

John E.C. Brierley & Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law*. Toronto: Emond Montgomery, 1993. Pp. lviii, 728 [\$90.00, \$65.00]. Reviewed by Hans W. Baade\*

On January 1, 1994, the *Civil Code of Québec* (C.C.Q.) came into force. Consisting of 3,168 articles and accompanied by an implementing statute numbering no less than 719 provisions,<sup>1</sup> it is highly likely to be regarded by future generations as one of the most comprehensive civil law codifications of this century. Such a result clearly was the intent of its creators. As stated in its Preliminary Provision, the *Code* "governs persons, relations between persons, and property," and codifies not only the private law relations encapsulated in these three categories, but the civil law as such:

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.<sup>2</sup>

It should be noted that *jus commune* appears, in the French text, as "droit commun". As exemplified by standard references, specifically in the Commercial Codes of Spain and of Mexico<sup>3</sup> and more generally, in other Romance-language countries as well, this latter term designates *general* law rather than special legislation, even that of general application. In post-codification private law parlance, "droit commun" embodies the Civil Code instead of legislation outside of that Code and not supplementary to it. *Jus commune*, on the other hand, is a term traditionally employed (and presently used) to describe Roman law as received and applied in European countries and their colonies before the nineteenth- and twentieth-century codifications.<sup>4</sup> When used together, these two

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<sup>1</sup> *Law Respecting the Implementation of the Reform of the Civil Code*, S.Q. 1992, c. 57 [hereinafter "Transitory Provisions"].

<sup>2</sup> Preliminary Provision C.C.Q.

<sup>3</sup> Art. 2 *Spanish Commercial Code (Codigo de Comercio y Leyes Complementarias)*; art. 1050 *Mexican Commercial Code (Codigo de Comercio y Leyes Complementarias)*. Both refer to derecho común.

<sup>4</sup> See e.g. R. Zimmermann, "Roman-Dutch Jurisprudence and Its Contribution to Roman Private Law" (1992) 66 *Tulane L. Rev.* 1685.

terms have one central meaning for civil lawyers: the civil law, received and/or codified, is the *real* common law, reflecting the senior legal tradition.

Coming from the only civil law province of Canada, a legislative assertion such as the *Civil Code of Québec* requires the most solid of foundations. That foundation is amply supplied by the work here under review.<sup>5</sup> The joint product of fourteen members of McGill University's Faculty of Law and Institute of Comparative Law, the book is a *summa* of Quebec civil law on the eve of its most recent codification. Professors Brierley and Macdonald, both former deans of McGill's Faculty of Law, have contributed Part One, entitled "Nature, Scope and Techniques of the Civil Law"<sup>6</sup> and those portions of Part Two, "Institutions of the Civil Law",<sup>7</sup> not attributed to other authors. The work is devoted, fittingly enough, to those who have taught civil law at McGill since 1853.<sup>8</sup>

The historical introduction<sup>9</sup> should be required reading not only for comparative lawyers generally, but also for all those who take an interest in the survival of islands of the civil law (codified as well as uncoded) in the sea of Anglo-American common law. As is well known, the civil law survived after 1759 initially because it was seen by the francophone population of Lower Canada,<sup>10</sup> and especially by the *de facto* or perhaps even *de jure* established Roman Catholic Church, as one of the three bulwarks, along with language and religion, of a God-fearing, closely knit, mainly rural community against the encroachments of commercialism, materialism, and irreligion (in other words, England, the United States, and revolutionary France). Almost simultaneously with the work here under review, Professor Greenwood's study on "Law and Politics in the Era of the French Revolution"<sup>11</sup> has documented the hostile reaction of *Canadiens* to these three forces.

The point at which Quebec ceased to be, in Mignault's words, "surtout fille de la France coutumière"<sup>12</sup> during the nineteenth and twentieth centuries, is a

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<sup>5</sup> J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) [hereinafter *Quebec Civil Law*].

<sup>6</sup> *Ibid.* at 5-198.

<sup>7</sup> *Ibid.* at 199-713.

<sup>8</sup> *Ibid.* at iii-iv.

<sup>9</sup> *Ibid.* at 5-97.

<sup>10</sup> "Lower" Canada was created in 1792.

<sup>11</sup> F.M. Greenwood, *Legacies of Fear; Law and Politics in Quebec in the Era of the French Revolution* (Toronto: University of Toronto Press, 1993).

<sup>12</sup> P.-B. Mignault, "Le Code Civil au Canada" in *Le Code Civil 1804-1904, Livre du Centenaire*, t. 2 (Paris: Arthur Rousseau, 1904) at 725.

matter of debate. Professor Brierley is the leading historian of the drafting of the *Civil Code of Lower Canada* (C.C.L.C.) (1866),<sup>13</sup> and Professor Macdonald, the chronicler of legal education at McGill University and of Quebec legal literature.<sup>14</sup> Not surprisingly, they emphasize that the *Civil Code of Lower Canada* combined the pre-revolutionary French legal tradition with the nineteenth-century economic liberalism closer to the heart of the mainly anglophone business community of Montreal.<sup>15</sup> Their meticulous account of Quebec civil law in the first century after codification<sup>16</sup> acknowledges that the perception of the *Code* as the “legal embodiment of French legal culture” was the main interpretive tendency in this period, although the authors themselves clearly prefer to emphasize, even during this period, the “mixed character of Quebec civil law and the diversity of the philosophic and cultural forces that inspired it.”<sup>17</sup>

This preference likely reflects the McGill Faculty of Law’s commitment to a “polyjural, universalist and bilingual curriculum,” which Professor Macdonald has traced to the late 1850s.<sup>18</sup> That commitment attracted, as the first non-practising professor, Fredrick Parker Walton in 1897, and his successor as Gale Professor of Roman Law and Dean, Robert Warden Lee in 1915.<sup>19</sup> These names serve as synonyms, even today, for English-language literature of French and Roman-Dutch law, respectively.<sup>20</sup> J.J. (“Hamish”) Gow and H.R. (“Bobby”) Hahlo come to mind as more recent McGill acquisitions from Scotland and South Africa. It is not unlikely that the continued magnetism of McGill for leading scholars from anglophone civil law jurisdictions was also a crucial factor in the survival of the civil law in Quebec, since this presence visibly and decisively contradicted the conventional wisdom of anglophone North America that all English-speaking people live under Anglo-American or Anglo-Canadian common law.

Walton had become the first full-time professor of law in Quebec (and, apparently, in all of Canada) in 1897; in 1966, Paul-André Crépeau of the McGill

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<sup>13</sup> J.E.C. Brierley, “Quebec’s Civil Code Codification: Viewed and Reviewed” (1968) 14 McGill L.J. 521.

<sup>14</sup> R.A. Macdonald, “The National Law Programme at McGill: Origins, Establishment, Prospects” (1990) 13 Dalhousie L.J. 211 [hereinafter “National Law Programme”]; R.A. Macdonald, “Understanding Civil Law Scholarship in Quebec” (1985) 23 Osgoode Hall L.J. 573.

<sup>15</sup> *Quebec Civil Law*, *supra* note 5 at 35.

<sup>16</sup> *Ibid.* at 33-84.

<sup>17</sup> *Ibid.* at 68.

<sup>18</sup> “National Law Programme”, *supra* note 14 at 225.

<sup>19</sup> *Ibid.* at 243, 248.

<sup>20</sup> M.S. Amos & F.P. Walter, *Introduction to French Law*, 1st ed. (Oxford: Clarendon Press, 1935); R.W. Lee, *An Introduction to Roman-Dutch Law*, 1st ed. (Oxford: Clarendon Press, 1915).

law faculty became “the first full-time academic in Quebec ever to be charged with responsibility for major law reform.”<sup>21</sup> His appointment as head of the newly-created provincial Civil Code Revision Office (C.C.R.O.) coincided with the “silent revolution” within francophone Quebec society, a phenomenon documented dramatically by statutory provision for civil ceremonial marriage in 1968(!). Professor Crépeau “was able to marshal the financial resources of the government of the day and the human resources of the legal professions, the bench, the university world, and the government itself, as well as foreign experts” to cast the task of Civil Code revision as a “vast process of rethinking” of the civil law.<sup>22</sup>

The major product of the first phase of that effort was the enactment of the 1980 *Civil Code of Québec*.<sup>23</sup> This was a partial recodification, devoted mainly to family law and coexisting with (although increasingly displacing, through partial revisions) the 1866 C.C.L.C. The historical introduction leaves us here with a brief reference to “further legislative activity” between 1980 and 1989. The historical survey concludes by stating:

The implications of the work of the C.C.R.O. for the future of Civil law, as reflected through the completed *Civil Code of Québec*, cannot be evaluated until the Code is fully implemented and its statutory complements are in place. The interpretation of the Code, both doctrinally and judicially, will turn upon the understanding of the place of a Code in the legal order and its relation to the theory of sources it presupposes.<sup>24</sup>

The remainder of the work here reviewed should be read with this statement in mind. For as initially mentioned, the C.C.Q. and its implementing legislation *did* enter into effect on January 1, 1994, and the theory of sources which it presupposes is spelled out, in so many words, in its Preliminary Provision. Furthermore, articles 6 and 7 of the new *Code* condition the exercise of private law rights to the general and pervasive requirement of good faith and its mirror image, the doctrine of abuse of right. It is difficult, with these provisions in place, to read the next two chapters of the work here under review, dealing with the sources and basic jural concepts of Quebec civil law,<sup>25</sup> without being plagued by the nagging question as to their present utility. For unlike legal history generally, applied legal theory cannot well be divorced from the present.

<sup>21</sup> *Quebec Civil Law*, *supra* note 5 at 86, note 71.

<sup>22</sup> *Ibid.* at 86.

<sup>23</sup> *Ibid.* at 93-96.

<sup>24</sup> *Ibid.* at 97.

<sup>25</sup> *Ibid.* at 98-198.

This brings us to the second main part of the book, devoted to "Institutions of the [Pre-1994 Quebec] Civil Law." It consists of some twenty-six chapters and ten additional titles, each followed by a section entitled "For further reading". These bibliographic sections are of immense value, in particular since they cite French-language sources not only in the professional and academic law journals but also in symposia and *Festschriften* — in effect further substantiating the editors' claim that since 1865, "jurists in Quebec have produced a *corpus* of scholarship that is without parallel elsewhere in Canada."<sup>26</sup> References to literature include some 1993 publications; statutory references stop at 1989.

There is, however, a fundamental question as to the current utility of a *summa* (or perhaps more accurately, of a *glossa ordinaria*) of Quebec civil law, codified commercial and private international law as they stood in 1989, even if updated interstitially by citations to more recent literature. The pre-eminent source of Quebec civil law is now, and will be for some time to come, the *Civil Code of Québec* which entered into effect on January 1, 1994. In their Preface, the editors state that readers should have at hand a recent edition of the C.C.L.C.,<sup>27</sup> but surely a still more recent edition of the C.C.Q., with the appropriate implementing texts and concordances, is much more essential even for legal historians. The ultimate test of the influence of the past is not the most recent past, but the present.

In the following discussion, this proposition will be tested in five areas of interest to comparative lawyers and those actively engaged in transnational legal advice: forced heirship, trusts, security interests in movables, products liability, and recognition of foreign judgments. The rationale behind this selection is reasonably familiar: the *Quebec Act 1774*<sup>28</sup> had abolished the *légitime*; trusts in Civil law countries cannot be based on the (Anglo-American) common law distinction between "legal" and "equitable" title; modern commercial finance needs more than possessory pledges; products liability has become "Europeanized"; and Quebec does not enjoy a good reputation in international civil procedure.

To take this last matter first, Professor Patrick Glenn's summary of private international law states, "Quebec law currently permits re-examination of the merits of the foreign decision, even when the foreign court was competent ac-

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<sup>26</sup> *Ibid.* at 125.

<sup>27</sup> *Ibid.* at iii.

<sup>28</sup> *An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America* (U.K.), 14 Geo. 3, c. 83.

ording to Quebec rules and where there are no other obstacles to recognition."<sup>29</sup> He rightly finds this possibility of re-examination of the merits of foreign judicial decisions "unwarranted".<sup>30</sup> So did the Legislature, for "examen au fond" of foreign judgments is expressly barred by article 3158 of the C.C.Q. This provision does not, however, apply to foreign judgments rendered or resulting from foreign judicial proceedings instituted before January 1, 1994,<sup>31</sup> thus starkly underlining the abrupt nature of this highly welcome break with the past.

As described by Professor Brierley,<sup>32</sup> freedom of testation is one of the fundamental principles of the Quebec law of succession, but in 1989 it was qualified at least indirectly by the statutory recognition of post-mortem alimentary claims by the surviving spouse and ascendants, as well as descendants in the direct line. Like the German *Pflichtteil*, these are pecuniary claims against the heirs, not rights of inheritance strictly speaking. Departing in this respect from the testators' family maintenance model originating in the Antipodes and followed generally in the common law Commonwealth, these claims are subject to rather drastic limitations as to time and amount. The 1989 reform thus described is now reflected in articles 684-695 of the C.C.Q. In its treatment of this subject, the work here reviewed thus reflects current law.

Trusts made their first appearance in Quebec through legislation enacted in 1879 and integrated into the C.C.L.C. in 1888.<sup>33</sup> Trusts are dealt with in various contexts in the work here under review, readily located through the index. Professor Jeremy Webber notes that "the absence of a doctrine of estates and the presence of the concept of indivisible ownership are obvious embarrassments to a clear theoretical understanding of the trust in Quebec."<sup>34</sup> In the settlor-trustee-beneficiary triangle, *somebody* has to be the owner — or perhaps, nobody. That, at least, is the solution adopted by the C.C.Q. Article 1261 provides, in so many words, that the trust patrimony, consisting of the property transferred in trust, is "autonomous and distinct from that of the settlor, trustee or beneficiary." Consequently, none of the aforementioned parties has any "real right" (right *in re*) in the object of the trust. Pursuant to articles 1290 and 1291, the settlor, the beneficiary "or any other interested person" can enforce the terms of the trust against the trustee and, with judicial authorization, against

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<sup>29</sup> *Quebec Civil Law*, *supra* note 5 at 712.

<sup>30</sup> *Ibid.*

<sup>31</sup> "Transitory Provisions", *supra* note 1, art. 170.

<sup>32</sup> *Quebec Civil Law*, *supra* note 5 at 334, 347-49.

<sup>33</sup> *Ibid.* at 77.

<sup>34</sup> *Ibid.* at 275-76.

third parties on behalf of the trust. The trust *res* as “*patrimoine d’affectation autonome*” created by article 1261 may indeed be the “strangest” among the beasts in the forest,<sup>35</sup> but it is also the newest. It surely deserved mention in the work here under review.

Nonpossessory security interests in movables were also not enforceable under the C.C.L.C. as originally enacted. Pursuant to article 1970, the privilege created by the pledge of movables subsisted only while the creditor or an agreed-upon escrow holder was in possession, and article 2016 defined hypothec as a “real right upon immovables”. As chronicled by Professor David Stevens, this system “was gradually overtaken by statutory innovation, commercial practice, judicial interpretation, and amendments to the Code itself.”<sup>36</sup> The result was a “hodgepodge” of exceptions to the initial codal scheme.<sup>37</sup> Once again, the C.C.Q. has brought drastic change. Article 2665 provides, in so many words, that a hypothec can be movable or immovable, and that a movable hypothec can be created “with or without delivery of the movable hypothecated.” Movable hypothecs without delivery are of course subject to special rules, but just like hypothecs of immovables, they can be set up against third parties if registered (“published”).<sup>38</sup> This reform too, should have been “published” in the work here reviewed.

We turn, finally, to products liability. The background, narrated by Professor Daniel Jutras, sounds reasonably familiar to students of comparative law. Article 1053 of the C.C.L.C., corresponding to article 1382 of the *Code civil*,<sup>39</sup> was predicated on “fault”, and article 1054(1) of the C.C.L.C., corresponding to article 1384 C.N., relating to damage by things, was hobbled with the requirement of “*garde de chose*”. Prodded by the Privy Council, Quebec courts eventually followed late-nineteenth century French jurisprudence in recognizing article 1054(1) as an independent basis for liability, but, this time to some extent restrained by the Privy Council, they did not abandon the “centrality of fault in Quebec law”.<sup>40</sup>

This represented the state of the law in 1993, at least for those who were not victims of industrial or automobile accidents subject to special statutes out-

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<sup>35</sup> It is characterized as such by M. McAuley & J. Talpis, “The Quebec Trust in the ‘Real World’” in *Conférences sur le Nouveau Code Civil du Québec* (Cowansville, Que.: Yvon Blais, 1992) 55 at 59.

<sup>36</sup> *Quebec Civil Law*, *supra* note 5 at 612.

<sup>37</sup> *Ibid.* at 619.

<sup>38</sup> Arts. 2663, 2696-2701 C.C.Q.

<sup>39</sup> (1804) *Code civil des Français* [hereinafter “C.N.”].

<sup>40</sup> *Quebec Civil Law*, *supra* note 5 at 459.

side the *Code*.<sup>41</sup> Moreover, as reported by Professor Patrick Glenn in another context, the Legislature had shown strong distaste for products-liability plaintiffs in other jurisdictions.<sup>42</sup> Professor Glenn reports that the provincial *Code of Civil Procedure* provides Quebec courts with "exclusive jurisdiction over all demands or actions founded on liability for damage suffered in or outside Quebec as a result of exposure to or use of raw materials, whether processed or not, originating in Quebec."<sup>43</sup>

This legislation continues to present an obstacle to the recognition and enforcement of foreign products liability judgments against Quebec asbestos miners and manufacturers, since article 3165(1) of the C.C.Q., in conjunction with article 3155(1), denies such recognition and enforcement where, by reason of the subject matter, Quebec law asserts exclusive jurisdiction. Products liability, however, came to Quebec on January 1, 1994. Article 1468(1) of the *Code* provides:

The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.

The second paragraph of that article extends the same rule to suppliers (including importers), and article 1474(2) qualifies products liability by providing a "state-of-the-art" defense. "Safety defect" is further defined in article 1469 to include design and manufacturing defects as well as failure to warn. Article 85 of the Transitory Provisions provides that civil liability is governed by the legislation in force at the time of the causal fault or act. Whether this justifies omission of reference to the forthcoming products-liability revolution in Quebec seems doubtful.

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Individual contributions to the work here under review should not be faulted, of course, for complying with the editors' decision to exclude comment on the new C.C.Q., enacted at the time but not as yet in force. The editors advance two reasons and one excuse for that decision. The reasons provided are that a critical examination of the new enactment and its comprehension as "but

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<sup>41</sup> *Ibid.* at 460. Note that product liability does not appear in the index.

<sup>42</sup> "Other jurisdictions" refers mainly, one supposes, to the Eastern part of this reviewer's state of residence (see most recently *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96).

<sup>43</sup> *Quebec Civil Law*, supra note 5 at 703.



the latest legislated expression of the Civil law tradition” will be more readily accessible only upon the basis of a “general” work such as this. It would be “premature to put forward any synthetic perspective ... prior to the accumulation of several years of judicial and doctrinal exposition of the new Code and a like experience with the professional practices by which its specific prescriptions are given concrete expression.”<sup>44</sup> The excuse offered provides that the inclusion of comment on the “new” Code would have “expanded the compass of the present work, already lengthy, beyond manageable proportions.”<sup>45</sup>

Turning first to the excuse: A compendium of 728 pages on the entire civil law, codified commercial law, and private international law of Quebec in historical context is not “lengthy” but rather, given its comprehensiveness, admirably concise. Coverage of the “new” C.C.Q. could have been accomplished by short synopses, like Theodor Kipp’s notes on the German Civil Code in the 1900 and 1906 editions of Bernhard Windscheid’s authoritative treatise on the *jus commune* as it prevailed in Germany through December 31, 1899.<sup>46</sup>

The editors have chosen instead, in the Year XI, to cut short their account of the “*ancien droit*” and the “*droit intermédiaire*” of Quebec by limiting it to the “*projet*” of the Year VIII. The Code civil finally enacted by the Law of the 30th of *ventôse* of the Year XII was also “but the latest expression of the Civil law tradition” at that time.<sup>47</sup> It did, however, set its own tradition which is still very much with us today. The C.C.Q., too, might be (at least so it is hoped) more than an episode in the history of the civil law of the province.

That said, it remains to acknowledge the outstanding value of the work here under review as a *summa* of pre-1994 Quebec civil law in historical perspective. It should have its place on every comparative lawyer’s bookshelf — along with the Code that has at last crowned the work of our other distinguished colleague at McGill, Professor Paul-André Crépeau.

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<sup>44</sup> *Ibid.* at iii.

<sup>45</sup> *Ibid.*

<sup>46</sup> B. Windscheid, *Lehrbuch des Pandektenrechts*, 8th & 9th eds. by T. Kipp (Frankfurt: Rütten & Loening, 1900 & 1906).

<sup>47</sup> On Nov. 24, 1793, in the wake of the French Revolution, the National Assembly of France decreed that a new era began with the foundation of the Republic on Sept. 22, 1792. The Legislature decreed that 1792 was Year I. The months of the year were also renamed (*ventôse* was the third winter month) and each divided into three ten-day periods called decades. The Republican calendar remained in force until Jan. 1, 1806 when France returned to the Gregorian calendar (R. Batiza, “Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law” (1982) 56 Tulane L. Rev. 477 at note 85, p. 497).