter VI: Procedure Before the Family Court*

##### 1. *Procedure in Civil Matters*

65. That, even in the absence of formal proceedings for separation as to bed and board or divorce, either consort be allowed to bring family

problems before the Admission Service by *affidavit*, and request the assistance of the Court's Family counselling Service in such matters (p. 197).

66. That in the initial stage of proceedings, suit be instituted by motion in order to speed up the judicial process and to promote a climate conducive to mediation of disputes. If conciliation should fail and it becomes necessary to go through with the judicial process, the rules governing the action should apply, in order to protect the rights of the parties to a full and complete defence (p. 199).

67. That designation of parties in family matters be made less contentious. To this end, a motion to institute such proceedings could be entitled: "The Family of A and B" (pp. 199-200).

68. That any motion to institute proceedings in matters of separation as to bed and board or of divorce comprise a single request that the Court inquire into the viability or failure of the marriage.

69. That the applicant not be allowed to submit any exact and precise details until after the assessment interview, and within ten days following deposit of the certificate attesting to the failure of the attempts at conciliation. If there should be any further interviews with the marriage counsellor, submission of details of the request would be suspended until after deposit in the file of either the certificate of non-conciliation or a notice from either party to the effect that it wished to terminate conciliation (p. 202).

70. That every application to the Family Court be accompanied by a form, signed by the applicant containing the data required by the Court (p. 203).

71. That legible mention be made on the document to be served of the existence of a Family counselling Service, and that publicity folders prepared by the Family counselling Service be attached to such document (p. 204).

72. That the parties be called by the Family counselling Service for an assessment of the conflict between them and, if possible, to conciliate their differences. One interview would be compulsory, but family counselling could be continued if the parties agreed to it (p. 204 et s.).

73. That the Court be empowered to adjourn the proceedings if it believes this would be conducive to reconciliation of the parties, or would provide the consorts with a period for reflection, permitting them to reach agreement on questions of child custody and determination of support. In this event, the Court could, either with agreement of the parties or on its own authority, refer the consorts to a marriage counsellor (pp. 208-209).

74. That any family counselling ordered by the Court during the proceedings be limited to a period of not more than thirty days, unless the



parties agreed mutually to continue, or the Court ordered an extension for an additional period not to exceed thirty days (p. 209).

75. That a provisional *ex parte* order determining the amount of support to be paid during the proceedings should be made as soon as a motion for it has been filed, without the parties being required to appear before the Court. The amount of the support would be determined by the mediator according to tariffs established previously and based on a sliding scale, taking into account the resources of the person owing support, the number of children in the custody of the person entitled to support, and the age and schooling of such children. This decision could be contested by the opposing party, by a written notice served within ten days (p. 212).

76. That in family matters, use be made of the pre-trial conference provided for in article 279 of the Code of Civil Procedure (pp. 213-214).

77. That the Family Court be authorized to order a social investigation or an expert medical opinion, even on its own initiative; that the investigator or medical expert involved be designated by the Court, and the expenses borne by the State (p. 214).

## II. *Procedure in Family Matters of a Penal Nature*

78. That in exercising its penal jurisdiction, the Family Court avoid, as much as possible, any punitive or repressive concept of justice, and that it avail itself of its specialized auxiliary services, especially the Admission Service and the Family counselling Service (pp. 218-219).

79. That a periodic review be assured of cases where children are placed outside their natural family surroundings, and where children or adults are released on probation. At the time of this review, it would be appropriate to consult with the child or adult concerned, and with the persons or organizations responsible for him (p. 219).

80. That whenever a child is called as a witness before a court of criminal jurisdiction, that child be placed under the protection of the Family Court so that he will be better prepared for the experience of the examination; that police inquiry and questioning of children before any court of criminal jurisdiction be carried out by specialized services for children, and finally that the examination of any child in a criminal court be carried out *in camera* (p. 220).

## III. *Procedure Common to the Civil Section and the Penal Section of the Family Court*

81. That all statements made and information given to a member of the Admission Service or to a family counsellor in the performance of his duties—whether or not this person is attached to the Court's Family counselling Service or to a community service providing such assistance—be

strictly confidential and never used as evidence in any judicial proceedings. The Committee moreover believes that the Admission Service and the Family counselling Service should inform all interested persons of the confidential nature of their declarations (pp. 220-221).

82. That the Code of Civil Procedure be amended to include a rule similar to Section 21 of the *Divorce Act*. This new rule would prohibit all members of the Admission Service and all professionals acting as family counsellors from divulging confidential information obtained in their professional capacities, and would protect them from being compelled in this respect; it would also provide that nothing disclosed to these persons during admission or counselling interviews would be admissible as evidence in any judicial proceedings (pp. 222-223).

83. That the results of every social investigation be forwarded, within a reasonable time before the hearing, to the lawyers of the parties and to the parties themselves, unless the judge decides otherwise if he feels that disclosure [*sic*] of the report would seriously prejudice the emotional and mental balance of the person concerned, and compromise his rehabilitation and the efforts made to improve his relations with other members of his family (pp. 224-225).

84. That the author of any social investigation report, and his sources, be subject to cross-examination by the parties or their lawyers.

Recommendations 83 and 84 would also apply to expert medical opinions (pp. 225-226).

85. That only those directly concerned, namely the parties, their lawyers and the personnel of the Court, be given legal access to the Family Court's judicial files, including the information form.

Access to the Court's files could be authorized by the judge for research purposes, provided the identity of the persons concerned is not disclosed. The files should also be available for preparation of statistics on the activities of the Court (pp. 226-227).

86. That anonymity of the parties be assured through identification of persons by their initials only (p. 227).

87. That the general public not be admitted to sessions of either the penal or the civil section of the Family Court (p. 228).

88. That the judge be authorized to admit certain persons to hearings of the Court if he considers that they have a legitimate research interest, or for any other valid reason (p. 229).

89. That members of the press be entitled to attend sessions of the Family Court *de jure* on the express condition that they in no way identify the parties involved, and that if this prohibition is broken, severe penalties be imposed. Adoption proceedings would not be subject to this rule, however, because of their confidential nature (p. 230).

90. That once all family matters have been integrated under the authority of a single court, all appeals from decisions rendered in such matters, when such procedure is established, be made to the Quebec Court of Appeal. The rules of practice of the Court of Appeal should be amended, particularly in respect of cases involving children, so that hearings can be held quickly and expenses kept to a minimum (pp. 230-231).

91. That the decisions of the Family Court be published in a collection available to the Bar, to the Bench and to the public at large (p. 231).

92. That suitable monthly statistics be compiled on the activities of the Family Court and of the specialized auxiliary services (p. 232).

93. That a special effort be made to arrange the premises of the Court in such a manner as to create a calm and relaxed atmosphere. The Committee also believes the judges and lawyers should wear their gowns only during hearings of contested cases (p. 233).