THE LAW CANNOT STAND STILL

Walter S. Johnson*

"Les codes se font avec le temps;
à proprement parler, on ne les fait pas."
PORTALIS.

Now that our Civil Code is to undergo a careful scrutiny and possibly some amendment, it may be of interest to consider some of its ties with the law of France.

The codifiers were instructed, not to carve a code out of the law of France, but to reduce to codal form the laws of Lower Canada, following as closely as convenient, the form and arrangement of the Code Napoléon. It was no small task. What was sought was a code reflecting and preserving a precious body of law, inchoate because not organized, having different sources, and rooted back to the establishment of the Sovereign Council in 1663, with the accretion of several of the great French *Ordonnances,* the old French law expounded by Dumoulin, Domat and Pothier, the Coutume de Paris, English commercial law, custom and usage, and the decisions of our courts — a body of law indigenous because acceptable and over many years moulded to our ways of life in a world very different from that of France whether ancient or modern. It was what we conveniently call the *ancien droit* — historically speaking; as distinct from the *droit moderne,* namely the Civil Code, which came into force on Augnst 1, 1866, with the changes made in it since that time. The Code, then, has always been regarded as a reproduction of our *ancien droit,* except where a text is indicated by the codifiers as *droit nouveau.*[1]

The task of the codifiers of the Code Napoléon was a very different one. The Revolution in its final phase was and affected a complete break with the past — with a society and regime feudal in character, corrupt, bankrupt of any hope for social justice, exploited for a privileged aristocracy and powerful groups and institutions, the law a hopeless medley of conflicting *coutumes,* the judges holding office often as members of the *familles de robe,* by inheritance and even by purchase. The Revolution blazed, out of control and irresistible, as does a volcano in eruption. A world had to be made over, and the law of France unified for all its citizens on a basis of absolute equality. How and on what foundation and in what spirit were the codifiers to proceed?

**Of the Montreal Bar.*

[1]Mignault, *Droit Civil Canadien,* I, p. 11. And article 2613 expressly provides: "The laws in force at the time of the coming into force of this code are abrogated in all cases: In which there is a provision herein having expressly or impliedly that effect; In which such laws are contrary to or inconsistent with any provision herein contained; In which express provision is herein made upon the particular matter to which such laws relate", with a reserve as to "transactions, matters and things anterior to the Code."

Napoléon had brought order out of revolutionary chaos, and the nation looked forward more calmly and with hope for better days.

It is the spirit in which the French codifiers approached their great work that is so noticeable. The social organism, short of course of many thousands who had been exterminated as enemies of the people, was the same — shopkeepers, artisans, doctors, lawyers, rentiers, peasants. Life had to go on. There was an old society, not to be made over but to be given new and equitable laws which would be a bridge between the old familiar ways and the revolutionary achievement of liberty and equality of all citizens before the law. Mourlon, as reproduced by Mignault,[2] says of the codifiers:

> Ils ont emprunté au droit romain, aux anciennes ordonnances, les maximes dont la sagesse et l'utilité pratique avaient été consacrées par un long usage et par l'autorité des hommes les plus éminents dans la science. Dumoulin, Domat et Pothier leur ont servi de guides. Mais il fallait assortir le vieux droit à une société qui avait cessé d'être aristocratique. La démocratie avait proclamé des règles nouvelles.

So that the historical sources of the French law of the Code Napoléon were the *ancien droit* — the Roman law of the *pays de droit écrit* and the more Germanic *coutumes* of the north, the *ordonnances* and *édits* and *arrêts de règlement* from the commencement of the monarchy down to the 17th September 1789, when the intermediary period of Revolutionary law making began; secondly, the laws made from that date until the new Code Napoléon was finally in force, on March 31, 1804 — the *droit intermédiaire*. The *droit nouveau* is the Code itself with the changes made in it.

But the promulgation of the new Code decreed by the *Loi du 30 ventôse*, provides by article 7 that:

> A compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d'avoir force de loi générale ou particulière, dans les matières qui sont l'objet des dites lois composant le présent code.

That is a more laconic and severe cancellation of the *droit ancien* than is our article 2613 C.C. It left the new Code to be interpreted in the spirit that guided the codifiers, as explained by Mourlon:[3]

> Les Français sont égaux devant la loi; Il n'est point permis aux citoyens de faire des conventions dont l'effet serait de compromettre l'égalité devant la loi, en établissant d'une manière permanente l'inégalité des fortunes; Le droit civil est indépendant des idées religieuses; La liberté individuelle et l'nviolabilité de la propriété doivent être protégées.

Beyond that informing spirit, bringing out of the treasuries of French law things both old and new, there remained the problem of the daily application of the articles of the Code, remarkable for their concise expression and connotative force, to cases before the courts. The Code was welcomed by the man in the street as a literal statement of the law governing his life and affairs, which he who ran could read and understand, and to be read literally. Jeremy Bentham, whose reforming ideas were well known on the Continent, sought to

[2]Mignault, *op. cit.*, at p. 40.

[3]Mignault, *op. cit.*, at p. 40.

reduce to the narrowest possible limits the need for interpretation of laws by lawyers and judges. In his view, they thrived on the obscurity and the plethora of laws, and their interpretations added to the uncertainty. Codification, and strict application, with no or the least possible interpretation, of the codified texts, finding and applying the law literally as thus stated, alone could bring certainty and avoid the ambiguities and distinctions of judge-made law. He drafted model codes of English law which erred because they sought to provide a rule for every possible incident, not realizing that this was neither the function nor within the range of any code. That the new code was intended by the codifiers to be very complete in itself, was doubtless true. It was a statement of the law for a new age. It had for many an excessive importance as being so clear and so free from ambiguity that it needed no commentator to elucidate it; though they did not all go so far as did Napoléon in his pride: when the first commentary appeared, Napoléon cried, "Mon code est perdu." That, as Gény[4] says, was not the view of many of his most able advisers in the work of codification; yet for many years it decisively influenced the method or principles of that interpretation and comment which in the nature of things had to come and has been so notable a feature of French law.

And here we enter upon very interesting ground. The first commentators on the new Code went with vast energy and enthusiasm to the work of analysis, comment, and explanation. Proudhon, Duranton, Toullier, Duvergier, Taulier, trained under the old customary law which invited and needed elaborate comment upon text and custom and jurisprudence, refused to concede that the new Code of positive law could entirely stand alone and needed no illumination from the *ancien droit*. They were very dogmatic about it, and Troplong later even more so. Where a text seemed to them to invite or need explanation or justification, they went freely to old custom, *coutumes*, the Roman law, the vast collections of jurisprudence, the *travaux préparatoires* of the codifiers. True, the old law had been abrogated and instead a positive rule been enacted, but they were teachers and expositors of law, entitled, even bound in loyalty, to go behind and beneath a positive text and independently to expound their view of it, and to criticize the current judgments of the courts with which they were often in conflict. The danger was that they would drag back features of the old common law having little in common with the intent and spirit of the new law; while the judges' first obligation was to enforce the law of the Code. There was, in the search for justice, a conflict between the narrow point of

[4]F. Gény, *Méthode d'interprétation et sources en droit positif*, 2nd Ed., 1919, Vol. I, p. 23. That the French commentators are seldom in agreement is well known. See the amusing article, "English and French Lawyers", in (1883), 6 Legal News, p. 321, and the remark of a distracted Louisiana judge: "When jurists of a race so much addicted to *theoretical speculation*, and so little addicted to reverence for each other's opinions draw a conclusion from the Code, in which they unanimously concur, we may *perhaps* set it down as an obvious truth."

view of the legalist and the broader one of the legal humanist[5] — sterility as against organic growth. Legislative interference, often and possibly unfortunate, was the penalty if the narrow road proved to be the wrong one. "But the liberal deviseth liberal things; and by liberal things shall he stand."[6] "La liberté et l'égalité dans l'ordre de la société civile étaient des bienfaits nouveaux."[7]

Zachariae, little consulted now, has a way of stating principles clearly and simply. He begins his section on the *Théorie de l'interprétation des lois,* saying:

> L'interprétation de la loi est ou grammaticale ou logique. La première doit donner le sens de la loi d'après le texte; la seconde, d'après la raison ou le motif de la loi, *ex ratione legum.*
> Il peut être nécessaire de connaître la raison de la loi, soit pour éclairer telle ou telle disposition, soit pour l'étendre, soit pour la restreindre.[8]

Passing in his next section to *L'interprétation du Code Napoléon en particulier,* he says it is important to observe certain rules:

> 1. Dans les matières tirées de l'ancien droit ou de la législation intermédiaire, il faut consulter les sources. Toutefois, lorsqu'il y a lieu de présumer que le législateur a voulu rester fidèle à l'ancien droit, il ne faut pas, même dans le doute, introduire dans le Code civil un principe de l'ancien droit, qui ne se trouve contenu dans ce Code ni d'une manière expresse, ni implicitement; et, pour cela, il ne faut pas perdre de vue les conséquences résultant des modifications opérées par le Code civil quant à l'ancien droit, même relativement à des principes de ce droit non expressément modifiés par le Code.[9]
> 2. La discussion du Code Napoléon au Conseil d'Etat et les observations du Tribunat sur le projet du Code sont très utiles pour son interprétation . . . On ne peut . . . tirer de cette source les moyens de remédier aux lacunes du Code . . .
> 5. Il importe encore d'observer que le projet de Code civil a été préparé par des hommes d'écoles différentes, les uns originaires des pays de coutume, les autres des pays de droit écrit. C'est ainsi que, dans plusieurs dispositions relatives aux droits de la femme mariée, il n'est question que de la femme commune en biens . . .[10]

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[5]Gény, *op. cit.,* p. 23, note 2, says of Merlin: "Je n'ignore pas que l'opinion courante représente Merlin comme étroitement légiste. Voy notamment: *Mémoires du chancelier Pasquier* — 'Je n'ai jamais connu un homme qui eût moins le sentiment du juste et de l'injuste. Tout lui semblait bon et bien, pourvu que ce fût une conséquence d'un texte de loi.' Mais la sincérité m'oblige à dire que la fréquentation des oeuvres de ce jurisconsulte m'en laisse une impression toute différente. On y trouve la marque d'un juriste solid, mais non étroit. Et, s'il n'a pas toutes les audaces de Dumoulin, il sait pourtant, à son exemple, faire progresser le droit en dehors de l'action législative." Gény describes him as the "bridge between the old law and the new."

[6]Ezekiel, 32:8.

[7]Preface, Vol. I, p. VII, by Massé et Vergé in their edition, 1854, of Zachariae's *Le Droit Civil Français.* There had been five editions of Zachariae in Germany when, about 1839, Aubry et Rau made a French translation.

[8]*Op. cit.,* p. 52.

[9]He adds: "L'inobservation de cette précaution a donné lieu à tant d'erreurs, que l'on est amené à se demander si l'interprétation du Code civil n'a pas plus perdu que gagné par l'application de la règle qui nous occupe."

[10]He adds: "En général, la lutte entre les coutumes et le droit écrit a eu l'influence la plus marquée sur la rédaction du Code."

And he concludes, warning that:

> Tout ce qui précède ne saurait ébranler cette règle immuable, à savoir, que le Code doit surtout s'expliquer par lui-même; chaque article, en partie par l'examen attentif de son texte, en partie par le sens qui résulte de sa relation avec les autres dispositions du Code.

That was a fair and balanced expression, giving the Code first and last authority, of the inherent right of judges and jurisconsults to interpret the Code where necessary; a refusal, as Gény says, to "facilement conçevoir que la promulgation d'une loi civile générale eût coupé les ailes au progrès doctrinal ou judiciaire du droit appliqué."[11] But the courts were less inclined than the commentators to accept those views, and there was conflict between *la doctrine* and *la jurisprudence*. As the late Dean Walton explained it:

> During the first fifty years after the passing of the Code Napoléon the commentators paid very little attention to the judgments of the courts. They interpreted the Code by the light of reason, by consideration of the old law, and by discovering from the reports of the codifiers and the other official documents contained in Locré whether the intention had been to retain the old law or to change it. In the university teaching of law this was markedly the case.
> As M. Esmein expresses it, "La doctrine faisait un peu la fière et ne se compromettait pas volontiers dans le commerce de la jurisprudence." On the other hand, the courts, while regarding the professors with respect thought their theories often academic and unpractical, and frequently decided contrary to principles laid down by the commentators.
> The older writers are continually obliged to say in effect, "This is the view taught in the schools and supported by the best writers, but unfortunately the courts will not accept it."[12]

It is hardly surprising to find exponents of a narrower system, determined, while admitting that interpretation was necessary, to refuse, or at least limit, the aid of sources outside that Code. For them the Code was positive law, its force and meaning to be found within itself, from its text and the spirit that inspired it, as Gény explains — a view that became very general from 1841 onward. In that year, Blondeau, Dean of the Paris Faculty of Law, lectured before the *Académie des sciences morales et politiques*, asserting that the only source of judgments must be the actual law — the Code, which is essentially the legislator speaking, for which and for whom precedents, authors, usage, sentiment, equity, general utility, and maxims cannot be substituted:

> A ses yeux, donc, la loi, toute seule, doit et peut, grâce à une interprétation, en quelque sorte interne, suffire à toutes les exigences de la vie juridique. Que si le juge, chargé de satisfaire ces exigences, se trouve en présence d'une loi ambiguë, absolument insuffisante, ou de loi contradictoires, et que la pensée du législateur, sur le point à trancher, lui échappe, Blondeau va jusqu'à dire qu'"*il aura des motifs aussi puissants pour s'abstenir que pour agir, et devra considérer ces lois comme n'existant pas, et Rejeter La Demande*."[13]

[11]*Op. cit.*, p. 23. That it was acceptable as such an expression is indicated by the fact that Massé et Vergé presented their translation for the use of the profession as well as of teachers and students.

[12]F. P. Walton, *The Scope and Interpretation of the Civil Code*, 1907, p. 122. Dr. Walton at the time was the distinguished Dean of the McGill Faculty of Law. The book is one which every student should read.

[13]The italics and capitals are Gény's.

Gény says that except for that final bit of exaggeration, "which was far from being accepted by all", the "fonds essentiel" of his thesis became the basis of the method.

> Enseignée, sinon toujours mise en pratique, par les auteurs les plus accrédités des traités généraux de droit civil, qui sont encore classiques aujourd'hui. Légèrement atténués chez Demante et chez Marcadé, cette méthode apparait très reconnaissable chez Demolombe, Aubry et Rau, surtout chez Laurent. C'est elle encore, que professent G. Baudry-Lacantinerie et A. Vigié dans leurs ouvrages élémentaires, qui semblent le mieux représenter, en moyenne, la physionomie générale de l'enseignement actuel du droit civil dans les facultés de droit françaises. On la rencontre aussi, à peine modifiée, tant dans le récent *Commentaire du Code civil* de Th. Huc, que dans la partie parue du *Cours de droit civil français* de Ch. Beudant.[14]

Gény thinks Blondeau was not a little influenced by Jeremy Bentham's teaching, which we earlier mentioned. If so, Bentham had greater influence on the changed current of legal interpretation in France than we in Quebec have generally recognized. An English authority, evidently with Gény's statement in mind, is doubtful:

> It has been contended that the method of literal and logical interpretation, which rejected all considerations of policy, and which characterized the work of the French legal writers in the nineteenth century, known as the *"école des interprètes"*, had its origin in Bentham's writings. However, the suggestion seems to be unfounded. Bentham's preference for legislation and for the strict interpretation of statutes was inspired by the desire to reduce the law-making power of the judiciary. The "école des interprètes" applied strict methods of interpretation because the new Codes had abrogated the old common law with the result that gaps in the Code could not be filled by a supplementary common law. Instead, the solution of every question had to be found within the four corners of the statute.[15]

Gény makes the interesting comment that to appreciate clearly Laurent's system, one must understand that for him an interpretation rigorously strict of the texts was necessary "pour garantir la liberté du citoyen, en précisant la notion de l'ordre social"[16] — that is, one may deduce, the social order embodied and visualized in the new Code and in its spirit of justice, liberty and equality for all, free from suggestions of policy, shorn of privilege or ideologies, free at least from ancient inequalities and injustices associated with the abrogated law.

On the whole, the result has been that the old antagonisms and contrarieties of doctrine and jurisprudence have gradually tended to disappear. The

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[14]In note (1), p. 26, Gény says the appearance of Laurent's *Principes de droit civil français* marked the zenith of this conception of interpretation, since when his doctrine has become less preponderant than formerly. In note (1), p. 24, Gény says: "L'interprétation, subjective et souvent fantaisiste de Troplong, a exercé une influence funeste. C'est elle, surtout, à mon avis, qui a déterminé la réaction violente et exacerbée de Laurent," which reminds me of the quip the late revered Judge Mathieu would smilingly make when I was young at the Bar and Troplong was confidently cited to him — "Ah, oui — trop long!"

[15]*Jeremy Bentham and the Law, A Symposium,* London, 1948, p. 208, in the chapter by Prof. K. Lipstein, "Bentham, Foreign Law and Foreign Lawyers." I think, however, that Gény gives good reasons for his opinion. Besides, such a sharp reversal hardly comes spontaneously — it originates with a mind ahead of its period.

[16]Gény, *op. cit.*, p. 26, n. 1. Bugnet, the editor of Pothier and a professor in the Paris Faculty: "Je ne connais pas le droit civil; je n'enseigne que le Code Napoléon."

jurisconsults more readily accept the consistent decisions of the courts, the courts are influenced by the weightier doctrine. The modern writers, faced with the social and industrial changes moving now so rapidly and with the necessary new law designed to control them, have had to orient their thought and in some ways their conception of the Code — even the Code, that once immutable foundation rock of a new regime that has merged into a newer and more complex but not happier age.[17] The law must change as society develops — the new wine must mature in at least not the oldest bottles.

Now what I have tried to suggest is a very brief sketch indeed of a subject with many ramifications and a vast and complex literature. If it serves any useful purpose it is to enable us in Quebec, when we read and cite French doctrine and jurisprudence in our cases, to visualize in some degree the stages and shifts of the evolution through which the French law has passed, and to sense whether, for example, the author we cite stood for strict and literal interpretation "within the four coruers of the Code" or for a larger interpretation grounded in the historical sources, in what may be called the spirit of the particular text in the light of its background and historieal motive. We have both schools in Quebec.

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In Quebec some interesting problems arise. The Code, as we have said, codifies the old French civil law of Quebec as modified by statute and usage, and the broad principles of the commercial law which had both French and English sources. It has been customary, both before and since the Code, in case of doubt, in civil law matters to refer to French authority, and in commercial matters to both French and English authority. More and more we have come to rely, very properly I think, on the Reports of our codifiers when we seek an interpretation; for they earefully express their intention and their reason — reproducing an article of the Code Napoléon, or making some change found desirable in France, and often returning to the old law which the French Code had rejected, especially where Pothier's views were in question.

The old French law is for us a precious heritage. But I think the Quebec Act did more than guarantee to us the survival of the old law — it guaranteed that our civil law, *if we desired,* should be in future French law. It is for us to say how much of the evolving French law we adopt from time to time. It must be remembered that the old law codified in our Code is of massive content. As the Honourable Thibaudeau Rinfret said recently:

> On s'accorde à faire remonter à la date de l'édit de création du Conseil Souverain (1663) l'introduction de tout le droit tel qu'il existait alors en France. L'on y ajoute, cependant, comme source du droit civil canadien, les édits et ordonnances françaises subséquentes qui sont enregistrées au greffe du Conseil Souverain, ainsi que les arrêts et les règlements de ce Conseil ou du Conseil d'Etat du roi.[18]

[17]"The modern writers on the Code have applied themselves to fitting all this new law into the new systems" — Walton, *op. cit.,* p. 123.

[18]*La revision du code civil* (1955), 15 R. du B. 313.

Where the Code has clearly retained the old law by codifying it in an article or group of articles, we inevitably turn to Pothier and to the contemporary jurisprudence to ascertain the meaning, exhuming the past and sometimes, though plausibly enough in the circumstances, adopting a decision of some obscure French court that pondered the question several hundred years ago under a feudal *coutume*.[19] The Code Napoléon contains articles adopting Pothier's view in certain matters, and we have adopted the French article or articles, but French courts and authors have found in those articles new meanings and adaptations more suited to later times in France. Do we follow Pothier, though changed conditions here would justify the later French view? Or consider the numerous articles, new law, of the Code Napoléon which our Code textually reproduced and which now have been debated for a hundred and fifty years in France, with so many new and creative results that the Code Napoléon must be revised. Are we to accept those later and changed views, when interpreting our corresponding articles, or are we to interpret our articles in our own way, with an eye turned rather to the past and ignoring our indigenous changes, socially, industrially, and commercially? To what extent are we to be influenced by the subtleties of French jurisconsults?

The late distinguished Antonio Perrault, Q.C., raised the whole question very acutely in his discussion of the decisions in *Doucet* v. *Shawinigan Carbide Co.*,[20] before the Association Henri Capitant in 1939.[21] The issue was the extent of the liability "rattachée au fait des choses" under article 1054 C.C., whether there was responsibility without proof of fault, and all the judges were greatly divided.[22] He says this:

> Ce que je voudrais dégager de cette cause c'est, si je puis dire, une leçon d'à côté. Elle mit en lumière les deux écoles qui, en notre province, étudient et appliquent le Code civil et l'influence très grande que juristes et tribunaux français exercent et peuvent continuer d'exercer sur le développement de notre droit privé.
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> Au jugement de quelques-uns, le 1 août 1866 n'a pas, par la promulgation de notre Code Civil, marqué la phase ultime de l'évolution de notre droit privé. Ce code contient des textes, des règles juridiques, promulguées par le législateur compétent, et que, donc, nous devons appliquer. Mais la société canadienne est en mouvement; des idées nouvelles y pénètrent, des coutumes s'y modifient, d'autres besoins surgissent, une compréhension plus sociale du rôle réservé au droit se fait jour. Comment résoudre les problèmes posés en 1939 avec des textes édictés, il y a trois-quarts de siècles? Et l'on cherche à faire violence au texte pour y trouver des principes ou des idées juridiques que n'avait pas le législateur en 1866.
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> C'est alors que se dressent les conservateurs, dans le bon sens du mot, refusant aux juristes et tribunaux d'assumer une fonction réservée au législateur et qui prétendent

[19]We must select, on the assumption that what is so obsolete as to be repugnant to our concepts is no longer law.

[20](1909), 35 S.C. 385; (1909), 18 K.B. 271; (1910), 42 S.C.R. 281.

[21]Premier Congrès International de l'Association Henri Capitant, 1939, at pp. 482-484.

[22]A boiler in a plant exploded, injuring a workman. The trial court held art. 1054 imposed liability without proof of fault — the employer had the boiler "under his care." The Court of Review held proof of fault was necessary. In Appeal, a majority, influenced by certain French authors on art. 1384 C.N., agreed with the trial judge. A divided Supreme Court agreed with the majority in Appeal.

que celui-ci peut toujours remettre son oeuvre sur le métier et la compléter selon les exigences de l'heure.[23]

But after mentioning the debt we owe to French jurists, Mr. Perrault utters this warning:

> En ce domaine, gare à l'exagération. Les textes parfois diffèrent. Et puis — me permettez-vous un aveu? — nous trouvons parfois que certains professeurs ou écrivains français compliquent à plaisir leurs théories juridiques. C'est la rançon des hommes trop intelligents et qui, à la fin, aboutissent à une extrême subtilité. A ce propos je n'ai pas oublié le conseil que me donna à la faculté de droit l'hon. juge Honoré Gervais . . . Lui, si cultivé, si amant passionné de toutes les oeuvres françaises, me disait un jour: "Dans votre pratique du droit, consultez les juristes français, mais soyez prudent, défiez-vous de leurs distinctions trop subtiles, des fendeurs de cheveux en quatre."

There is a temptation, when the spirit and the literality of a text are in question, to go too far afield for an answer. If the article is clear and unambiguous, its spirit surely is that it shall be taken literally. If it is not clear and unambiguous, its true meaning, its spirit or *motif*, must be sought first in the sources indicated by the codifiers and next in their recorded deliberations — bearing in mind that the article is positive law to be applied as nearly as may be according to its tenor, that any foreign law or doctrine is no better than written reason more or less illuminating or persuasive, and that the article was drafted by Quebec jurists, both French and English, alive to the conditions of life in Quebec. The Code laid the foundation of a system of law for us, for our peculiar needs and use. Is the superstructure to be imposed from without and become, not what we might think it should be, if we thought long and deeply about it, but what foreign authors and courts have thought or decided, and thus to become a reflection of our inertia?

The text is ours, freely chosen; the spirit of inquiry in interpretation is French — we must become jurisconsults in our own right, achieving independent conclusions, stressing perhaps less the literal survival of French law and opinion and somewhat more the vital and generative spirit that is at the heart of French law — the spirit of critical inquiry into text or doctrine, its soundness in principle, its application as suitable or not to our conditions and problems. Domat, Dumoulin and Pothier, Cujas, Ricard, Demolombe, Troplong, Baudry-Lacantinerie, Laurent and Aubry et Rau — how their names peal and sing to us! — did that for French law which without them would not be what it has been and is today. We have been complacent before that wealth of easy reference. Mignault, in 1895, felt we had been too complacent:

> . . . si la littérature légale de notre mère-patrie est abondante, nous ne pouvons en dire autant de celle de notre pays. Il y a pour cela plusieurs raisons. Et d'abord le

[23]It may be well to explain a little further. Of the judges, several held for the literal words of the article holding a person responsible for damage caused by things he has under his care. Others said — that is not the spirit of the article which, in accordance with art. 1053, requires proof of fault. The point was greatly debated in France at the time. We went to France for guidance and concluded that the article was to be taken literally.

fait même de cette abondance et de l'excellence des commentaires du Code Napoléon, nous permettrait, jusqu'à un certain point, de nous dispenser de commenter nous-mêmes nos lois civiles qui sont calquées sur les lois civiles françaises. Ensuite, la circulation très limitée que nos ouvrages peuvent se promettre, puisque cette circulation, pour un ouvrage comme celui-ci, devra nécessairement se limiter à la province de Québec, n'était pas faite pour encourager auteurs et éditeurs à tenter l'entreprise.[24]

Up to a certain point, he adds, thanks to the abundant French legal literature, we could get along without works upon our own law; especially as our Code is largely based on and follows the general plan of the Code Napoléon. His own great work is his monument for all time — *si monumentum requiris, circumspice* — born of an obvious need, as he explains:

Mais il y a des différences de la plus haute importance entre les deux codes, des titres tout entiers sont tirés de notre législation particulière et d'autres ne reproduisent qu'une faible portion des dispositions des titres correspondants du code civil français. A cela, ajoutez des différences de détail, de phraséologie, la substitution d'un mot pour un autre, des variantes dans la reproduction même textuelle d'articles du Code Napoléon, et on comprendra la difficulté qui entoure l'étude du droit en cette province. A chaque pas, il faut se défier des commentaires qu'on étudie, se demander si l'article, jusque dans sa ponctuation, est identique, si, dans le cas d'identité textuelle, cette disposition n'est pas affecté par une autre disposition de notre droit; et ce travail fait, il faut interroger la jurisprudence de nos tribunaux et rechercher si l'article reçoit ici la même interprétation judiciaire qu'en France. Ceux qui ont voulu étudier notre loi . . . peuvent rendre compte du travail délicat, minutieux, microscopique même . . . auquel ils ont dû se livrer.

That, it will be seen, is a warning that we must take nothing for granted if we look at French authority — *il faut se défier des commentateurs,* challenge, or suspect their relevance, and independently pursue our own textual exegesis. Fifty or more years later, reflecting our maturing independence nationally and intellectually, Trudel can confidently write:[25]

Notre province est peut-être la plus grande bénéficiaire du droit français. Notre Code en sortit comme un fils de sa mère . . . La parenté si proche . . . a eu des inconvénients. Le plus grave, le plus menaçant, a été de faire oublier le caractère essentiel quand il devient loi: *l'autochtonéité* . . .
Notre droit remplira sa fonction dans la mesure où il reflétera bien la vie sociale et économique du Québec . . . Son nord n'est pas le droit français, mais le milieu économique et social du Québec. Non que l'exemple soit mauvais, mais le plagiat l'est toujours. L'inspiration est vivifiante dans la seule mesure où elle met en branle l'esprit d'observation, le sens critique, la volonté d'adaptation et la faculté créatrice.

Trudel, again, commenting on a fairly recent appeal judgment,[26] would welcome a decision, where articles of the Code seem ambiguous, recognizing changed modern conditions rather than consecrating the drastic old law. The question was whether a wife, guilty of adultery and separated as to bed and board at the husband's instance, could be deprived of her share of the

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[24] *Op. cit.,* p. VI.

[25] *Traité de droit civil,* I, pp. 8 and 9. In *Bernard* v. *Leduc* [1955] C.S. 289, nullity of marriage for lack of consent due to insanity, where there were articles not ambiguous and the authority of Loranger and Mignault and our own jurisprudence, was it necessary to add quotations from Demolombe, Aubry et Rau, and Huc?

[26] *B.* v. *D.* (1941), 71 B.R. 469. See also, as to arts. 2485 - 2489 C.C., the article by Douglas Barlow, "La suppression de la nullité des polices d'assurance pour simple réticence" (1955), 15 R. du B. 359.

community (as she could have been under the old law). As between articles 208, 209, and 211 there was a doubt. The judgment, viewing article 209 as penal in nature, and hence to be restrictively interpreted, allowed her right to a share and the making of the usual inventory, but suspended an actual partage until the death of one or the other consort. Trudel's comment[27] seems to find in the court's reasoning an underlying feeling (which I do not see there) that the old harsh law is unsuited to modern conditions where the wife's interest is apt to be so much more important than it was in less opulent centuries, and hence that, as the texts presented an ambiguity, a modern view was the proper one. He says this, a very refreshing point of view:

> Cette ambiguité permet donc à l'interprète de ne pas se claquemurer dans l'ancien droit et de tenir compte des évolutions économiques et sociales qui, en droit appliqué priment une exégèse livresque. Faire appel à l'ancien droit, c'est du même coup exhumer les conditions de vie du temps. Le texte pénal était alors acceptable, parce qu'il punissait également toutes les femmes adultères. La communauté de biens était alors quasi universelle; un contrat de séparation de biens était des plus rare. Conserver ce texte quand nos moeurs ont donné à la séparation de biens une importance telle qu'en certains milieux elle est prépondérante, c'est méconnaître la fonction du droit. La même peine qui était autrefois juste devient partiale. Il est donc permis, si les textes s'y prêtent, de chercher une interprétation plus acceptable par la société contemporaine. *C'est à quoi ont dû penser nos tribunaux* . . .[28]

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There remains a question of the right attitude about amendments of the Code. It was made for our use, not we for its unchanging sovereignty. Humanity outgrows every imposed system. The Code of 1866 met the needs and uses of that now remote era. It was, and still is, a marvellous compilation. As it came from its creators' hands, whether in French or English, whether the draftsmen were of either language, the texts were clear, brief, connotative, the English versions sharing those supreme qualities of the French. No wonder that the laying of impious hands upon it is regretted and dreaded — to amend it is to lacerate it.[29] M. De La Durantaye, in the preface of his 1937 edition, says it "a déjà au delà de cinq cents remaniements d'articles." In the preface to his 1950 edition he writes:

> Le Code civil de 1866 avait une excellence de fond et de forme qu'aucune codification de l'Amérique du nord n'a encore égalée. Mais il souffre maintenant de trop d'assauts des lois modificatives . . .
> Il en est ainsi d'une foule d'innovations, dont la plupart sont mal à leur place quand elles ne sont pas inutiles.
> Entre de telles mains le Code de 1866 ne sera plus reconnaissable dans une quinzaine d'années, à la célébration de son centenaire.
> Qui donc nous délivrera de ces incursions barbares d'écrivains sans vergogne dans notre plus beau domaine de la latinité?

In so far as the language of amendments is in issue, only a new race of codifiers is needed (are we producing them?) who can and will breathe

[27]*Traité de droit civil,* II, pp. 32-33.

[28]Italics added.

[29]Per Galipeault C.J. in *B.* v. *D.* (1941), 71 B.R. 469, at p. 483. Mignault *op. cit.,* I, p. 57: " . . . le code civil a été amendé d'année en année par le pouvoir législatif. C'est un droit dont nos législateurs ont usé largement et abusé quelque peu."

into their texts the same clean spirit of Latinity, the same meticulous and selective choice of words in harmony with their prototype. The Code cannot escape amendment and change:

> La vie c'est le mouvement. Plus une société est active, plus rapides sont ses changements économiques, plus nombreux sont les problèmes nouveaux que la justice ou l'autorité législative ont à résoudre. La jurisprudence évoluant avec une sage lenteur, il ne faut pas s'étonner si le législateur est souvent forcé par l'opinion d'adopter des lois nouvelles.[30]

Life is movement. The reign of law means some restraint, adjusted to life in a constant process of change.

> Change is the nursery
> Of musique, joye, life, and eternity,

said John Donne long ago. And judicious change may be the life of the Code — it changes, but it is always the Code.

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[30]Per the late Justice Philippe Demers, in his preface to the *Supplement to the Civil Code*, 1931, by J. F. Saint-Cyr, C.R.