

12-1-1973

The Civil Law of Quebec: Some Disjointed Notes for a Lecture

G. V. V. Nicholls

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Civil Law Commons](#)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

Recommended Citation

G. V. V. Nicholls, "The Civil Law of Quebec: Some Disjointed Notes for a Lecture", Notes, (1973-1974) 1:2 DLJ 336.

This Commentary is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Notes and Comments

The Civil Law of Quebec: Some
Disjointed Notes for a Lecture

G. V. V. Nicholls, Q.C.*

Quebec private law, though not the public law, can be regarded as a reasonably characteristic example of that system of law known as the Civil Law, one of the world's great legal systems; and you live in the province of Prince Edward Island and I of Nova Scotia, where another of the world's great systems flourishes, the Common Law — you will notice that I say “another”, not “*the* other”. It is right and proper that we should attempt to familiarize ourselves with at least one other system of law besides our own, not necessarily with the detailed rules, which may or may not differ from ours, but with the approach of that other system to human problems, its method. For there is no better avenue to improved knowledge of other peoples than through their law, and no one can deny that a better understanding of French Canada in other parts of our country is badly needed.

Before I attempt to say anything about the Civil Law, as it is illustrated by the private law of Quebec, I must remind you that Quebec, like Prince Edward Island and my own Province of Nova Scotia, are constituent units in a federal state. Under

*G. V. V. Nicholls, Q.C., Professor of Law, Faculty of Law, Dalhousie University. The lecture was given on October 22, 1973, to a group of undergraduate students, particularly in political science, at the University of Prince Edward Island in Charlottetown. The course in which the lecture was given is an interesting experiment in introducing students to some of the fundamental ideas of law. It is being encouraged, and where possible assisted by lecturers from the Faculty of Law at Dalhousie University.

This particular lecture in turn derived a good deal from some introductory lectures given by Professor Nicholls in a course begun at the Dalhousie Law School in 1967-68 under the name, “Aspects of Quebec Law”, now “Introduction to the Private Law of Quebec”. Deliberately, the course has never been described as Comparative Law, which would certainly in this case be a pretentious label. It is a half-year elective open to students in the Second and Third Years and at the moment is given in the autumn term with a written examination. Welcome assistance has been given on aspects of the course by lecturers from the Province of Quebec. It is not the best-attended elective offered by the Dalhousie Law School.

section 91 of the British North America Act of 1867 "Laws for the Peace, Order, and good Government of Canada" are federal laws and common throughout the country, to Quebec as well as the Common-law provinces. More specifically, "The Regulation of Trade and Commerce", for example, "Navigation and Shipping", "Fisheries", "Bills of Exchange and Promissory Notes", "Bankruptcy", "Patents" and, most important of all perhaps, "The Criminal Law" are regulated by Dominion legislation so that the laws governing those subjects are the same in Quebec as in the other provinces. More often than not the origins of these laws are to be found in English rather than French models.

For this, and some other reasons too, it is misleading to generalize about Quebec, which is often done, and speak of it as a Civil-law province. Another example to illustrate the error is that the public as opposed to the private law of Quebec is English not French. It may not be easy to distinguish clearly between public and private law, but I should say that, as a beginning, the laws governing the administration of justice are public laws. Laws are administered in the name of the Crown and when what is now Quebec was finally ceded to Britain by the Treaty of Paris in 1763 there was of course a transfer of sovereignty. The law was now to be administered in the name not of the French, but of the British Crown, which no doubt explains why the courts in Quebec are more like British than French courts, following practices and procedures closer to those of Britain than of France. So too with the organization of the judiciary and, on the whole, the legal profession.

In what respects, then, is it correct to describe Quebec as a Civil-law Province? To return for a moment to the British North America Act, the law of the province of Quebec may differ from that of the other provinces only on "Property and Civil Rights in the Province", "Generally all Matters of a merely local or private Nature in the Province" and on those other subjects specified in the act, mainly in section 92. Quebec is constitutionally free, like all the provinces, to adopt its own, speaking loosely, "private law". In this restricted, though admittedly very important area, it is a Civil-law province. Its law of property, by way of example, of successions and wills, of contracts including sale, lease and hire, loan and partnership, of what Quebec calls "delicts and quasi-delicts" but we call "torts"

is derived generally from the law of France and through it can be traced back to origins principally in the Roman law or the early "customs" of the Germanic tribes. Regarded as a whole, though, one would have to say that the law of Quebec is a hybrid.

Another indication of the hybrid nature of Quebec law is the fact that a few provisions of the Quebec Civil Code, not many, have been borrowed directly from English law. It is thus, for example, with article 984, which lays down four requisites for the validity of contracts, one of them being "A lawful cause or consideration", the term "consideration" quite unknown to the Civil Law; and with article 1206, which provides that where the Code contains no provision for the proof of facts in commercial matters, the rules of evidence laid down by the laws of England govern. One of the most interesting provisions of this sort is article 851, which permits in addition to the notarial, holograph and military wills recognized by the Civil Law a fourth category called by the article "wills made in the form derived from the laws of England", a will signed by the testator in the presence of at least two competent witnesses. The recognition of the "English will" in Quebec goes back at least as far as the Quebec Act of 1774, which in its tenth section permitted the making of wills "either according to the laws of *Canada*, or according to the forms prescribed by the laws of England".

* * * * *

The Civil Law, whether in France, Quebec or any of the many other areas to which its principles have been exported, is marked by system, logic, method. The Civilian likes to talk about the *ratio legis*, the "reasoning of the law", which seems to imply a sanguine belief on his part that all the world's ills can be solved by the application of human reason. The Civilian may be more likely than the Common lawyer to argue to his conclusion from analogies, less likely to isolate problems and their answers in self-contained compartments. On the other hand, the civil-law lawyer, it is probably not unfair to suggest, is less concerned with the day-to-day experience of settling disputes as they arise in practice; he is certainly less court-oriented. His reasoning tends to be conceptual, to proceed by deduction from general principles, rather than inductively like that of the more practic-

ally minded Common lawyer from the particular incident. If you like alliteration, the Civilian prefers principles to precedents, the Common lawyer precedents to principles. So too of the French-speaking layman in Quebec and his mother country of France. We English-speaking Canadians will never understand Quebecers unless we grasp this difference.

Only a quick glance at the Civil Code of the Province of Quebec should demonstrate the truth of what I have just been trying to say. Look at the table of contents at the beginning of the volume, divided into "Books" — "Of Persons", "Of Property . . .", "Of the Acquisition and Exercise of Rights of Property", "Commercial Law" — and then each Book into "Titles", and each Title into "Chapters", and each Chapter into "Articles", sometimes into "Sections" and "Articles". How systematic, logical, methodical the arrangement is.

If you go further and examine a few particular provisions of the Quebec Code, or its ancestor the *Code Napoléon*, you will see illustrated the Gallic predilection for principle, generality, abstraction. Although the Quebec Code does have regulatory provisions as specific as any section of an Englishman's statute — for example, article 115 ("A man cannot contract marriage before the full age of fourteen years, nor a woman before the full age of twelve years.") or article 227 ("A child born after the three hundredth day from the dissolution of the marriage is held not to be issue thereof and is illegitimate.") or article 841 ("Two or more persons cannot make a will by one and the same act, whether in favor of third persons or in favor of one another.") — the characteristic provisions of the Code are more generally phrased, more abstractly, for example:

article 13, "No one can by private agreement validly contravene the laws of public order and good morals";

article 173, "Husband and wife mutually owe each other fidelity, succor and assistance";

article 406, "Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulation";

article 1053, "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill";

article 1072, "The debtor is not liable to pay damages when the inexecution of the obligation is caused by a fortuitous event, or by

irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract”;

article 1650, “If the lease [of a farm or rural estate] be for one year only, and, during the year, the harvest be wholly or in great part lost by a fortuitous event or by irresistible force, the lessee is discharged from his obligation for the rent in proportion to such loss”;

article 1830, “It is essential to the contract of partnership that it should be for the common profit of the partners, each of whom must contribute to it property, credit, skill, or industry”;

article 2192, “Possession is the detention or enjoyment of a thing or of a right which a person holds or exercises himself, or which is held or exercised in his name by another”.

* * * * *

It is almost a commonplace, but nevertheless true, that every civilized system of law aims at achieving two objectives, which may sometimes be inconsistent: certainty and flexibility. “Certainty” is desirable because everyone should know in advance, or be able to discover, how the law will affect him if he acts or fails to act in a given way; and “Flexibility”, because the law should have the capacity to adjust to meet the changing needs of the society it serves or the exceptional case that arises. For example, the ancient Hebraic rule of “Life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe” would hardly be an acceptable guide for this third quarter of the twentieth century.

These, then, are the twin aims of both the Civil Law of Quebec and the Common Law of the other provinces. The interesting thing is, though, that they tend to reach their ends by different routes. At the risk of over-simplification, the Common Law tends to seek certainty through the application of its doctrine of *stare decisis*, the binding force of precedent, to the decisions of courts of law; it may be that increasingly all the provinces are turning to statutes as a means of declaring the law but the “residual” law of the provinces other than Quebec is still the Common Law, the “unwritten law” as declared by the courts, which acknowledge as binding on them previous decisions of courts higher in the hierarchy than themselves. Common-law courts *do* make law.

Generally speaking, the principle of *stare decisis* is not recognized in France — for one thing to do so would be to

acknowledge that the judges make law, which would be too great a departure from the separation of powers doctrine for Old France – nor is it accepted in the New France of Quebec. Perhaps a Quebec court will acknowledge that it must follow what is called an “established jurisprudence” – a line of cases that over the years has consistently held the same thing – but it does not concede that it must follow the single decision of a higher court, however wrong it thinks the decision is (lower courts in Quebec, it has been argued by some, ought to be prepared to follow a decision of the Judicial Committee of the Privy Council, when appeals still lay to it, or a decision of the Supreme Court of Canada, now the highest court in the country).

The certainty that is acknowledged to be a desirable aim of law is looked for in France and Quebec in a code, or codes, a code that traditionally is interpreted, even supplemented, by legal writers other than judges. It may be true that increasingly civil-law countries are referring to decisions of the courts to assist them in discovering what the law is, but there the “residual” law remains in theory “The Code” supplemented by the authors. The French go to the Code and the authors when all else fails, whereas, when everything else fails, the English turn to their courts. The works of the authors the French conveniently call *la doctrine*, whereas the case law they speak of as *la jurisprudence*, to the former of which, unlike the English, they give priority.

The two threads of code and *doctrine* are interwoven in the history of the Civil Law. Both make law, the code first and then the authors, but perhaps the writers should be mentioned first here because, as it has always seemed to me, they are an even more characteristic feature than the codes. Circulating among the class are the two volumes on *Obligations* from the published works of Pothier – Joseph Robert Pothier – the judge, teacher and above all writer on the law who lived in Orléans, south and slightly west of Paris, in the eighteenth century. Pothier lived at a time when judicial offices could be purchased and in certain circumstances inherited. He belonged to *une famille de robe* and succeeded his father as a judge when he was only twenty-one, remaining in the post for fifty-two years. It is as a writer on the law, though, that he is still remembered. In middle age he was appointed a professor at the

University of Orléans and is reported to have said that he wrote his books for his students. Perhaps it is so, for he writes with supreme clarity, and most students like clarity. Pothier is still cited as an authority by judges and lawyers in Quebec.

The civil-law tradition of legal writing goes back in an almost unbroken line from the present day to Roman times, interrupted only, if even then, by the so-called Dark Ages from the collapse of the Roman Empire in the West in 476 A.D. to the “reception” of the Roman Law again early in the 12th century. Without apology I assert that an educated man or woman should know at least the names of some of the deities in the pantheon of the Civil Law. Here are the five who are perhaps best known from the Roman law: Papinian, Paul, Ulpian, Modestinus and Gaius. They are the five singled out by the extraordinary Law of Citations in A.D. 426 to have special authority in the Eastern Empire. Where the law was uncertain and there was conflict of opinion among these five authors, the judge was instructed to follow the opinion of the majority; if opinions were evenly divided on the question but Papinian had pronounced, his view was to prevail; only if Papinian was silent and the remaining authors evenly divided was the judge authorized to decide for himself. Contrast this extraordinary method of settling disputes by a counting of noses with what the Civilian would regard as the equally extraordinary practice, followed by many judges in England and the common-law provinces until recently, if not still, of discouraging the citation, the mentioning, of writers by counsel and, of course, never citing a writer themselves: a practice that sometimes has taken the form of suggesting that no one but a writer who has held or holds judicial office should be cited; sometimes that living authors should not be cited, apparently on the basis of some such rationalization as that a writer might always change his mind so long as he was alive; and sometimes that legal periodicals are somehow less worthy of attention than bound books. Neither system of law has a monopoly of stupidity.

The concept of codification can be traced back on the continent of Europe as far as the *doctrine*, or almost as far — more than fifteen hundred years. In this lecture we need not concern ourselves with anything older than the *Corpus juris civilis* of the Emperor Justinian, compiled at Byzantium, later called Constantinople and now Istanbul. The most important of

the four parts of the *Corpus juris* is the Digest, or Pandects, and it was completed in the extraordinarily short period of three years from 530 to 533 A.D. It is a freely edited collection of excerpts from thirty-nine earlier writers on the Roman law arranged in some sort of rough order, but hardly systematically.

Possibly by modern standards the Digest ought not, strictly speaking, to be called a code at all. On the other hand, it was in writing like a code, not "unwritten" in the sense of the Common Law. Like a modern code, it received its binding authority from legislation, in the case of the Digest from the Emperor. And, like a code, it purported to consolidate in one place all the law in force at the time over a wide field; indeed Justinian had the temerity to forbid further commentaries on the passages in the Digest, an attempt that was almost inevitably doomed to failure, for the doctrinal writers went to work almost immediately. Finally, Justinian's commissioners did make some attempt to improve, to reform, the existing law.

In the 16th, 17th and 18th centuries the *doctrine* flourished in France, as indeed it does to this day. Roman law, even after its reception at the beginning of the 12th century, was never applied to the same degree in the northern part of France as it was in the southern, in what has somewhat misleadingly been called the *pays de droit coutumier* to the same degree as in the *pays de droit écrit*, but there were doctrinal writers in both, sometimes writing on the Roman law, sometimes on the customary law, and sometimes on both: on the Roman law for example, to continue the name dropping, Cujas (1522-1590) and Domat (1625-1695); on the customary law, Dumoulin (1500-1566) and D'Argentré (1519-1590); all culminating in the master of both systems, to whom I have already referred, Pothier. Not so many years after his death, Pothier's works were to become most influential sources in the drafting of the *Code Napoléon* of 1804, which in turn was to be the model for the Civil Code of Lower Canada of 1866.

Scholars like these, not to mention later ones like Aubry et Rau, F. Laurent, G. Baudry-Lacantinerie, Marcel Planiol, Georges Ripert, Henri Capitant, René Savatier, the Mazeauds, Jean Carbonnier, and so on and so on, probably enjoy a prestige in France at least as high as that of judges of the highest courts, the *Cour de Cassation* and the *Conseil d'Etat*. Influenced partly by attitudes in neighbouring provinces, Quebec can hardly be

said to regard its legal writers quite as highly, though there have been, and are, some distinguished ones.

It may be thought that the prevalence of customary law in the northern half of France up to the Revolution at the end of the 18th century suggests something less than enthusiasm for codification, but the fact is quite the opposite I think. The *coutumes*, of which it is reckoned there were sixty major ones and something like 300 local ones in France at the time of the Revolution, admittedly had their origins in unwritten customs of the Germanic tribes, as the term *coutume*, custom, implies, but under royal prodding from the early sixteenth century they were progressively reduced to writing, to “codes” in spite of the name. The Custom of Paris, for example, had been reduced to writing by 1510 and revised by 1580, so that by the Cession of New France to Britain it had been in codified form for almost 200 years. True, the Custom of Paris did not cover the whole of the private law — it did not deal with the law of Obligations, for example, including contracts or delictual responsibility, and there were other important omissions — but my point is that the inhabitants of France, Old and New, from whatever part of the country they came, were thoroughly familiar with codes, and the techniques of using them, long before what is now Quebec had been ceded to Britain.

* * * * *

The time may now have arrived to say a little about the law in force in New France before the surrender of Quebec and Montreal in 1759-1760 and the final cession of the country (much more extensive by the way than the present province of Quebec) to the British Crown by the Treaty of Paris in 1763. Very briefly, that law was the Custom of Paris, or at least the part of it regarded as appropriate to the colony, which from 1663 had been formally in force. Also in force were edicts and at least some of the royal ordinances of Louis XIV and Louis XV and judgments of the King’s Council, together with ordinances and other regulations of the administrative authorities in the colony and the judgments of the local courts. The French authors, so far as their works were available, must also have been used.

After the Conquest, and even for some years following the Treaty of Paris, much uncertainty existed about the system of

law, whether English or French, to prevail in Britain's new colony. The matter was settled by the Quebec Act of 1774, an Imperial statute, which provided that "in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of *Canada*, as the rule for the decision of the same". As to the criminal law, the act went on that "whereas the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants, from an experience of more than nine years, during which it has been uniformly administered, . . . the same shall continue to be administered, and shall be observed as law in the province of *Quebec*, as well in the description and quality of the offence, as in the method of prosecution and trial". So the position was much the same under the Quebec Act as it now is under the British North America Act.

By the 1850's the complexity and uncertainty of the law, partly the result of the diversity of sources, had grown very great in Quebec, which in 1791 had been separated from what is now Ontario, and then reunited again, at least partially. In 1857 an act of the united province of Canada provided for the codification of the laws of Lower Canada "upon the same general plan" and with "the like amount of detail" as the *Code Civil* in France. The Commissioners appointed to the task were to reduce into one code the laws "which relate to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature". They were further instructed to "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". The code came into effect in 1866.

* * * * *

Why does the Common lawyer when faced with a legal problem tend to turn first for a solution to his cases, and the Civilian to his code and the authors? Perhaps the only explanation is to be found in the accidents of history. A basic tenet of the policy of William the Conqueror, a strong administrator, and most of his

Norman successors was the unification of the country under a centralized authority. No doubt the administration of justice was consciously used by them to further this policy at the expense of the various local courts, like the courts of the county and the hundred and the manorial courts. At first the royal justice was presumably dispensed by the King himself and his immediate advisers as he travelled constantly about the kingdom. Later it came to be administered by royal justices whose headquarters were at Westminster but who went out on regular circuit to the assize towns. In some such way as this the Common Law was formed, the law *common* to the whole kingdom.

The contrast with France is striking. In spite of the unifying influence of the Roman law, the impact of which was much greater in France, especially in the southern part, than in Britain, there was little uniformity in the law of different parts of France until the French Revolution. The monarch was always weaker and the feudal lords more powerful in France. The *coutumes* and the provincial *parlements*, jealous of their prerogatives (incidentally they were courts rather than legislatures), were influences working towards fragmentation, legally speaking as well as politically. Voltaire's often-quoted remark that the traveller in France changed his law as often as he changed his horse had an element of truth as well as hyperbole. In these circumstances it is consistent with his history that the Common lawyer should look to the courts for his solutions; the Civilian instinctively turns elsewhere.

Of course there have been articulate apostles of codification in common-law countries too, but I wonder whether they are right, right if what is meant by "codification" is the kind of thoroughgoing summation of all the law in a wide area that is represented by the Civil Codes of France and Quebec. Statutes codifying the law on some narrower subject like the federal Bills of Exchange Act, or the provincial Sale of Goods Acts, or the uniform acts drafted by the Conference of the Commissioners on Uniformity of Legislation in Canada are another matter. But the instinct of most Common lawyers that makes them indifferent, if not opposed, to any codification on a broader scale seems to me to be sound. Codification on this level can never be made to work in the absence of the conditions for its success that are present in the countries where it has flourished,

notably an active fraternity of authors whose words will be listened to with respect by men of affairs, and the absence of any strict doctrine of binding precedent.

Codes, like the Common Law, have their advantages and disadvantages. An advantage, though perhaps one that becomes less obvious as the code grows older, must be that it gathers together under one cover all the mass of laws, whether statute, doctrinal or case, on the subject matter it deals with, and into the mass introduces some order. I think, by way of contrast, of the description by a distinguished contemporary lawyer in England of his law as “a welter of confusion”, thus echoing Tennyson’s lines of a century ago:

“Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Thro’ which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.”

Convenience of use is the characteristic that makes codes popular with ordinary people and law students, if not with lawyers, who as a race tend to be conservative.

On the other hand, the criticism is often directed against codes by lawyers trained in the Common Law that a code attempts artificially to squeeze the law into a formal and rigid framework, a characteristic that is particularly unfortunate at a time of rapid social change. A code, it is said, is drafted at a particular moment of history and so reflects inevitably the attitudes of its period — in the case of the French and Quebec codes, an approach, for example, of Christian individualism. Unquestionably, once they are given the force of law, codes are difficult to alter. But then what is to be said of an outmoded rule of the Common Law under a regime of binding precedents? Weighed in the scales of the Blind Goddess of Justice, which system has the advantage here?

* * * * *

Much of this lecture has been concerned with the first of the twin objectives of civilized legal systems, Certainty, about which it is easier to find tangible things to say than about the second, Flexibility. About this I have a few remaining things to add now. Both the Civil- and Common-law systems have evolved methods of permitting development to meet new social condi-

tions or the exceptional case, on the whole more openly, it has always seemed to me, with less pretence, in the former than in the latter. The deliberate generality of many articles in the French and Quebec Civil Codes, some examples of which I mentioned earlier, give doctrinal writers and courts a freedom that is inhibited by *stare decisis* in England and the Common-law provinces. Here, or so it seems to me, a court anxious to meet the challenge of new needs is often reduced to the subterfuges of "fiction" and "distinguishing". When a Common lawyer suggests that once a system of law is codified it becomes immutable, he betrays an ignorance of the nature of a code as the Civilian understands it. The Quebec Civil Code receives its authority from the legislature, and in that respect is a statute, but it is dealt with much more flexibly than the typical statute to which the English Canadian is accustomed. The generality of a code may be deceptive in its simplicity but it is preferable to the hypocrisy of the alternative.

Both the Civil and Common Laws of course can always be amended by the legislature to meet changing needs. It has been estimated that about a quarter of the approximately 2,300 articles of the Code Napoléon have been amended since 1804. I do not know how many amendments have been made since 1866 to the roughly equal number of articles in the Quebec Code, but they have not been negligible. The adoption of a *codé* therefore does not crystallize the law for all time. Revision of a whole code, or a substantial part of it, is naturally more difficult than piecemeal amendment, but even here the attempt is being made in Quebec. By a provincial statute of 1955, a very brief statute but a promising one, the Lieutenant-Governor in Council was authorized to entrust "a jurist" with the task of revising the Civil Code. After a false start or two, the work of the Civil Code Revision Office has, in the last six or seven years, resulted in significant reforms, for example, in the title on marriage and the title on marriage covenants and the effect of marriage on the property of the consorts. The work of revision proceeds.