

# Louisiana Law Review

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Volume 34 | Number 5  
*Special Issue*  
1974

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### Repository Citation

Paul-A. Crépeau Q. C., *Civil Code Revision in Quebec*, 34 La. L. Rev. (1974)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss5/4>

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## CIVIL CODE REVISION IN QUEBEC\*

Paul-A. Crépeau, Q.C.\*\*

“Laws with the patina which comes from accepted usage over a long period of time should not be lightly cast aside and paroxysmal legislation should be made to justify its right to reception into time-tested codes of general law.”

J. H. Tucker, jr.<sup>1</sup>

Monsieur le Doyen,

Qu'il soit permis à un civiliste du Québec d'exprimer, dans la langue de Domat et de Pothier, toute sa gratitude pour l'insigne honneur que vous avez bien voulu lui faire en l'invitant à donner la troisième des Conférences créées en l'honneur d'un ardent civiliste, M. J.H. Tucker, jr., dans cette prestigieuse faculté de droit qui s'est donné pour mission d'assurer la défense et le rayonnement de la tradition civiliste sur cette terre de Louisiane qui fut jadis française et qui le demeure par la teneur et l'esprit de son droit privé.

Civil Code revision is a most significant chapter in the history of a legal system. A discussion of this experience in Quebec is here presented in the following manner: first of all (I) some of the difficulties encountered, then (II) the basic objectives of the Civil Code Revision Office, and finally (III) the methods of operation in the pursuit of these objectives.<sup>2</sup>

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\* This was the third of the Tucker Lecture Series, and was delivered at the Louisiana State University Law School on February 28, 1974. A list of the abbreviations used appears in the appendix.

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1. Tucker, *Tradition and Technique of Codification in the Modern World: The Louisiana Experience*, 25 LA. L. REV. 698, 718 (1965).

2. Certain views expressed here have been developed elsewhere by the author. See in particular *La renaissance du droit civil canadien*, in I LE DROIT DANS LA VIE FAMILIALE, LIVRE DU CENTENAIRE DU CODE CIVIL, xiii (1970); II *Les principes fondamentaux de la réforme des régimes matrimoniaux*, in LOIS NOUVELLES 9 (1970); *Vers une nouvelle conception de la justice civile*, RELATIONS no. 359, at 110 (1971); *La réforme législative, Canada, droit civil*, in TRAVAUX DU NEUVIÈME COLLOQUE INTERNATIONAL DE DROIT COMPARÉ 27 (1972); *Le droit familial du Québec: réalités nouvelles et perspectives d'avenir*, 51 CAN. BAR REV. 169 (1973).

I should like to express my gratitude to my colleagues J.E.C. Brierley, J.W. Durnford, and Y. Caron, who read the manuscript and offered many valuable suggestions.

## I. DIFFICULTIES ENCOUNTERED IN THE QUEBEC CODE REVISION

When one reads Plutarch's life of Solon,<sup>3</sup> one is told that, upon presentation of his Tables of the Law to the people of Athens, he made what may at first be considered as a surprising and singular request. He asked for a ten-year "sabbatical" leave. After having been actively involved in the revision of the Civil Code of Quebec for a number of years, I am now in a position to begin to understand why!

For, if law reform is an absolutely fascinating and even unique experience, it can also be a very difficult undertaking. And this is particularly true of the task of revising the Civil Code of Quebec, the responsibility for which I had the temerity to accept in 1965.

The difficulties encountered in law reform are many. I should like to bring to your attention certain particular problems that we are confronted with in Quebec and which render our task so difficult and, in certain cases, so frustrating. These problems are of two kinds: the first results from the constitutional division of legislative powers; the second arises from the existence of a tremendous gap between the Civil Code and the realities of present Quebec society.

### A. THE CONSTITUTIONAL PROBLEM

American jurists will not of course be surprised to hear about the importance of constitutional issues, but in Canada we have our own brand of constitutional problems. Indeed, as a result of the division of legislative power between the central and local authorities in the constitutional instrument known as the *British North America Act* of 1867,<sup>4</sup> every time we examine a problem, the first question we must ask ourselves is whether it comes within the domain of Federal authority or of Provincial jurisdiction.

The revision of the Civil Code does indeed pose difficult constitutional problems as a result, on the one hand, of the particular timing of the first codification in the nineteenth century, and on the other, of a rather peculiar constitutional division of legislative powers in relation to private law. Let me briefly explain.

The Civil Code of Quebec came into force on 1 August 1866, eleven months before the British North American Colonies united to form a Federal State under the provisions of the *British North America Act*. The Civil Code purported to codify, upon the model of the French Civil Code, the existing private law, both civil and commer-

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3. See Plutarque, *Vie de Solon* in 1 LES VIES DES HOMMES ILLUSTRES 203 (1951).

4. 30 Vict., c. 3 (Imp.).

cial, of the then Province of Lower Canada.<sup>5</sup>

Now it happened that when the *British North America Act* came into force on 1 July 1867, certain subject matters which had recently been codified were placed under the exclusive legislative authority of the Federal Parliament. But, at the same time, Section 129 provided that the laws in force at the time of Confederation would continue in force until modified or repealed by the competent authority.

This meant that certain areas of the Civil Code, although still part of a codified system, could no longer be amended by Provincial authorities. For instance, in the subject of family law,<sup>6</sup> the Civil Code of 1866 provided a cohesive and comprehensive set of rules relating to such matters as capacity and solemnization of marriage, the effects of marriage in relation to persons and property as between consorts and between parents and children, nullity and separation together with the doctrine of indissolubility of marriage.<sup>7</sup>

Then, the Constitutional instrument of 1867 provided that, while "Solemnization of Marriage"<sup>8</sup> and "Property and Civil Rights"<sup>9</sup> would remain under provincial jurisdiction, "Marriage and Divorce"<sup>10</sup> would come, however, under federal jurisdiction.

This kind of division of legislative powers, where political considerations loomed larger than the exigencies of logic and coherence, brought about constitutional uncertainty as to the boundary lines of jurisdiction and created difficult problems of characterization.<sup>11</sup>

It also contributed to a process of stultification of the Code's rules: neither party—the Federal or the Provincial—was always sure of its grounds, each fearing to tread on the other's jurisdiction, and sometimes refraining from legislating for fear of the other's reaction. Thus, while divorce is clearly federal, it is not an abstract concept; it dissolves a marriage tie; it allows remarriage; it affects such questions as parental rights, alimony; it requires the settlement of

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5. See in this respect, An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure, 20 Vict., c. 43 (1857).

6. Another topical illustration is to be found in the struggle against lesion in contracts of loan. The Provincial Legislature has jurisdiction over the validity of a contract, but the Federal Parliament has authority over interest. See *Beneficial Finance Co. of Canada Ltd. v. Morasse*, [1972] C.A. 846; *Boutin v. Corporation de Finance Belvédère*, [1970] C.A. 389.

7. See art. 185 of the 1866 Code. This article was amended in 1969, (S.Q. 1969, c. 74) as result of Federal legislation on Divorce (S. Can. 1967-68, c. 24).

8. 30 Vict., c. 3, § 92, para. 12 (1867).

9. 30 Vict., c. 3, § 92, para. 13 (1867).

10. 30 Vict., c. 3, § 91, para. 26 (1867).

11. For instance, parental consent to marriage of a minor. Did it come under "Marriage and Divorce" or "Solemnization of Marriage." Was it, in other words, a question of substance or one of form?

property rights and of gifts, pension, insurance or annuity rights. For all such principal and incidental questions, where does "Divorce" end and where do "Civil Rights" begin?

This division of powers has also, for a long time, inhibited law reform. Both federal and provincial legislatures were prevented from taking a comprehensive view of an area and dealing with it in a global way for fear that the resulting legislation be declared *ultra vires* of the enacting legislative body.

When Quebec amended the Civil Code in 1964 in order to confer full legal capacity upon married women,<sup>12</sup> there were public utterances that this modification by the Quebec authorities was *ultra vires* as coming within the "Marriage and Divorce" powers of the Federal Parliament. A few years ago when a Senate Committee reported on a divorce law reform,<sup>13</sup> they included in the "Marriage and Divorce" section, *inter alia*, the settlement of property rights, but that subject matter was not enacted in the subsequent bill as it was felt that this might be going too far and would infringe on the provincial competence in "Property and Civil Rights".

Such was the situation when I took over responsibility of the Civil Code Revision Office in 1965. One of the first Committees to be created was that on family law. After being advised by an expert on constitutional law that no one was quite sure what articles of the Civil Code on family law were within the legislative authority of the Province, I sought and obtained authorization to deal with the whole area of family law as if no constitutional problem existed and to submit a report to the Quebec authorities with a recommendation that it be implemented by the competent authorities within the limits, probably unknown to each of them, of their respective legislative jurisdictions.

I really cannot say how this difficulty will eventually be resolved, but I firmly believe that problems of family law are first and foremost human problems intimately related one to another and that we ought not to allow constitutional issues to prevent a global and comprehensive reform in this area.

#### B. THE "GAP" PROBLEM

Another major problem and source of difficulty in our task of revising the Civil Code is the existence of a tremendous gap between the basic policies as they are enshrined in the Civil Code and the social realities which the Civil Code purports to regulate. Indeed, it

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12. S.Q. 1964, c. 66.

13. Report printed by The Queen's Printer, Ottawa 1967.

can be said that, until not so long ago, the underlying policies of the Code reached far into the distant past, even back to medieval times and, in some cases, straight back to Roman law. The simple truth is that our Civil Code was, and to a large extent, still is, a monument to the glory of past doctrines that may well have suited the *mores* of bygone eras, the rural and artisanal societies of the past, but that no longer suit the needs of a new Quebec society striving to catch up with its North American destiny.

This phenomenon is perfectly understandable when one considers (1) the character of the Codification of 1866 and (2) the prevailing attitudes, until recently, towards the Civil Code.

### 1. *The Character of the Codification of 1866*

The Codification of 1866 was not meant to produce an "original body of Civil Law";<sup>14</sup> rather, it was essentially conceived as a redaction, a compilation of the "living laws"<sup>15</sup> as they then existed and had been applied for centuries in the *Parlement de Paris* under the *Coutume de Paris* as modified by the great Royal Ordinances of Louis XIV and Louis XV. Thomas McCord, the Codification Commission's Secretary, described the Civil Code of Quebec "as an embodiment of existing laws."<sup>16</sup>

To convince oneself of the truth of this statement, one has but to read the preamble to the 1857 Act of the Legislature of the United Province of Canada providing for the Codification of the Law of Lower Canada (as Quebec was then called).<sup>17</sup>

One gathers from the text that the legislative intentions corresponded to a fourfold preoccupation: diversity of the sources of the law; accessibility of the private law to all citizens, whether French or English; inaccessibility of old French source materials; and general advantages of Codification "à la française."<sup>18</sup> It is easy to

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14. See, in the case of Louisiana, Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 369-70 (1973).

15. For an exhaustive study on the Quebec Codification of 1866, see Brierley, *Quebec's Civil Law Codification*, 14 MCGILL L. J. 521 (1968).

16. SYNOPSIS OF THE CHANGES IN THE LAW EFFECTED BY THE CIVIL CODE OF LOWER CANADA 4 (1866), [hereinafter cited as MCCORD].

17. 20 Vict., c. 43 (1857): "Whereas the Laws of Lower Canada in Civil Matters are mainly those which at the time of the cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases; and it therefore happens, that the great body of the Laws in that division of the Province, exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin; And whereas the Laws and Customs in

understand the specific mandate given to the Codifiers in Sections 4 and 6 of the same Act.<sup>19</sup> The moving inspiration behind the work of Codification in the 1860's was therefore one of consolidation.<sup>20</sup>

The net result of their efforts was that, although many substantive and important changes were made<sup>21</sup> in various parts of the draft, the Codifiers did not deem it their duty to embark upon an overall appraisal of the fundamental policies underlying the main institutions of private law. As my learned colleague Professor Brierley wrote in a careful study of the work of the Commissioners:

On the whole, however, the codification amounted to casting together various elements into a practical summary of the law, differing as little as possible from what it formerly amounted to and what was actually in use.<sup>22</sup>

In the main, therefore, the rules that were written into the Code basically expressed, in codal form, legal policies that then prevailed in Quebec, and which had substantially undergone little change in the previous centuries.

So it was that, as a result of seven years of labour, the "Ancient laws and Customs of the Prévôté et Vicomté de Paris," which had been introduced in New France in 1664 and maintained in force after 1763 when New France became a part of British North America,

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force in France at the period above mentioned, have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer reprinted or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them; And whereas the reasons aforesaid, and the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows: . . . ."

18. See Brierley, *Quebec's Civil Law Codification*, 14 MCGILL L. J. 521, 533 (1968).

19. 20 Vict., c. 43, §§ 4, 6 (1857): "IV. The said Commissioners shall reduce into one Code to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada which related to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature; but they shall not include in the said Code, any of the Laws relating to the Seigniorial or Feudal Tenure.

"VI. In framing the said Codes, the said Commissioners shall embody therein such provisions only as they shall hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest such amendments as they shall think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are founded."

20. Brierley, *Quebec's Civil Law Codification*, 14 MCGILL L. J. 521, 544 (1968).

21. See MCCORD 3.

22. Brierley, *Quebec's Civil Law Codification*, 14 MCGILL L. J. 521, 566 (1968).

found a new lease on life in the form of a Civil Code, which was modelled after the French Civil Code but which essentially purported, as T. McCord put it:<sup>23</sup>

[to] present[s] to us our civil laws rescued from antiquity and chaos, and embodied in the form which renders them accessible and intelligible to all classes of the people whose rights and property they control.<sup>24</sup>

## 2. *Prevailing Attitudes Towards the Civil Code*

The Codification of 1866 was indeed a great moment for the Civil Law in Canada. Quebec thus submitted its private law system to the democratic process of legislative enactment. The formulation of policy therefore became and still remains essentially a legislative function, and legislative expression became a primary source of the law.<sup>25</sup> Another advantage was that the civilians of Quebec were thenceforth in a position to reap benefit from the growing body of doctrine and cases which had developed in France on the basis of the Code Napoleon of 1804.

But Codification carries with it its own drawbacks; the most important is undoubtedly a tendency towards a crystallization of the law which often produces a "freezing" of policy. This in turn may well prevent the constant adaptation of the law to the changing needs of a particular society and thus create a rather peculiar situation where a growing gap develops between the law and social realities.

It can also lead to a potentially dangerous situation. A legal norm that is no longer in touch with the realities and the *mores* that it purports to regulate and control, can only lead to disrespect for, and violation of, the law. This is why a society which has a codified system of private law ought to provide for certain other mechanisms, such as a vigorous academic tradition or a vigilant law reform body, in order precisely to avert and offset the dangers of Codification and to allow for a permanent reevaluation of policy so as to suit the changing needs of that society.

The necessity of such a permanent reevaluation of policy should all the more have been felt in view of the fact that a number of important things have been happening in the world since 1866! Events of both local and world-wide magnitude have gradually but completely—in Quebec as elsewhere—modified our ways of living,

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23. McCORD 3.

24. See also Brierley, *Quebec's Civil Law Codification*, 14 MCGILL L. J. 521, 542 (1968).

25. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 363 (1973).



our sense of values, our attitudes towards the basic institutions of the law, particularly in respect of the recognition of human rights, the position of the family in society and the status and relative position of the members of a family, the role of ownership, the sanctity of contract, the basis of civil responsibility. As these changes came about, one would naturally think that the Civil Code would have reflected them.

Unfortunately, for a long time, such was not the case in Quebec; and the story of the Civil Law in Quebec from 1866 and until recently has been a rather disappointing one, for several reasons. One reason which was generally accepted by Franco-civilians throughout the 19th century and by Quebec civilians in particular until very recently, is that the Civil Code was considered as the incarnation of Reason and of Justice in human relations. With such an underlying assumption, it could well be thought quite inconceivable that the basic postulates of the Code were susceptible of modification. The Code was thought and taught to be a timeless monument, not to be subjected to the stress of social currents.

Another reason, which is more peculiar to Quebec civilians, is that it seems as though the Civil Code came to be considered as a sacred book that no one ought to touch for fear that our precious French legal heritage might crumble to pieces.

There ensued naturally a period of immobility, of stultification of our Civil Laws as expressed in the Civil Code. The absence of great law schools and of a vigorous tradition of scholarship caused the Civil Law to suffer considerably from a lack of vital nourishment and also from an unwarranted and unjustified intrusion, in many areas, of Common Law doctrines and vocabulary. The situation might well have become hopeless. The Civil Law tradition might well have disappeared in spirit if not in the letter, had there not been a few ardent civilians who showed the dangers of what Prof. T.B. Smith of Edinburgh aptly described as "servile acquiescence from within . . ."<sup>26</sup>

Happily, the scales have been turning. Winds of good omen are blowing. There are now signs of hope that point towards a renaissance of Canadian Civil Law. One of these signs is a growing consciousness and recognition of the necessity for a legislative reform of the Civil Code. The need for such a reform was first felt in 1955, when, by an Act of the Quebec Legislature,<sup>27</sup> a jurist was entrusted with the responsibility of providing a new draft Civil Code. In the years that

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26. T. B. Smith, *The Preservation of the Civilian Tradition in "Mixed Jurisdictions,"* in *CIVIL LAW IN THE MODERN WORLD* 11 (A. Yiannopoulos ed. 1965).

27. An Act respecting the revision of the Civil Code, S.Q. 1954-55, 3-4 Eliz. II, c. 47, §1.

followed, preliminary reports were submitted to the Government of Quebec but without legislative action.

In 1964, the Office, then under the chairmanship of Me A. Nadeau, Q.C.,<sup>28</sup> submitted a draft project (Bill 16) on the capacity of married women, which was enacted by the Legislature and became law on July 1st, 1964. Since my appointment in October 1965 as President of the Office, I have endeavoured to pursue and develop the work done by my predecessors. But a fundamental question had to be answered. Was the work to be essentially a revision of the Civil Code or a reformation of the Civil Law?<sup>29</sup> There was no doubt in my mind that, however more difficult it may be, the second course was the one to follow. And I am happy to say that the Minister of Justice readily accepted this fundamental option and gave full support, both moral and financial, to this new orientation. Such support has continued even through successive changes of Government.

Of course, such a policy had important implications. First of all, it meant—and it was indeed more and more recognized—that the Civil Code of 1866 was not the expression of Justice, but of a particular conception of justice founded on certain basic assumptions which may have been perfectly valid in past centuries, but which now no longer corresponded to the *mores* of our times.

It also meant that Justice could no longer be seen as an absolute, abstract and universal notion, but rather as a relative concept that corresponds to a certain *schema* of social, moral, and economic views about human relations at a definite moment in the life of a particular society.<sup>30</sup> It equally implied that a society has the right—indeed is duty bound—to reconsider from time to time its social values so as to adapt its legal institutions to the changing needs and conditions of social life.

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28. As he then was. He is now a Justice of the Superior Court of Quebec.

29. For the difference between Revision, Consolidation and Codification, see Brierley, *Quebec's Civil Law Codification*, 14 MCGILL L. J. 521, 555-56 (1968). See also Lawson, *A Common Law Lawyer Looks at Codification*, 2 INTER-AM. L. R. 1 (1960); Tucker, *Tradition and Technique of Codification in the Modern World: The Louisiana Experience*, 25 LA. L. REV. 698 (1965). The original version, in French, was published in *ETUDES JURIDIQUES OFFERTES À LÉON JULLIOTT DE LA MORANDIÈRE* (1964); S. Bayitch, *Codification in Modern Times*, in *CIVIL LAW IN THE MODERN WORLD* 161 (A. Yiannopoulos ed. 1965).

30. See Caron, *The Legal Enforcement of Morals and the So-called Hart-Devlin Controversy*, 15 MCGILL L. J. 9, 36 (1969): "One should remember that 'society' is as vague a concept as 'morality,' 'justice' or 'equality', which are convenient abstractions to work with, but are quite difficult to define in practice; since both law and morality vary with the nature and structure of each society, absolute or definitive rules in this field can only belong to Utopia."

## II. THE OBJECTIVES OF THE CIVIL CODE REVISION OFFICE

It is with the foregoing ideas in mind that over the past decade the Civil Code Revision Office has been reforming the Civil Law of Quebec. A true reform of the Civil Law requires the fulfillment of certain basic objectives, both in substance and in form.

### A. SUBSTANTIVE OBJECTIVES

From the substantive point of view, our objective is three-fold:

1. Resolution of conflicts of interpretation; 2. Integration of civil law statutory provisions; 3. Reappraisal of basic policies.

#### *1. Resolution of Conflicts of Interpretation*

First of all, it is necessary to solve the problems arising from conflicting provisions of the Code. Many such problems have arisen as the Courts have proceeded, through the haphazard chance of litigation, to determine the meaning and significance of the institutions and terms written into the Code. Some of these conflicts are, of course, merely the result of the natural growth and development of a legal system. Others, however, result from the diversity of sources and authorities and are thus peculiar to our system. One need here only allude to the fact that certain parts of the Code, though clearly of civilian origin, have nevertheless been interpreted by reference to common law sources and authorities. The many bold warnings of Mr. Justice Mignault, particularly when he was a member of the Supreme Court of Canada, provided ample evidence of this type of conflict of interpretation.<sup>31</sup>

The Revision Office will make specific recommendations so as to eliminate, in the words of the codifiers of 1866, "the evil of conflicting judicial decisions and contradictory interpretations by commentators."<sup>31.1</sup>

#### *2. Integration of Civil Law Statutory Provisions*

Another objective of the Office is to integrate into the revised Civil Code the numerous provisions contained in statutes dealing with civil law matters. It is indeed one of the present day features of the Civil Law of Quebec that, while the Civil Code has for a very long time remained practically unchanged, the Quebec legislature, pressed by the new social and economic conditions of life in an in-

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31. See in particular *Desrosiers v. The King*, [1920] 60 S.C.R. 105, 126; *Curley v. Latreille*, [1920] 60 S.C.R. 131, 177.

31.1 See 7th report, 1864, p. lii.

creasingly urbanized and industrialized community, has found it necessary to enact a large mass of statutory legislation dealing with private law matters.

Such fragmentary legislation was often hastily conceived and generally delivered in a form totally foreign to the civilian tradition of legislative expression. It nevertheless frequently bore the mark of an evolution in policy, and often provided solutions that were contrary to those found in the Code. As a result, a gap has been gradually growing larger between the Civil Code and the Civil Law. And thus the Civil Code has become less and less representative of the Civil Law.

The Revision Office will attempt wherever possible to close the gaps by recommending the insertion and integration into the revised Code of such statutory legislation so as to harmonize policy and to restore the organic unity of the Civil Law.

### 3. *Reappraisal of Basic Policies*

The most important and most challenging objective of the Revision Office is the reexamination of the basic policies underlying the main institutions of the Civil Code. The Civil Code of Quebec is still to this day, in essence, the product of the moral authoritarianism, the philosophical individualism and the economic liberalism of past centuries.

We have, therefore, embarked upon a frank reappraisal of the policies underlying many parts of the Code. And if the policies are found wanting, as they have been in so many areas, we are prepared to recommend their rejection and the substitution of policies that meet the needs of our times and of our society, always bearing in mind that our legal destiny is that of a Franco-civilian tradition living in a 20th century North American environment.

Professor André Tunc has very accurately described the spirit of our reform endeavours when, in his preface to a remarkable thesis by Miss G. Viney, he wrote:

Il faut, certes, employer le mot révision dans son sens propre. Il ne s'agit pas de tout bouleverser, mais de tout revoir, de se demander loyalement devant ces phénomènes nouveaux, et aussi devant les transformations techniques et psychologiques de la société, ce qui, dans l'ancien, garde sa force et parfois sa vertu, et ce qui gêne l'élaboration de règles et de techniques nouvelles qui pourraient mieux servir l'homme contemporain.<sup>32</sup>

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32. Viney, *Preface to DÉCLIN DE LA RESPONSABILITÉ INDIVIDUELLE* at ii (Paris 1965). [Translation: One must indeed use the word Revision in its proper (or etymological)

In the pursuit of these objectives, we must, of course, have a sure grasp of the new social realities to be regulated by the Code. And in this respect, we are taking care to consult various persons and bodies particularly interested in or dealing professionally with social problems. We must also rely on the data of the other social or human sciences.

We must again be comparative-law-minded. The comparative approach is indeed essential nowadays in any serious law reform. It brings out very strikingly the relative merits of one's own legal institutions and techniques. It often shows that, beyond techniques and jargon, legal systems are often closer than they are thought to be. It allows us consciously to benefit from the experience of others.

More importantly, the comparative method brings us to realize that the policies of the law are neither Civil nor Common, that they are but the reflection of basic values shared by men and women on human problems in a particular society at a given time. Wherever they may come from, the best policies ought to be accepted or "received" if, after an objective and critical examination, they are found to be preferable to one's own, provided of course they are carefully woven into the fabric, style and language of one's legal system.

#### B. OBJECTIVES RELATING TO FORM

Another objective of the Civil Code Revision Office relates to the form of the new Code. Our ambition is to produce a *Projet* that will state in as clear and simple language as is possible the basic rules governing the private relations between citizens. It has been said that the difference between a statute and a Code is that the first is drafted, the second written. There may be some truth in this! It is my belief that a Code must be written not for the specialist but for the ordinary citizen with as little of the jargon as is compatible with accuracy and precision of language.

I have often said that my greatest hope is, one day, to see a citizen traveling in the Montreal subway, take out a pocket book edition of the new Code, and watch him get absorbed in it with an air of understanding.

We are spending a great deal of time on form. Indeed a reading committee is specifically charged with the responsibility of ensuring precision in terminology, uniformity in vocabulary and clarity in style

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sense. It is really not a question of throwing everything overboard, but of looking anew at everything ourselves: when confronted with new phenomena, as well as the technical and psychological changes in our society, what, of the old, retains its strength and, in certain cases, its virtues, and what prevents the elaboration of new rules and techniques of serving men and women of today.]

in both French and English versions of the *Projet*. We do not want the English version to be a mere translation of the French text. Each version must be written in its own style. Furthermore, as each title or chapter is ready, the *Projet* will be fed into a computer, and we shall thus be in a position with greater certainty to ensure, from one Book of the Code to another, uniformity of terminology and style in both versions. This at least is one definite advantage we shall have had over Tribonian, Portalis and Caron!

Of course, our aim is not to produce a Code that will procure literary satisfaction to poets and novelists as was the case, we are told, with the Code Napoleon, but there is no reason why the new Civil Code of Quebec should not be written in simple, clear, and precise language.

### C. ILLUSTRATIONS

Having stated our objectives, let me now illustrate by referring to certain recommendations that have already been made or are about to be made with respect to major areas of the Code.

#### 1. *Persons and Family Law*

Book I of the Civil Code dealing with Persons and Family law has, until recently, been little changed since 1866. Indeed, it can even be said the policies recognized at the time of Codification in that part of the Code have been enduring for many centuries. Such policies reflected a certain type of conjugal society based on the legitimacy of the relationship, on the submission of the wife to marital authority—one could not read the Civil Code a few years ago without being reminded of the Epistle of Paul to the Ephesians<sup>33</sup>—and finally on the submission of children to the authority of the *Paterfamilias* and the rejection of the illegitimate child as an outcast. Major policy changes are contemplated.

##### a. *Marriage: a Partnership of Equals*

The basic policy with respect to consorts is to promote a conjugal association founded on a real partnership of equals. This means full legal capacity for both consorts—already the law since 1964;<sup>34</sup> it also means full participation and equal responsibility of the consorts in the moral and material direction of the family, and particularly in decisions concerning the choice of the family residence, as well as in

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33. *Ephesians* 5:22-23.

34. S.Q. 1964, c. 66.

the determination of the interests of the children.

Another important step in that direction was taken in 1969,<sup>35</sup> with respect to matrimonial property regimes when the Legislature changed the legal regime from the community of property of moveables and acquests to a partnership of acquests.

On the technical level, this new regime attempts to combine the advantages of separation and of community. Indeed the regime provides, on the one hand, for complete separation of patrimonies, and complete powers of administration of one's property except for gratuitous transfers of acquests. On the other hand, the regime creates in favour of each consort a right—characterized as a matrimonial right—to receive eventually a half share in his consort's acquests, *i.e.* generally speaking, the proceeds of work, together with the fruits and revenues arising from all one's property.<sup>36</sup>

At the policy level, this partnership of acquests aims at giving recognition to a new concept, a new philosophy of marriage, as a real partnership which explicitly recognizes that the contribution of each consort, though often of a different kind, is nevertheless a very real one. More specifically, it seeks to affirm the very effective participation of the wife in the accumulation of the family's patrimony. It also tends to make consorts realize that what is earned by one of them is truly earned for both.

#### *b. Recognition of De Facto Unions*

A modern Civil Code must also take into account the existence of couples who live as man and wife in a *de facto* conjugal union which may well be a very stable one. Should not the Civil Code take notice of such unions and provide basic rules for the protection both of the partners and of third parties in respect of alimentary claims and contributions to debts incurred for the benefit of the family unit? It might even be that a right of inheritance should be granted to the surviving partner when the union has been involuntarily dissolved by the death of the other. Such a right is perfectly conceivable in a system where the devolution of estates is fundamentally based on the theory of presumed affections.

#### *c. From Paternal to Parental Authority*

The partnership of equals would also bring about two important changes with respect to the children. The first would be a transfer from paternal to parental authority—both parents having equal say

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35. S.Q. 1969, c. 77.

36. See QUE. CIV. CODE art. 1266d.

in the determination of the children's interests. This new parental authority would no longer be considered as a form of *potestas*, but essentially as the exercise of a responsibility in the sole interest of the child's welfare. Within such a context, rules could be provided, in case of abuse of authority, for the withdrawal of some, or even all, of the attributes of parental authority.

The second change is really a corollary of the first and would make parental authority include the correlative parental responsibility particularly with respect to damage caused by minors.

*d. The Status of Children*

An important aspect of the Civil Code revision concerns the status of children in our society. There is indeed a growing consciousness of the necessity to define more clearly the rights of children, as is witnessed by the United Nations Declaration of Rights of the Child. Traditional rules in this area were based more on an obsession with legitimacy and the legitimate transmission of patrimony than with the development (*épanouissement*) of the child.

The Civil Law has for a long time meted out harsh treatment to illegitimate children. It is my hope that, one day soon, the Civil Code of Quebec will accept a new deal in recognizing that a child, whatever be the circumstances of his birth, is a human person and deserves equal treatment and opportunity in his civil relations with his authors. The adoption of such a policy means the elimination, to the fullest extent possible, of such distinctions as legitimate and illegitimate children whether natural, adulterine, or incestuous, and the recognition of a single status for children.

A new title on Filiation would enunciate the principle of equality and set down rules concerning the relations between parents and children, whether born in or out of wedlock, providing equal rights with respect to support and maintenance, gifts, and rights of intestacy.

*e. Reappraisal of the Law of Successions*

In the area of successions, we are reexamining our system which is based on the rule of absolute freedom of willing.<sup>37</sup> A person in Quebec may still bequeath all his property to any one whether that be a charitable institution, a friend, or a society for the prevention of cruelty to animals.

This system<sup>38</sup>, inherited from English law in the Quebec Act of

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37. See QUE. CIV. CODE art. 831.

38. See A. MOREL, LES LIMITES DE LA LIBERTÉ TESTAMENTAIRE no. 16, at 19 (1960); H. ROCH, 5 TRAITÉ DE DROIT CIVIL DU QUÉBEC 272 (1953).



1774,<sup>39</sup> is susceptible of producing very unjust results. Firstly, as disclosed in a survey made in 1968,<sup>40</sup> consorts generally opted to marry under the regime of separation of property instead of under the regime of community, thus depriving the wife of a vested interest in her husband's property on the dissolution of the marriage. Secondly, there do not exist in Quebec law any alimentary claims against the estate of the deceased consort.

No wonder voices have already been raised in order to have the law changed in this area. But how should one go about it? A first step was to create a new matrimonial regime which no longer carries with it undertones of incapacity or inferiority of the wife. Should the regime of partnership of acquests win favour,<sup>41</sup> it could go a long way towards the establishment of a just distribution of matrimonial assets. But that is not sufficient. Essentially, the problem is to determine as a matter of policy, whether to adopt a regime based on the survival of an alimentary claim along the lines of the *Family Maintenance Acts* or *Dependants' Relief Acts* of the common law Provinces of Canada, or to establish in favour of the surviving consort or of the children, or of both, a forced share, as was the case in our system prior to 1774 and is still the case in the Franco-civilian tradition.

Both systems have advantages and disadvantages. To force a surviving consort or children to come to court "hat in hand" and beg for maintenance is not entirely satisfactory. And yet to allow for a forced and fixed share may be too rigid a formula to adopt in this day and age. On this question, the policy to be adopted is not yet finally determined. We seem to be moving away from the forced share for children, but we are thinking of one for the surviving consort on the theory that, although in a different way, the consorts have contributed to the accumulation of the family patrimony and that it would be unjust to allow a spouse to disinherit his consort completely.

## 2. *The Law of Obligations*

The law of obligations is another area likely to be profoundly affected in the new draft Code, particularly in respect of an increased control over contractual freedom and change of emphasis in the basis of civil responsibility.

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39. An Act for making more effectual Provision for the Government of the Province of Quebec in North America, 14 Geo. III, c. 83 (1774).

40. See R. COMTOIS, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA COMMUNAUTÉ DE BIENS* no. 371, at 317 (1964).

41. Of course, the parties are still free to opt for a regime of separation of property.

a. *Increased Control over Contractual Freedom*

The basic principle of our theory of contract is that of freedom within the limits of public order and good morals.<sup>42</sup> The contracting parties are allowed freely to shape their relations to the best of their mutual interests. The Codifiers, it is true, did not reproduce in the Civil Code of Quebec, the famous text of Article 1134, par. 1, of the French Code or of Article 1901, par. 1, of the Louisiana Civil Code:

Art. 1134, French Civ. Code

*“Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.”*

Art. 1901, La. Civ. Code

*“Agreements legally entered into have the effect of laws on those who have formed them.”*

But our Courts have nevertheless written the French text into the body of our case law. As Mr. Justice Casey of the Court of Appeal recently said in *Hecke v. La Cie. de Gestion Maskoutaine Ltée*.<sup>43</sup>

Under our system freedom of contract is the rule, and the generality of this rule is limited only by the provision (C.C. 13) that one may not in a private agreement contravene the laws of public order and good morals.

This principle, which finds its justification in the philosophical doctrines and economic theories of the 18th and 19th centuries, found its way into the Code in a number of ways. Let me mention two which I believe to be of significance for the purpose of our law revision endeavors: the first relates to Codal standard form contracts; the second concerns the regime of lesion.

(1.) *Codal Standard Form Contracts*

Under the general theory of freedom of contract, the parties may determine for themselves the number, extent and intensity of the obligations by which they wish to be bound.

The legislator has, however, deemed fit—following in this a long tradition which goes back to the Institutes of Gaius and of Justinian—to give special attention to a number of contracts, in effect those which were most frequently used in practice,<sup>44</sup> and to provide for each

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42. See together QUE. CIV. CODE arts. 1022, 1024, 13.

43. [1970] C.A. 225, 226.

44. See QUE. CIV. CODE arts. 1472-1595 (sale); 1596-99 (exchange); 1600-1700 (lease and hire of things and of work); 1701-61 (mandate); 1762 (loan); 1794-1823 (deposit); 1830 (partnership); 1929 (suretyship); 1966 (pledge).

a standard regime of rights and duties. It must be remembered that most of these provisions are *suppletive* in character; they are thus characterized, except in a certain few cases of mandatory provisions,<sup>45</sup> as implied contractual clauses which will govern the relations of the parties but which the latter are perfectly free, by express stipulation, to write out of the agreement.

This is still the system of the Code today in 1974, with the one exception of residential leases, for which the Code was modified<sup>46</sup> to provide a set of largely *imperative* rules with respect to the rights and duties of the parties.

(2.) *Regime of Lesion in Contract*

Not only were the parties free to negotiate the content of their contractual relationship, but in giving a binding character to the agreement the legislator took special measures to ensure the integrity and the stability of contract. The most important single measure was to rule out *lesion* as a cause for annulment of contracts entered into by persons who were of age and under no incapacity.

Article 1012, of the Civil Code still stands as a monument to the glory of "*laissez faire*":

Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.

It may well be that such a regime of contract, when established in 1866, was perfectly justifiable in an artisanal and rural society; however, things have changed since the advent of the Industrial Revolution!<sup>47</sup>

Indeed, at the very moment that the legislator was giving strong approval to the theory of freedom of contract, new social and economic forces were at work which gradually undermined the accuracy of the assumptions that served as the basis for such a theory. Industrialization and the concentration of economic forces showed fairly quickly, at least in the area of contract, that our system was based on a pretty idealistic or abstract conception of the equality of men. It became apparent that juridical equality was very often only a myth. The economic and social superiority of one party was such that although there was consent—and therefore juridical equality—the contract had often become what Saleilles called a "*contrat*

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45. See, e.g., QUE. CIV. CODE art. 1509.

46. See An Act respecting the lease of things, S.Q. 1973, c. 74 assented to on 22 December 1973 (now being new articles 1600 to 1665 in the Title of Lease of Things).

47. See Yntema, *The Law of Obligations* in CIVIL LAW IN THE MODERN WORLD 68 (A. Yiannopoulos ed. 1965).

*d'adhésion*" where one party in fact was in a position to impose his will on the other.<sup>48</sup>

Such tremendous changes brought about a complete change in the role of the State with respect to freedom of contract. State interventions were very limited indeed in the Code of 1866 and were considered, as it were, as a extremely regrettable concession to the requirements of public order and good morals in what was otherwise a sanctuary of private interests. But gradually and increasingly, the State assigned to itself a new role, that of promoter of "justice in contract," which has led to active interventions in practically all fields of contractual relations so as to restrict not so much the freedom of the parties but the abuse of freedom, and to restore some real measure of equality between the parties.<sup>49</sup>

At long last, the words of Lacordaire, uttered in the middle of the nineteenth century, were being heeded:

*Entre le fort et le faible, c'est la liberté qui opprime; c'est la loi qui affranchit.*

In Quebec as elsewhere, statutory interventions have introduced different modes of restricting contractual freedom: legislative, administrative, and judicial controls.

*Legislative Control.* In certain areas, such as insurance policies and residential leases,<sup>50</sup> the legislator has directly intervened in the contractual relationship by imposing statutory conditions of an imperative character out of which the parties are no longer free to contract.

*Administrative Control.* In other areas, the legislative intervention has been indirect and has taken the forms of administrative control through the creation of Boards empowered closely to regulate contractual relations. This has been particularly the case in such fields as public utilities, *e.g.*, transportation, telecommunications.

*Judicial Control.* The legislator has provided the Courts with the power to supervise contracts and annul or modify conditions of a contract which appear inequitable. As Dean Ripert once wrote,<sup>51</sup>

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48. For an early grasp of the problem, see Hall, *Employer's Liability for Negligence*, 7 R.L.N.S. 513 (1900).

49. See G. RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* no. 61, at 105 (4th ed. 1949).

50. See, *e.g.*, Insurance Act, R.S.Q. 1964, c. 295, § 240 (statutory provisions in fire insurance policies); S.Q. 1973, c. 74 (a recent standard form residential lease); QUE. CIV. CODE arts. 1600 *et seq.*

51. G. RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* no. 65, at 114 (4th ed. 1949).

"Judges are turned into 'Ministers of Equity.'" Such judicial control has been gradually introduced in specific instances, such as in cases of accidents causing bodily injuries,<sup>52</sup> rent control,<sup>53</sup> transactions concerning securities,<sup>54</sup> loans,<sup>55</sup> and credit operations.<sup>56</sup>

All such legislative enactments, the purpose of which has really been to reintroduce the concept of lesion in contracts, give rise to two kinds of observations. Firstly, it must be realized that this striking evolution has only just begun to find its way into the Civil Code. It is indeed ironical to note that the Civil Code still preserves the liberal and individualistic character of the 19th century while the legislator has by statutory legislation considerably reduced the scope of Civil Code article 1012 to the point that the rule may well state the exception.

The second observation is that the concept of lesion varies considerably from statute to statute. In certain cases, the traditional word lesion is used in its normal meaning which conveys, as it does in article 1860 of the Louisiana Civil Code, the idea of a discrepancy between the value of the prestations—an objective test of lesion.<sup>57</sup>

Yet in another instance, in which one can readily detect the influence of the *Unconscionable Transactions Relief Acts* schemes of the common law provinces<sup>58</sup> or of the Uniform Commercial Code,<sup>59</sup> a court may reduce or annul the monetary obligations of a loan if "it finds that, having regard to the risk and to all the circumstances, they make the cost of the loan excessive and the operation harsh and unconscionable."<sup>60</sup>

In the recent *Consumer Protection Act*,<sup>61</sup> applying to contracts involving credit and "itinerant solicitation contracts," sec. 118 states that

Every consumer whose inexperience has been exploited by a mer-

52. See QUE. CIV. CODE art. 1056b, para. 4, introduced by S.Q. 1940, c. 68.

53. An Act respecting the regulation of rentals, S.Q. 1950-51, 14-15 Geo. VI, c. 20, § 29.

54. See Securities Act, R.S.Q. 1964, c. 274, §§ 35(g), 50.

55. See QUE. CIV. CODE art. 1040c, introduced by S.Q. 1964, c. 67; *Boutin v. Corp. de Finance Belvédère*, [1970] C.A. 389.

56. See Consumer Protection Act, S.Q. 1971, c. 74, § 118.

57. QUE. CIV. CODE art. 1056b, para. 4.

58. See R.S.O. 1970, c. 472.

59. See UNIFORM COMMERCIAL CODE § 2-302 (unconscionable contract or clause).

60. See QUE. CIV. CODE art. 1040c; *Beneficial Finance Co. of Canada Ltd. v. Morasse*, [1972] C.A. 846; *Boutin v. Corporation de Finance Belvédère*, [1970] C.A. 389. See also *Les Restaurants La Nouvelle Orléans Inc. v. Roynat Ltée, C.S. (Quebec 9829)* April 18, 1974.

61. S.Q. 1971, c. 74.

chant may demand the nullity of the contract or a reduction in his obligations if they are greatly disproportionate to those of the merchant.

In the *Securities Act*,<sup>62</sup> a recourse based on lesion requires three conditions: (a) a dangerously hazardous speculative transaction; (b) abuse of the credulity, ignorance, weakness or manifest inexperience in business of a person incapable of estimating the risk involved in the transaction; (c) a serious prejudice.

Confronted with such illustrations of fragmentary legislation, we wonder whether we ought not simply to recommend the abrogation of Civil Code article 1012, and the reintroduction, in the general law of contract, of a theory of lesion as a ground for annulment of contract or for either reduction or increase of obligations. But, in doing so, we feel that we certainly cannot return to the traditional rigid rules of lesion based on a fixed percentage of value such as the 1/4 rule in cases of partition<sup>63</sup> or the 7/12 rule in case of sale of immoveables.<sup>64</sup>

So we are thinking of a general theory of lesion based on two criteria: (1) a serious disproportion between prestations, and (2) resulting from imposition. In so doing, we believe that a proper balance might be struck between equity and stability in contract, a just balance between the powerful and the weak, so as to ensure, as Dean Ripert once put it,<sup>65</sup> that no longer shall justice be founded on contract, but rather contract on justice.

#### *b. Basis of Civil Responsibility*

In the area of Civil Responsibility, one of the basic problems is to reexamine the basis of liability. Should liability for damage remain essentially a system based on fault, as expressed in Civil Code article 1053—the equivalent of Code Napoleon articles 1382 and 1383, and Louisiana Civil Code article 2315—or should there be a shift from fault to risk?

While it seems quite reasonable to retain the general principle that every person capable of discernment is bound to act with reasonable diligence, there are certain cases which must be dealt with more severely, as the hazards and dangers of life in society are ever increasing and the role of liability insurance is more clearly perceived.<sup>66</sup>

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62. See R.S.Q. 1964, c. 274, §§ 35(g), 60.

63. See CODE NAPOLEON art. 887; LA. CIV. CODE art. 1861, para. 1.

64. See CODE NAPOLEON art. 1674; LA. CIV. CODE art. 1861, para. 2.

65. See G. RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* no. 73, at 127 (4th ed. 1949).

66. See H. Yntema, *The Law of Obligations*, in *CIVIL LAW IN THE MODERN WORLD* 72 (A. Yiannopoulos ed. 1965).

Illustrations may be found in such areas as that of duties between neighbours, products liability and automobile accidents.

(1.) *Legal Duties between Neighbours*

The new Civil Code might well recognize a special duty as between neighbours whereby one would be held responsible for any "excessive" damage, irrespective of all diligence exercised by the debtor of the duty. Such a duty, which is close to the common law concept of nuisance, has already been accepted by our Courts<sup>67</sup> and could well be given legislative recognition.

(2.) *Legal Duties Relating to Products Liability*

Again, with respect to what is now known as the problem of products liability, there would seem to be no reason why the manufacturer should not be under a legal duty towards the ultimate consumer—and quite irrespective of contract—to warrant against any latent defects in the conception, the production or the presentation of his product.

A most curious phenomenon has occurred in this area. In Pothier's time, it may have been sufficient to impose such warranty on the seller who, more often than not, was also generally the manufacturer of the product, and the doctrine of *spondet peritiam artis* applied quite naturally to the seller-manufacturer. Today, where there is no longer a direct contractual relationship between the manufacturer and the ultimate consumer, the irony of the situation is that the manufacturer (*qua* seller) owes a contractual duty of warranty to a person—wholesale dealer or retailer—for whom it was not intended, and owes no such duty to the person in favour of whom it was really meant. It would therefore appear reasonable to impose upon the manufacturer a legal duty of warranty towards the ultimate consumer of the product, leaving it to the consumer to choose whichever remedy is best available to him—either a direct contractual warranty claim against the seller or a direct extra-contractual warranty claim against the manufacturer.

(3.) *Legal Duties Relating to Automobile Accidents*

With respect to automobile accidents, much is being said and written these days about various plans to introduce a no-fault system of compulsory indemnification of victims. In view of the fact that a Special Committee has been set up in Quebec to look into the whole matter of automobile liability insurance, the Civil Code Revision

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67. See *Katz v. Reitz*, [1973] C.A. 230, conf. C.S. (Montreal - 719, 611) 21 Feb. 1969.

Office will first wish to examine the report of the Committee which proposes the introduction of a no-fault system of indemnification based on a compulsory insurance scheme.<sup>68</sup> But, for the moment anyway, it seems that our system must, at the very least, accept two basic propositions:

i. A strict liability imposed on the owner of a car involved in an automobile accident, with avoidance of liability only by proof of a fortuitous event or irresistible force other than those that might result from the state of health of the driver or the condition of the vehicle.

ii. A compulsory insurance scheme whereby no one could own or drive a car without having adequate insurance coverage for third party and personal injury claims.

### 3. *The Law of Property*

In the area of the law of property, the Revision Office is about to propose that two bold steps be taken, both of them contrary to the traditional rules of the Civil Law. Firstly, the integration into the Civil Code of a general concept of fiduciary ownership alongside absolute ownership; secondly, the recognition, as a matter of principle, of the hypothecation of moveables.

#### a. *Fiduciary Ownership*

It is a simple fact of life that every day in Quebec, trusts of one kind or another are being created not only for family purposes, but also for business, investment, and other commercial purposes; yet such instruments generally provide a clause that the trust shall be governed by the laws of the neighbouring Common Law Province of Ontario. The reason of course, is very simple. Our laws do not as yet allow us to achieve the various objectives rendered possible by the concept of trust.

Now in this area as in others, the pressure of social forces resulted in the introduction, in the Civil Law of Quebec<sup>69</sup> of the concept of trust in the Civil Code Title on gifts *inter vivos* or by wills.<sup>70</sup> Also, in the creation of trust companies<sup>71</sup> it was specifically provided that they were authorized *inter alia*, "to accept, fulfill and execute all legal trusts . . . ." It is nevertheless true to say that Quebec civilians have

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68. See Rapport du Comité d'étude sur l'assurance automobile, Quebec, (1974).

69. S.Q. 1879, 42-43 Vict., c. 29. Inserted in the Civil Code in 1888.

70. QUE. CIV. CODE arts. 754-981.

71. R.S.Q. 1964, c. 287.



never felt at ease with the notion of trust.

Both writers<sup>72</sup> and Courts<sup>73</sup> have wrestled with the concept of trust and tried to insert it into the traditional framework of ownership in the Civil Law, with the result that no one seems quite sure today whether the trust property is vested in the trustee or in the beneficiaries, and whether the trustee is really an owner or merely a depositary or executor charged with the administration of another person's property.<sup>74</sup> Also the limited scope within which the trust can operate (gifts and wills, and trust for bondholders) has considerably affected and restricted its usefulness.

It is with these ideas in mind that the Civil Code Revision Office has constituted a Committee whose mandate is to report and prepare a draft on a new chapter entitled *Fiduciary Ownership* to be inserted into the Civil Code in the Book on property. Thus, the Projet would provide for two kinds of ownership, personal and fiduciary: the first dealing with the traditional notion of property; the second providing for a considerably expanded notion of trust to meet the needs, both commercial and non-commercial, of a modern Quebec society living in a North American environment.

And so the Trusts Committee of the Office, with the advice of an expert on Anglo-Canadian Trusts, is in the process of integrating the notion of fiduciary ownership within the fabric of the Civil Law. And may I say here that the work of the Committee is considerably facilitated by the Louisiana experience, so much so that each article of the report is written in the light of the corresponding provision of the Louisiana Trust Code. And no doubt, as soon as the draft is completed later this year, my colleagues on the Committee will wish to seek the critical observations of Louisiana experts in this area.

#### *b. Hypothecation of Moveables*

With respect to the hypothecation of moveables, we intend to recommend the rejection of the traditional rule of Civil law, best expressed in the famous article 170 of the Coutume de Paris:

*Meubles n'ont point de suite par hypothèque, quand ils sont hors de la possession du débiteur.*<sup>75</sup>

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72. See, e.g., 5 P. MIGNAULT, *LE DROIT CIVIL CANADIEN* 155 (1901); see also M. FARIBAULT, *TRAITÉ DE LA FIDUCIE* nos. 54, 55, 106 (1936); Faribault, *De l'acte de fiducie*, 66 R. DU N. 335, 387 (1964); Graham, *Some Peculiarities of Trusts in Quebec*, 22 R. DU B. 137 (1962); Mankiewicz, *La fiducie québécoise et le Trust de Common Law*, 12 R. DU B. 16 (1952); Mignault, *A propos de fiducie*, 12 R. DU B. 73, (1933-34).

73. See, e.g., *Curran v. Davis*, [1933] S.C.R. 283; *Laliberté v. Larue*, [1931] S.C.R. 7, 16, 20; *Reford v. National Trust Co.*, [1968] B.R. 689, 697.

74. See particularly QUE. CIV. CODE arts. 981a, 981b.

75. See QUE. CIV. CODE art. 2022. See also LA. CIV. CODE arts. 3281, 3289.

Translation: Movables are not subject to pursuit by mortgage when they are out of the possession of the debtor.

Such is still the basic rule of our Code under which a creditor's security, apart from privileges,<sup>76</sup> is obtainable only by hypothecation of immoveables<sup>77</sup> or by pledge of moveables.<sup>78</sup>

It is, however, interesting to note that the pressure of economic interests and the requirements of business transactions in Quebec, as has been the case in Louisiana,<sup>79</sup> have forced exceptions to be made to the basic principle.<sup>80</sup> The Federal *Bank Act*<sup>81</sup> allows a mortgage on moveables. Again, the Quebec *Special Corporate Powers Act*<sup>82</sup> allows joint stock companies to hypothecate present or future moveable property owned in Quebec.

And even more recently, the Civil Code was amended in 1940<sup>83</sup> and in 1962,<sup>84</sup> to introduce two new kinds of non-possessory security rights: one, the agricultural pledge of farm produce, present and future, and farm implements and machinery;<sup>85</sup> the second form of security is known as the "Commercial pledge"<sup>86</sup> of machinery and equipment pertaining to a business.

Now, if it has been felt necessary to introduce such a security device in particular areas, the question is whether the Civil Law of Quebec is not ripe for the introduction of a general doctrine concerning the hypothecation of moveables.

And after a careful examination of North American practices, particularly under Article 9 of the Uniform Commercial Code and the recent Ontario *Personal Property Security Act*,<sup>87</sup> the Committee on the law of security is about to submit its report recommending the establishment of a general system of hypothecs upon moveable as

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76. See QUE. CIV. CODE arts. 1983 *et seq.*

77. See QUE. CIV. CODE arts. 2016 *et seq.*

78. See QUE. CIV. CODE arts. 1966 *et seq.*

79. See Sachse, *Report to the Louisiana Law Institute on Article Nine of the Uniform Commercial Code: I and II*, 41 TUL. L. REV. 505, 785 (1967); Daggett, Dainow, Herbert and McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 36 (1937).

80. See Caron, *L'article 9 du Code uniforme de commerce peut-il être exporté?* in ASPECTS OF COMPARATIVE COMMERCIAL LAW 375 (1969).

81. R.S.C. 1970, c. B-1, §88.

82. R.S.Q. 1964, c. 275, §§ 22-36. (first introduced as a general statute in 1914).

83. An Act respecting the pledge of agricultural property, S.Q. 1940, 4 Geo. VI, c. 69 introducing QUE. CIV. CODE arts. 1979a to 1979d.

84. See An Act respecting pledge, S.Q. 1962, c. 57, introducing QUE. CIV. CODE arts. 1979e to 1979k.

85. See QUE. CIV. CODE art. 1979a.

86. See QUE. CIV. CODE art. 1979e.

87. R.S.O. 1970, c. 344.

well as upon immoveable property, together with the necessary technical requirements such as a modern computerized system of registration of hypothecary rights which will ensure the protection of creditors by a proper system of identification of the secured property.

In doing so, our Committee has been greatly and consciously influenced by the Uniform Commercial Code. But once the basic policy was accepted, it was then a question of civilianizing the institution by adapting it carefully to our system of creditors' rights, and by weaving it into the fabric and language of the Civil Law.

#### D. CHANGE AND CONTINUITY

I have given you specific illustrations of some of the changes that we are about to recommend to the Government of Quebec. If they are accepted, the new Civil Code of Quebec will bear little resemblance with the Code of 1866, and the Civil Law of Quebec will have undergone far reaching modifications.

But the point that I should like to emphasize here is that the adaptation of our Civil Law to the needs of our society cannot be regarded as a break with the great civilian tradition of past centuries. In fact, we shall only be doing what our predecessors themselves have done. For we must indeed bear in mind that the Civil Law, as Prof. F. H. Lawson, of Oxford, has so admirably shown in his Michigan lecture, "*A Common Law Lawyer Looks at the Civil Law*,"<sup>88</sup> is itself a mixture of Roman institutions and techniques, Germanic customs and Canon law principles.

Can it really be said that the Civil Law became less civilian when, in the Middle Ages under the influence of the canon lawyers, the principle of consensualism (as expressed in the maxim "*solus consensus obligat*") and the doctrine of cause which was subsequently developed, emerged as the new bases for contractual obligations?<sup>89</sup>

Can it really be said that French Civil Law became less civilian when Pothier lent his authority to the rationalization of the distinction between delictual and quasi-delictual responsibility based on the voluntary or the involuntary act of the wrongdoer? It may be heresy to our Scottish and South African brethren, but isn't it still quite civilian?

Can it also be said that the French, Quebec and Louisiana Civil Law became less civilian when they rejected the old maxim "*Traditionibus dominia rerum non nudis pactis transferuntur*" (the

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88. Ann Arbor, Michigan, University of Michigan Law School, November 1953.

89. See David, *Cause et Consideration*, in 2 *MÉLANGES MAURY* 111 (1960).

ownership of things is transferred by delivery, not by mere agreement) and accepted the basic policy that a contract may, by the sole consent of the parties, transfer the ownership of property both moveable and immovable?

Can it be said that the Civil Law of Quebec became less civilian when in the Codification of 1866 numerous changes were made in order to facilitate the free disposal of property;<sup>90</sup> when, in 1915, it considerably enhanced a wife's inheritance rights by making her a co-heir with her children to her consort's estate;<sup>91</sup> and when, in 1969, it replaced the old community of property by a regime of partnership of acquests?<sup>92</sup>

My answer is very simply: no. For I firmly believe that the Civil Law is not just a particular set of rules laid down once for all time either in the Institutes or in the works of Domat or of Pothier.

As Professor René David told us in Montreal in 1966, on the occasion of the centennial celebrations of our Codification, the Civil law is essentially "*un style*": it is a certain way of conceiving, of expressing and of applying a rule of law whatever be the policies it wishes to recognize at a certain time in the history of a country.<sup>93</sup>

I refuse to consider the Civil Law, and its legislative expression, the Civil Code, as a monument to the glory of past centuries, as a museum of legal antiques or as a piece of legal folklore.

The Civil Law is and must be a living body capable of responding to the needs of a modern society. The Civil Law, which has now endured for centuries through many changes, is rich enough and mature enough to bear, now in Quebec as has been done in the past and is being done elsewhere, a reappraisal and hopefully in many areas a renewal of basic policies.

### III. THE METHODS OF OPERATION OF THE CIVIL CODE REVISION OFFICE

Since I assumed general responsibility, the revision of the Civil Code has been conceived of as a process of collective thinking, start-

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90. McCORD at 5: "Of these changes, it may be remarked at the outset that they are not of a subversive character, or likely to disturb existing relations or to clash with prevailing notions. They are on the contrary of a nature to harmonize with the ideas of the present day, and to adapt our ancient laws to the changes which since their date society itself has undergone."

91. S.Q. 1915, 5 Geo. V, c. 74.

92. S.Q. 1969, c. 77.

93. See also J. MERRYMAN, *THE CIVIL LAW TRADITION* 2 (1969): "a set of deeply rooted, historically conditioned attitudes about the role of law in the society and in the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught."

ing with a draft report by a Committee of experts and providing for a broad program of consultation of various kinds, both professional and general.

#### A. THE REVISION OFFICE COMMITTEES

The basis of our *modus operandi* lies in the report of a Committee of experts. To this date, some twenty-six regular and five special Committees have been constituted to each of which a part of the Civil Law or related subjects<sup>94</sup> has been entrusted.

A Committee generally comprises from three to seven members representing the various branches of the profession: practitioners (members of Bar and of the Order of Notaries), judges and professors of law. Care is also taken to ensure, according to the type of reform area to be dealt with, representation of various interests, opinions and groups: geographic, linguistic, religious and age groups.

The Committees are provided with research assistants and consultants. They may also invite specialists or groups in legal or other fields to provide them with expert advice or relevant information.

Each Committee deals with a particular area of the Civil Law or related topic and its main function is to prepare, generally on the basis of a report by the Rapporteur or a Research assistant, a draft "*Avant-projet*" and an "*Exposé des motifs*" in both French and English.

#### B. PUBLICATION OF THE COMMITTEE REPORTS

The reports of the Committees are published. It has always been my firm belief that such a wholesale revision cannot be done, as it were, between the four walls of a law library by and for jurists.

The drafts must be tested against public opinion—both general and professional, both at home and abroad. And so it is that about 1,800 copies of each report<sup>95</sup> are sent for comment and criticism to the Courts, the Law schools, the various government departments, the professional bodies (Bar and Notaries), as well as to all kinds of organizations such as political parties, religious bodies, universities, banks, trusts, insurance companies, boards of trade, labour unions, social agencies, local community groups, women's organizations, and to certain individuals who have manifested an interest in law reform.

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94. Such as the creation of a central Registry relating to matrimonial regimes; the creation of a Family Court; the establishment of a modern system of registration of Persons and Property, Public Curatorship.

95. Twenty-five such reports—the Yellow reports—have already been published.

And, of course, to the press and other news media.

Public hearings are also held, when necessary and appropriate, so as to allow those who have submitted briefs to make known their views and even to air and discuss among themselves their opposing views.

It is then the responsibility of the Committee to examine their report in the light of comments received and to prepare the final draft of its report to be included in the *Projet*.

In certain instances, however, when a reform is deemed urgent in a particular area, a report is submitted to the Government with a recommendation for immediate implementation, without awaiting the complete revision of the Code. To this date, twelve such reports have inspired legislation on such matters as the capacity of married women,<sup>96</sup> marriage covenants,<sup>97</sup> adoption,<sup>98</sup> civil marriages,<sup>99</sup> rights of natural parents and children,<sup>100</sup> judicial declarations of deaths,<sup>101</sup> rights over one's body or cadaver,<sup>102</sup> abolition of civil degradation,<sup>103</sup> and lease and hire of things.<sup>104</sup>

### C. FINAL PHASE OF COORDINATION

The bringing together of all these reports into one general cohesive draft project requires a great deal of coordination in respect of both substance and form.

One can indeed easily imagine that with some thirty Committees comprising more than one hundred men and women representing different sectors and generations of the profession, one can hardly expect that they always and on all subjects speak with one voice!

It is for this reason that two coordinating committees have been constituted: a Committee on legal vocabulary and the final Coordination Committee. The first Committee is entrusted with the task of reading each Committee report so as to ensure uniformity of style and terminology in both languages. The second Committee will sit on matters of conflicting points of substance so as to provide uniformity and organic unity in the basic policies of the Code.

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96. S.Q. 1964, c. 66.

97. S.Q. 1969, c. 77.

98. S.Q. 1969, c. 64.

99. S.Q. 1968, c. 82.

100. S.Q. 1970, c. 62.

101. S.Q. 1969, c. 79.

102. S.Q. 1971, c. 84.

103. S.Q. 1971, c. 84.

104. S.Q. 1973, c. 74.

It is hoped that all these efforts will finally come to fruition in the year of grace 1975 when the *Projet* of a new Civil Code will be submitted to the Minister of Justice and, hopefully, adopted by the National Assembly of Quebec.

#### IV. CONCLUSION

Such then are the difficulties, the objectives and the methods of operation of the Civil Law reform efforts in Quebec. It is my sincere belief that if these endeavours finally meet with success, they may well serve as a basis for a vigorous renaissance of the Civil Law in Quebec.

Such a development will only occur if it is well understood that a codification is not a panacea, that it is not meant to decide on issues for all times. There are dangerous precedents in this regard. We are told that Solon proclaimed his laws in force for one hundred years.<sup>105</sup> Again Napoleon is reported to have said of his Code: "*S'il est le résultat exact de la justice civile, il sera éternel.*"<sup>106</sup>

I suppose one can understand law-makers being tempted to say as Horace<sup>107</sup> did in one of his Odes:

*Exegi monumentum aere perennius  
Regalique situ pyramidum altius  
Quod non imber edax, non Aquilo impotens  
Possit dirvere aut innumerabilis  
Annorum series et fuga temporum.*<sup>108</sup>

This may be true of temples and of works of art, but a Code is not a monument; or if it is, it must be a living monument, susceptible of adaptation to the ever changing needs of society.

It was once said that law is Life. It must also be understood that as life marches on, so must the Civil Law.

105. See Plutarque, *Vie de Solon* in 1 LES VIES DES HOMMES ILLUSTRES 201 (1951).

106. See J. LOCRÉ, *ESPRIT DU CODE NAPOLEON* 85 (1805).

107. 3 THE ODES xxx.

108. The Complete Works of Horace 90 (J. Marshall trans. 1911).

"A monument I've achieved more strong than brass,  
Soaring kings' pyramids to overpass;  
Which not corroding raindrop shall devour,  
Or winds that from the North sweep down in power,  
Or years unnumbered as the ages flee!"

## APPENDIX

## ABBREVIATIONS

B.R.	Banc de la Reine
c.	chapter
C.A.	Cour d'Appel
C.S.	Cour Supérieure
Can. Bar Rev.	Canadian Bar Review
Eliz.	Elizabeth
Geo.	George
Inter-Am. L. R. (Imp.)	Inter-American Law Review Imperial
La. Civ. Code	Louisiana Civil Code
Que. Civ. Code	Quebec Civil Code
R. du B.	Revue du Barreau
R. du D.	Revue du Droit
R. du N.	Revue du Notariat
R.L.n.s.	La Revue Légale (Nouvelle Série)
R.S.C.	Revised Statutes of Canada
R.S.O.	Revised Statutes of Ontario
R.S.Q.	Revised Statutes of Quebec
S.C.R.	Supreme Court Reports
S. Can.	Statutes of Canada
S.Q.	Statutes of Quebec
Tul. L. R.	Tulane Law Review
Vict.	Victoria



