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Quebec's Civil Law Codification

Viewed and Reviewed

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Introduction

Three events have been of capital importance in the history of the private law of what is now the Province of Quebec. These three events, in as many centuries, have successively secured a place for the development in Canada of a body of law rooted in the French tradition of *le droit civil*. In its origins and sources, its guaranteed place in the evolving Canadian constitution, and its final legislative expression in the form of a "civil code", Quebec's private law has thus had a distinctive development in Canadian legal history.

Its origins lie in the seventeenth century when Louis XIV adopted measures [1] by which the colony of New France was provided with the first elements of an organized legal system and, more lasting in importance, an initial body of customary but written law in the form of the *Coutume de Paris*, the "common law" (*droit commun coutumier*) of northern France, upon which many of the Quebec Civil Code's provisions were subsequently to be based. In the eighteenth century, the place in the constitution of Canada of such "Laws of Canada", that is to say, the French private law on "Property and Civil Rights" as understood in the new English possession at the end of that century, was assured by the imperial legislation popularly known as the "Quebec Act" of 1774.[2]

The third event, the codification of this body of law, occurred in the second half of the nineteenth century and formed part of a general effort to bring about wide-ranging legal reform in many areas. It followed closely upon the restructuring of the judicial organization in 1857, involving a decentralization upon which our present court system is in large part based.[3] But the law to be administered by such a reformed court system was itself urgently in need of re-organization and modernization. Whereas most of the province was still ruled by the French seigneurial system, in other specific portions of territory the English private law seemingly applied. The "settling" of this anomalous legal condition ruling

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[1] The *édits* of April 1663, creating the *Conseil souverain, Edits, Ordonnances royaux*, (Québec, 1854), t. 1, p. 37 and that of May 1664 establishing the *Compagnie des Indes occidentales*, section XXXIII, *ibid.*, p. 40.

[2] *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. 3, 1774, c. 83.

[3] *An Act to amend the Judicature Acts of Lower Canada*, 20 Vict., S.C. 1857, c. 44.

some lands,[4] and the abolition, finally achieved in 1854[5] after many difficulties both legal and political, of the French seigneurial system in force throughout the largest part of the province, were two measures which necessarily had to precede any recasting of the private law in general. The corporate organization of the legal professions of notary and lawyer was achieved somewhat earlier.[6]

It is somewhat surprising how little is known about the circumstances surrounding the creation of Quebec's now century-old Civil Code which came into force 1 August 1866. Few sources give any picture of events leading up to the enactment of the 1857 Act[7] which provided for the naming of three "fit and proper persons" to act as Commissioners to codify the laws. And what information we do possess respecting the actual working methods of the Commission, which began its work two years later, in 1859, is derived principally from the published *Reports* of the Commission itself, issued between 1861 and 1865.[8] Apart from these *Reports*, the fullest account of the circumstances surrounding the Commission's work remains, even today, that provided by Thomas McCord, whose English-language edition of the Code, containing an informative *Preface* and *Synopsis of the changes in the Law*, was first published in 1867. It is a contemporary account of particular value since McCord was one of the secretaries to the Commission during much of its work.[9] The principal commentators and historians of the later nineteenth century are brief in their accounts of the codification. They were, in fact, too close to the event and therefore either concerned primarily with expounding the provisions of this new legal instrnment itself, as in the case of de Montigny and Loranger,[10]

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[4] *An Act for settling the Law concerning Lands held in Free and Common Soccage, in Lower Canada*, 20 Vict., S.C. 1857, c. 45.

[5] *An Act for the abolition of feudal rights and duties in Lower Canada*, 18 Vict., S.C. 1854, c. 3.

[6] *An Act for the organization of the Notarial Profession in that part of this Province called Lower Canada*, 10-11 Vict., S.C. 1847, c. 21; *An Act to incorporate The Bar of Lower Canada*, 12 Vict., S.C. 1849, c. 46.

[7] *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure*, 20 Vict., S.C. 1857, c. 43.

[8] The chronology of these and other relevant dates is given in *Appendix II infra.*

[9] Thomas McCord was named English-language secretary to the Commission in 1862; see *Appendix II.*

[10] B.A.T. de Montiguy, in his *Histoire du droit canadien*, (Montréal, 1869), in his treatment of codification, was mainly concerned with providing a practical

or with investigating the much earlier antecedents of the Quebec legal system, as in the case of Doutre and Lareau.[11] More recent authors, in the absence of any new sources, have not been able to investigate further the method of the Commission, or chosen to examine closely the background of the period during which it functioned.

It should therefore be made known that recent researches, undertaken on the occasion of the celebrations marking the centenary of the Quebec Civil Code held in Montreal in the fall of 1966,[12] led to the discovery by the present writer of a considerable body of documents either used by, or recording the work of, the Commission during the period 1859-1865. These documents, in the custody of the archives of two Quebec institutions, are now available to students of Quebec legal history. This material provides new information about the attitudes and methods of the three Commissioners and, to the extent to which it contains information not found in the published *Reports*, may shed new light, when examined in detail, on some of its specific provisions.

This documentation — a full bibliographical presentation and description of which is given in *Appendix I* below — is made up of a folio volume containing the private notes of the apparent *président* of the Commission, René-Edouard Caron, compiled shortly after his appointment in 1859; a large but unfortunately incomplete run of the Commission's actual working papers and drafts of many portions of the Code, in various stages of development, of which those having belonged to the English Commissioner, Charles Dewey Day, are of greatest interest; the minute book of the Commission formally recording its regular meetings throughout the whole period in question; and certain other miscellaneous items and fragments.

"livre de consultation" in which he endeavoured to make the contents of the *Reports* more accessible by correlating their contents to the final arrangement adopted in the Code, indicating amendments adopted in the Legislative Assembly and the final corrections made by the Commissioners (matters not contained in the *Reports*); see the *Preface*, p. 7 and at pp. 596-961; T.J.J. Loranger, *Commentaire sur le Code Civil*, t. 1, (Montréal, 1873), pp. 80 *et seq.*

[11] G. Doutre & E. Lareau, *Le droit civil canadien*, (Montréal, 1872), trace the history of Canadian law to 1791; *cf.* also R. Lemieux, *Les origines du droit franco-canadien*, (Montréal, 1901), pp. 446-450. The later work of E. Lareau, *Histoire du droit canadien*, (Montréal, 1889), pp. 276-296, provides a summary of the substantive changes made to the private law, and was based on the work of Loranger.

[12] 30 September - 1 October 1966, under the presidency of Professor André Morel, *Faculté de droit, Université de Montréal.*

The documents containing the draft articles and discussions thereon, in the form of *cahiers,* will not, certainly, constitute "aids" in any process of strictly legal interpretation of the Civil Code such as the finally published *Reports* themselves provide. These *Reports,* as *travaux préparatoires,* have traditionally been admissible as guides in interpretation — and indeed must be in virtue of one of the final articles of the Code itself,[13] which creates a presumption in favour of the continuing effect of the prior law. But their continued relevance to a progressive interpretation of Quebec civil law has, rightly, declined over the last hundred years and should, in any event, be very much doubted at the present time. These newly uncovered documents, therefore, the raw materials upon which the *Reports* were written, are in themselves principally of historical interest. A greater understanding of the method of Quebec's first codification commission may nonetheless be significant today, in view of the current efforts to renew the whole range of Quebec civil law undertaken by the recently re-organized Commission for Revision of the Civil Code,[14] even though this body must necessarily approach its task in today's conditions with an outlook and methods quite different from those of the Commission of 1859.

The principal purposes of this article, therefore, are first to make known the existence of these new sources and, secondly, to provide a statement of the *modus operandi* of the Commissioners of a century ago. The first of these objectives is most appropriately executed in the *Appendix I,* already mentioned, which provides merely a description of this new body of documents. The analysis of the method adopted by the Commission in the execution of its task during the period 1859-1865 (for which an *Appendix II,* providing a chronology of events is designed to simplify the account), is based for the most part upon an examination of these new sources. The method of the Commission of 1859, however, will be better understood when placed

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[13] Art. 2613 C.C. provides (in part):

The laws in force at the time of the coming into force of this code [i.e. 1 August 1866] 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 matter to which such laws relate[.]

Cf. in general, F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada,* (Montreal, 1907), pp. 103-107.

[14] Most recently constituted by 3-4 Eliz. II, S.Q. 1955, c. 47 and 8-9 Eliz. II, S.Q. 1959-1960, c. 97.

against the background of the years preceding the enabling Act of 1857, and to this end a first section is devoted to gathering together the available elements of information concerning the circumstances leading to the birth of the idea of codification in Quebec.

SECTION I:

Circumstances Leading to Codification

After six years of work by its draftsmen, the Civil Code of Lower Canada entered into force on 1 August 1866 — a mere eleven months prior to the creation of the new Canadian confederation on 1 July 1867, but ten years after the mechanism for its compilation had been set up in virtue of the enabling legislation of 1857. The completion of the Code was, as Thomas McCord wrote in its first privately published English-language edition, "an event which forms an epoch in our history" and one "suggestive of many considerations." [15]

Apart from his valuable remarks concerning the place of the Code as a work of legislation and legal reform, McCord himself does not develop upon any other such "considerations" he may have held to be significant. Later observers, however, have been rather more quick to see the codification as a work not merely of *legal* but also of *political* significance; as not only an important step in legislative reform but also, and perhaps above all, as evidence of a desire on the part of French Canada to protect this element of its French cultural heritage on the eve of entering into a union with the other British North American colonies of different legal tradition.

In reviewing the reasons why any codification took place, it is certainly important not to neglect the political (or economic or social) context of the country in which it occurred. At the same time, it is manifestly dangerous to attempt to elucidate the circumstances leading to or contemporaneous with such event by means of attitudes that have only been produced by later historical developments. This is in part the problem in the case of the Quebec codification: there was clearly a series of compelling legal, technical and even linguistic reasons for advocating the codification of the law, and these alone still provide sufficient justification on which to view it historically. To

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[15] T. McCord, *Synopsis of the Changes in the Law effected by the Civil Code of Lower Canada* in *Civil Code of Lower Canada*, 1st ed., (Montreal, 1867), p. 1.

what extent, on the other hand, is there evidence to support the view that political considerations also figured in the idea that a Civil Code be drawn up? If they were present, how important was their role? Each of these aspects will now be considered, the *political* and the *legal or technical* factors contributing to the birth of codification.

A. Political Factors

That political factors played any great role in the inception of the idea of the codification of the laws of Lower Canada is perhaps more easily inferred than demonstrated, and this despite the closeness in time of the coming into force of the Code, on the one hand, and the creation of the Canadian confederation on the other.

When McCord, our principal contemporary observer, was writing he was concerned primarily with expounding the nature and organization of the Code and the substance of the changes it had effected in the law. He endeavoured to situate this important event in the general context of the development of Quebec's legal institutions rather than in that of the political events of his day. These tasks he accomplished in a skilful summary of some thirty pages which even today retains its value as the most complete statement of the transition between the old and the new orders brought about by the Code in the law of civil relations. In passing he did, however, make the following observation:

> In view of a union of the British American provinces, the codification of our laws is perhaps better calculated than any other available means to secure to Lower Canada an advantage which the proposed plan of confederation appears to have already contemplated, that of being the standard of assimilation and unity, and of entering into new political relations without undergoing disturbing alterations in her laws or institutions.[16]

An interesting reflection, certainly, on the part of one writing a mere ten days prior[17] to the coming into force of the *British North America Act*. But is it, as some authors declare, a basis upon which to affirm that codification itself was the instrument "officially" affirming the French fact, for the benefit of French-speaking residents of the soon to be created Province of Quebec, within the new

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[16] *Ibid.*, at pp. 1-2.

[17] His *Preface* is dated 20 June 1867, although the remarks cited are drawn from his *Synopsis* dated July 1866.

Canadian nation?[18] The suggestion implicit in this view is, of course, that the French law of Lower Canada was, in the period preceding confederation, threatened with either extinction or some degree of absorption by the common law of the surrounding jurisdictions.

That the Quebec codification has since been viewed in such a light, or has represented for some an instrument of legal nationalism, is not perhaps surprising — indeed, as remarked elsewhere, such nationalism has almost everywhere been one of the results of the nineteenth century European codifications.[19] It is probably also true to say that, as the plan for the Canadian political union took shape, the codification of the civil law came to be looked upon, more and more, in the light of its "political" significance. The importance of Lower Canada entering any kind of proposed union with a well-established system of laws had formed a specific point in a *communiqué* issued by the Canadian government between the Charlottetown and Quebec Conferences in 1864. It revealed that Lower Canada "insisted" upon local control of the whole body of civil and municipal law in the discussions on the subject of the powers and duties of the proposed local governments.[20] The same idea is implicit in the terms of the Quebec and London Resolutions of 1864 and 1866; Lower Canada was,

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[18] The Code has been characterized as an "arme défensive de la race canadienne-française" and as having been "né des besoins de la survivance française" by Professor L. Baudouin in his *Le droit civil de la Province de Québec*, (Montréal, 1953), p. 61; the same author has enlarged upon this thought in later publications: "La réception du droit étranger en droit privé québecois" in *Quelques aspects du droit de la province de Québec*, (Paris, 1963), p. 3, at p. 18: "Il semble... qu'à l'époque, la codification apparaissait comme l'instrument permettant l'affirmation officielle du fait français dans cette province d'origine purement française"; Professor Baudouin considers that the remarks of McCord, cited in the text above, "reflète certainement l'impression générale que l'on se faisait alors du rôle d'un code pour cette province, et qui devait être sur le plan du droit privé, ce que l'Acte d'Amérique du Nord britannique devait être, dès sa promulgation en 1867, pour la Confédération canadienne, un instrument de cohésion et d'unité." See also his *Les aspects généraux du droit privé dans la province de Québec*, (Paris, 1967), at pp. 9-21; *cf.* also J.-E. Prince, *Essai sur la pensée et les tendances de notre droit civil*, (1922-23), 1 R. du D. 399, at p. 401, 465, at pp. 466, 474, who considered it "un triomphe du patriotisme canadien".

[19] R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, (London, 1968), nos. 47-48, pp. 51-52, where the idea that the European codes were regarded as instruments of a "nationalization" of law is examined.

[20] "Manifestly... Lower Canada will insist that all judicial and legal matters — in fact the whole body of Civil and Municipal Law, with the exception of Criminal Law, mnst be vested in the Local Legislature..." *Montreal Gazette*, 23 September 1864.

in each case, excluded from the draft wording of the idea (finally contained in section 94 of the *British North America Act, 1867*) that the "General Parliament" was to have the power to render uniform "all or any of the laws relative to property and civil rights" in the future Canadian provinces sharing the common law tradition if and when such provision were sanctioned by their own legislatures.[21] In these respects, the special position to be enjoyed by the future Province of Quebec was also mentioned in the debates of 1865 of the Canadian Parliament on confederation.[22]

There is however no evidence to support the proposition that the *idea* of codification itself was born with such considerations in mind. Indeed the very growth of the movement leading to confederation really only began, according to present day historians, no earlier than 1858 and only with the Cartier-Macdonald coalition was it made part of the administration's political programme — subsequent, it should be emphasized, to the enabling Act of 1857. If the investigation is pushed beyond this date, there is even less reason to suppose that there was any body of opinion during the first half of the nineteenth century advocating that such a step be taken for the "political" reason that Lower Canada's *droit civil* was in peril of absorption. Even more remarkable perhaps is the absence, in this early period, of any suggestion that a codification of the private law should be put forward simply as a measure of intelligent legal reform; those reviewing the complexities and difficulties of the legal system of Lower Canada, which combined elements of both French and English legal traditions, saw no lesson applicable to them to be drawn from the already established examples of the French or Louisiana codes.[23]

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[21] *Quebec Resolutions*, (1864), 29:33 and *London Resolutions*, (1866), 28:32, and subsequently in the *B.N.A. Act*, 30 & 31 Vict., 1867, c. 3 as sec. 94; *cf.* the study by F.R. Scott who sees in this provision the expression of a political idea, *Section 94 of the British North America Act*, (1942), 20 Can. Bar Rev. 525.

[22] *Cf. Parliamentary Debates on the subject of the Confederation of the British North American Provinces*, (Quebec, 1865), Bureau, 15 February 1865, p. 191; Sol.-Gen. Langevin, 21 February 1865, p. 372; M.C. Cameron, 24 February 1865, p. 463; Cauchon, 2 March 1865, p. 575; Denis, 9 March 1865, p. 876.

[23] William Smith, for example, in his *History of Canada to 1791*, (Quebec, 1815), considered the legal system "sufficiently extensive and complex to require years of study to understand" (p. 164), but did not conclude that codification would remove such difficulties; see also the remarks of Hon. J. Sewell, Chief Justice of Lower Canada, writing several years later, who, while making a plea for the founding of "some Institution of a public description, in which Law may be taught as A SCIENCE," was equally silent on the subject of codification

However in the first legal review ever published in Quebec, the *Revue de législation et de jurisprudence* (of May, 1846), there did appear a short article, by an anonymous author, entitled *De la codification des lois du Canada* in which the idea was mooted for what must be the first time.[24] The elaboration of a code was suggested as the principal part of a scheme of *general* legal reform encompassing matters of public as well as private law, thus presaging the general movement of reform of the mid-1850's mentioned earlier. It contains no suggestion that a code of civil laws was rendered necessary for internal political reasons — and this not too many years after the publication of Lord Durham's celebrated *Report* in 1839 which had, it will be recalled, preached the need for the "assimilation" of the French of Lower Canada on all levels, including that of legal institutions.[25] Indeed this article is significant for putting forward quite the contrary idea — that the *droit civil,* organized into a code, might be suitable as a body of law to be adopted by the rest of British North America. This concept, that the whole of British North America, of which Lower Canada with its French legal tradition was the centre, needed a general legal system, suitable to all the different populations making it up ("qui devront composer un jour un vaste empire"), and equipped with its own institutions to constitute a single people distinct from its southerly neighbour, the United States, was not adopted in the enabling legislation finally enacted by the Canadian Provincial Parliament in 1857. It was however, as we now know, seriously discussed.

It is tempting to attribute this article written in 1846 to George-Etienne Cartier who, more than any other, must be credited with having conceived and carried through the project of codification some

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in his review of the legal system of Lower Canada: *Inaugural Address to the Quebec Literary and Historical Society, 31 May 1824* in *Transactions of the Literary & Historical Society of Quebec,* (Quebec, 1829), vol. 1, p. 2 (also reprinted in (1846), 1 Rev. de Lég. 477).

[24] (1846), 1 Rev. de Lég. 337.

[25] Lord Durham was not so critical of the "unchanged civil laws of ancient France" then in force in Lower Canada as he was of the whole system which he called "a patchwork of the results of the interference, at different times, of different legislative powers, each proceeding on utterly different and generally incomplete views... The law itself [he continued] is a mass of incoherent and conflicting laws, part French, part English, and with the line between each very confusedly drawn," *Report on the Affairs of British North America,* (London, 1839), p. 81 and in the edition of G.M. Craig, *Lord Durham's Report,* (Toronto, 1963), p. 69; his recommendations to the British government included the establishment of "English laws", at p. 212 (1839 edition) or p. 146 (Craig edition).

eleven years later in 1857 and who, moreover, played such a prominent role in the creation of the Canadian confederation. Its leading ideas — that codification was required to order and co-ordinate the existing law, to render all of it accessible in both the English and French languages, and that its model be the *Code Napoléon,* — all these were incorporated in the preamble to the 1857 Act. We now know, however, as suggested above, that there were, at this time, those in the Canaddian Parliament who wished to move farther in the direction of codification than Cartier himself then wanted to go. Drummond, the Attorney-General in the preceding administration, and others, were of the opinion that the laws of both Upper and Lower Canada should be assimilated so that there might be one code for the whole Province of Canada. Such a measure was advanced as one promising "incalculable benefit", whatever the political future might hold, and was in fact moved by way of amendment upon the second reading of the bill of 1857 providing for the creation of the Lower Canadian Codification Commission. And it was by no means assumed that the suggested assimilation would be to the detriment of Lower Canada's *droit civil.* In the end, however, even though it was easily agreed that Upper Canada had an equal "interest" in any step leading to the re-organization of the private law, it was evidently the opinion of most, as expressed by J.A. Macdonald, the future prime minister of Canada, that where there were two distinct systems of law, it was more prudent to find out first what each contained and then to proceed to their assimilation by degrees.

The debate, recorded as having lasted four hours, concluded by the adoption of the bill providing for the codification of only the civil laws of Lower Canada. The larger idea may perhaps be traced to the 1846 article mentioned above, but if Cartier was its author his views, as Attorney-General at the time of the enabling legislation ten years later, had changed; he too saw that it was necessary to begin first with the codification of *le droit civil* which Lower Canada "imperatively" demanded, and that later would be time enough to think about accomplishing the larger proposal.[26] And it was Cartier, in any event, when explaining the proposed legislation providing for

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[26] *Journals of the Legislative Assembly,* Provincial Parliament of Canada, 1857, vol. XV, pp. 239-240 (the proposed amendment called for a committee "to inquire and report as to the practicability of codifying the Laws of *Upper* and *Lower Canada* and framing a system adapted to the whole Province"); Debates, Legislative Assembly, Tuesday, 21 April 1857, in "*Scrapbook Debates*", 1857, pp. 62-63. Also recounted by G.M. Rose in his *A Cyclopaedia of Canadian Biography* (Series II), (Toronto, 1888), p. 573 and J. Tassé, *Discours de Sir Georges Cartier,* (Montréal, 1893), p. 129.

the setting up of the Commission and laying down the philosophy upon which it was to operate, who stressed its necessity for the Quebec legal order only on the basis of legal or technical factors rather than for its importance in any political context.[27] His expressed view of the reasons justifying the idea of codification, for which he claimed credit, did not alter in his later speeches,[28] when the plan for the Canadian confederation was well launched and Lower Canada's participation in any mechanism for bringing about national uniformity in private law was effectively excluded.

It is suggested therefore that the background of events leading to Quebec's codification has not been that of other countries adopting this same form of legislative expression. It was not used as a means of unifying the law of a country which, while politically united, was governed by separate legal systems each of which extended only over a portion of territory (as in the case of France); nor was it employed as a technique for reinforcing a newly found national unity within a country formerly fragmented along political lines (as in the case of Germany).[29] For some, at the time, the Quebec Code did constitute a means by which the first goal might be achieved, but this was no more than an aspiration; for others, subsequent in time, the Code has been seen as an expression, in the realm of private law, of a new kind of "national" political unity, but it is doubtful that this form of nationalist sentiment was a predominant force at the time of its inception.

The codification of the civil laws of Lower Canada was *advanced* as a matter of policy in 1857: at a time when the Province of Canada was politically united within itself and the place of the *droit civil* was constitutionally secure even though in a number of ways it had been affected by provincial and imperial (i.e. English inspired) legislation. And while the idea of codification did closely coincide in time with the first stirrings of that movement which was to lead to the larger political union of 1867, the real reasons for the project (as

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[27] His speech upon the second reading of the bill on 21 April 1857 is reproduced by Tassé, *op. cit.*, pp. 129-131; *cf.* J. Boyd, *Sir George Etienne Cartier, Bart.*, (Toronto, 1914), pp. 133-135.

[28] *Cf.* his speech of 31 January 1865 in *Legislative Proceedings in Relation to the Civil Code of Lower Canada* (*n.d.*, hereinafter called *Legislative Proceedings*); that on the Code of Civil Procedure, 26 June 1866, before its referral to a special committee, Tassé, *op. cit.*, p. 487, also reproduced in *Legislative Proceedings*; and that of 30 Octoher 1866 at a banquet offered by the citizens of Montreal, Tassé, *op. cit.*, p. 509.

[29] *Cf.* F.H. Lawson, *A Common Lawyer Looks at Codification*, (1960), 2 Inter-Am. L.R. 1.

examined in the next section) were, initially at least, more obviously technical or legal in nature than political. In the minds of some, it may have been hoped that the projected Code could offer that "standard of assimilation" (to borrow McCord's phrase) *to which* the laws of the other future Canadian common law provinces might adhere, or at least serve as a first phase in the elaboration of some "national code of laws". Either idea may in fact still have been alive in some quarters upon the actual completion and coming into force of the Code in 1866, and McCord's remarks may be taken as evidence of some such attitude. It nevertheless seems unlikely that these ideas had any general acceptance at that time, since the terms upon which any future unification of the private law in Canada was to be attempted, at least through the aegis of the central government, excluded Quebec's participation. The mechanism of section 94 of the *British North America Act, 1867* foresaw only the future collaboration of the common law provinces. As a means of achieving even this more limited end, section 94 has not, as examined elsewhere, been at all productive.[30] This fact in itself may be some indication of how fanciful was the dream of true national unity in the realm of Canadian private law which would have had to include the *droit civil* of Lower Canada.

B. Legal or Technical Factors

Against this picture of political factors surrounding the inception of codification, there may now be examined the range of compelling, and certainly more easily demonstrable, legal or technical reasons advanced in its support. These factors, as well, explain the nature of the instructions given to the Commission in the enabling legislation of 1857 and the details of its methods, now ascertainable on the basis of our new documentation, for carrying out these instructions over the period of its work.

The preamble to the 1857 Act, in conformity with the legislative style of the period, according to which it served the purpose of explaining the evils that the enactment was intended to remedy and the objects it was to achieve, is the first document to which reference must be made. It enunciates the four principal factors motivating the codification, some of which had already been put forward with not a little eloquence and some urgency in the anonymous article of 1846 mentioned above. These may be resumed as follows: i) the diversity of sources, ii) the problem of the language of the law, iii) the absence

[30] F.R. Scott, *loc. cit.*, at p. 528, traces the efforts made after 1867 to this end.

of legislative or doctrinal synthesis, and iv) the availability of foreign models.

i) *Diversity of Sources*

It is, of course, well known that Lower Canada, first a French and then an English colony, was with respect to its legal system in an altogether exceptional position: the private law, *le droit civil*, was essentially and traditionally French in origin; that is to say, it combined, in its own particular amalgam, elements of Roman law, "germanic" custom and, in those subject areas where French sovereigns had been strong enough to do so, royal legislation — all of which was only fully synthesized in the seventeenth and eighteenth centuries through the doctrinal writings of legal authors. And yet, in Canada, since the British Conquest, this domain of legal relations was situated in a context of public law, administration and judicial organization inspired along English lines. By the middle of the nineteenth century it had been further complicated by the introduction of portions of English substantive law in particular instances and a measure of domestic legislative activity on a variety of matters rooted in one or other of these traditions.

The schema of legal sources that resulted, denounced by Durham as having created a "patchwork of . . . incoherent and conflicting laws"[31] and decried by the anonymous author of 1846 as a "babel légale",[32] is the first factor to which the preamble of the 1857 Act refers:

> [T]he laws of Lower Canada in Civil Matters [it narrates] are mainly those which, at the time of the Cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases.

The actual manipulation of these sources was a matter of great difficulty for the practitioners and judges of the time.[33] While

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[31] See *supra*, note 25.

[32] *Loc. cit.*

[33] The author of the 1846 article remarked: "Il n'est peut-être pas un pays au monde soumis à plus de règles de droit, empruntées à des systèmes divers... Quel esprit assez vaste pourrait embrasser et connaître cette variété infinie d'édits, de coutumes, de brocarts, d'ordonnances, de statuts, de jurisprudence de tout genre?" (*loc. cit.*, pp. 337-338); another observer, writing in 1857, exclaimed: "Quelles sont les lois qui nous régissent aujourd'hui? Qui peut le dire? Quel est l'avocat, quel est le juge qui puissent dire 'voilà la loi'. La loi, mais nous n'en avons pas, ou du moins nous en avons trop, de si vieilles et de si nouvelles, de si usées et de si contradictoires, que les meilleurs juristes s'y perdent... Et la raison en est bien simple, c'est que la loi, telle que nous l'avons *n'est plus un texte, mais l'opinion des commentateurs* aussi divers que

evidently the major reason for proceeding to that kind of *consolidation* of the multiple sources of the law that its *codification* implies, the demonstration of this diversity is, for our purposes, more conveniently reviewed in the following section devoted specifically to that subject. At this stage, however, it is appropriate to examine the next reasons — consequences in fact of the first — to which the preamble also pointedly refers.

ii) *Problem of the Language of the Law*

The first of these was the fact that "the great body of the Laws . . . exist only in a language which is not the mother tongue of the inhabitants of British origin, while other portions are not to be found in the mother tongue of those of French origin." The problem of the language of the law, as suggested by the Act's careful wording, was a more serious handicap for the English-speaking inhabitants of Lower Canada than it was for those of French expression. In the case of the latter, at least, legislation by way of statute, whether provincial or imperial, had traditionally been available in French translation over the greater period of the history of the region.[34]

Such was not generally the case in respect of the principal elements of *l'ancien droit civil.* It is true that the *Coutume de Paris* was unofficially translated and published in English in the early 1840's [35]

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nombreux." The author was the correspondant "Marcus" writing 31 March 1857 from Toronto to the newspaper *Minerve* (4 April 1857) on the principal measures of the current session, which included the legislation under consideration brought in 10 March. This same extract is also reproduced in P.G. Roy, *Histoire du Notariat,* t. 3, (Québec, 1897), pp. 224-225.

[34] The *Provincial Statutes of Lower Canada,* 1793-1836, and the *Ordinances* of the Special Council, 1838-1841, were published in French and English, the texts side by side; the "Act of Union", 3 & 4 Vict., 1840, c. 35, re-uniting Upper and Lower Canada to form the Province of Canada, excluded the use of French in proceedings and instruments of both the Assembly and the Council but did not prohibit translations thereof (s. 41), and a local measure of the new parliament provided for unofficial translations (*An Act to provide for the translation into the French Language of the Laws of this Province,* 4-5 Vict., S.C. 1841, c. 11); in 1848 this provision of the Act of Union was repealed ("The Union Act Amendment Act", 11 & 12 Vict., 1848, c. 56).

[35] N.B. Doucet, in his *Fundamental Principles of the Laws of Canada,* (Montreal, 1841-1843), "compiled with a view of assisting law students in their studies," provided an English translation of the text of the *Coutume de Paris* "as followed in that part of the Province of Canada formerly called Lower Canada" (vol. I, pp. 227-298). Doucet also gave (in vol. II, p. 1) what he termed a "Civil Code", "formed partly by the dispositions of the customs and partly on those of the civil law" (at pp. 37-152), the contents of which are given *infra,* note 52.

and that certain doctrinal works, principally those of Pothier[36] and Domat,[37] existed even earlier in translations published in England or the United States, but there is no evidence that they were either known, relied upon, or generally available in Lower Canada. The other relevant legal materials, *ordonnances, ancienne jurisprudence,* etc., could only be found in their original language. The linguistic problem of the English minority, therefore, figured largely in Cartier's thinking, as he himself readily attested. In a speech of 26 June 1866, when proposing second reading of the bill on the Code of Civil Procedure, he remarked that for a long time the English had been deprived of the ability to study French law, as they would have wished, because there was no literature in English providing a correct statement of it. There resulted, he observed, on the part of some, "une espèce d'aversion ... contre notre droit français qu'ils ne pouvaient connaître et apprécier".[38] Cartier thereby confirmed a sentiment of a portion of the English population that had been singled out some twenty years earlier.[39]

Any re-organization of the law had to resolve this difficulty. The personnel named to the Commission was effectively equipped to do so. While the enabling Act only provided that each of the secretaries must be a person "well versed" in the other language not his mother

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[36] W.D. Evans published a translation of his work on *obligations* in 2 vols., *A Treatise on the Law of Obligations, or Contracts,* (London, 1806) and American editions by W.D. Evans (based on an earlier translation of F.X. Martin of 1802) were published as *On the Law of Obligations or Contracts,* (Philadelphia, 1826, 1839 and 1853). Other translations included: L.S. Cushing, *On the Contract of Sale,* (1839); C. Cushing, *On Maritime Contracts of Letting to Hire,* (1821); O.D. Tudor, *On Partnership,* (1854), etc.

[37] *Les Loix civiles dans leur ordre naturel* was translated as *The Civil Law in its Natural Order* by William Strahan, (London, 1722), and a reprint of the second (1737) edition was published by L.S. Cushing, (Boston, 1850 & 1861).

[38] Tassé, *op. cit.,* p. 487, at p. 491; and in *Legislative Proceedings Concerning the Code of Civil Procedure of Lower Canada* (*n.d.*), p. 13 — this last version of the speech reports Cartier as having said that "une espèce *d'antipathie*", rather than "aversion", resulted from this state of affairs.

[39] The commissioners of the *Revised Acts and Ordinances of Lower Canada* (to the time of the Union), published in 1845, remarked in a *Prefatory Note* (dated November 1843) that "the prejudice entertained by many to the civil law of Lower Canada ... arises solely from their want of means of obtaining [a] general knowledge of its provisions." The Commissioners indicated they would have liked to include in their work a reprint of parts of the *Coutume de Paris* still in force at that time, "with an English version sufficiently clear to make the provisions of the custom intelligible to those unacquainted with the French language," but that this was not done in order to avoid delays in publication.

tongue,[40] and laid down no such requirement of the Commissioners, each of the three judges (two French and one English) named would appear to have possessed some proficiency in the other language. The minutes of their meetings were formally recorded and read in both languages.[41] According to section 15 of the Act, the *Reports* of the Commission and the provisions of the Code were to be "framed and made" in both languages; the dual language texts, when printed, were to "stand side by side". An important part of the work of codification was thus devoted to evolving the texts settled upon in both languages. McCord, in his *Preface,*[42] fully confirmed on this point by a number of entries in the *Minutes*, reported that preliminary translations were made, by one or other of the secretaries, according to the language into which the draft had to be converted. These texts were then subjected to verification by the Commissioner responsible for the original draft before being reviewed by the whole Commission, when adjustments to the language of both texts were made accordingly. Both texts are thus really "originals" since both were discussed and evolved together, rather than one version being a simple translation of the other. They are, therefore, as a matter of principle, "equal in law" or "equally law". And in the case of a difference in the language of the two versions, for which problem the Code itself provides a rule,[43] the language of the first draft, even though it is now wholly ascertainable, should be of no weight whatso-

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[40] Section 1.

[41] *Livre des Minutes,* Archives, *Séminaire de Québec,* S. 817, p. 29; Caron noted that this way of proceeding would be "conforme à l'esprit de la Loi", *Notes Générales sur les lois en force* (Quebec Archives), p. 14 (hereinafter referred to as *Notes Générales*).

[42] McCord, *op. cit., Preface,* p. viii. *Cf.* as well the remarks of Ramsay, J., *Harrington* v. *Corse,* (1882), 26 L.C.J. 79 (B.R.), at p. 108.

[43] Art. 2615 C.C. provides:

Dans le cas de différence entre les deux textes du présent Code sur les lois existantes à l'époque de sa promulgation, le texte le plus compatible avec les dispositions des lois existantes doit prévaloir. Si la différence se trouve dans un article indiqué comme modifiant les lois existantes, le texte le plus compatible avec l'intention de l'article d'après les règles ordinaires d'interprétation doit prévaloir.

If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is most consistent with the intention of the article and the ordinary rules of legal interpretation shall apply in determining such intention.

ever in any work of legal interpretation.[44] It is not that language version of a text in which it was originally drafted (a fact now fully established[45]) that must prevail, but rather that version most consistent with the law on which it was founded.

iii) *Absence of Legislative or Doctrinal Synthesis*

The second consequence flowing from the general pattern of sources of law in Lower Canada was, however, even more crippling to the development of the system than the first. The bulk of the *droit civil*, apart from the superimposition on specific points of provincial or imperial legislation drawn on many points from English law, was made up of French *ancien droit*, such as it existed during the latter part of the eighteenth century prior to the French political revolution of 1789 and the legal changes brought about by the *Code civil* of 1804. Lower Canada's legal system was denied any continuing nourishment, so to speak, from the legal system of the country which was the seat of the tradition that had produced it; the source from which it sprang was stopped off by the transformation of the uncodified *ancien droit* into a modern code, and the consequential change in the viewpoint of French legal writers. "[T]he old laws still in force in Lower Canada," the preamble states, "are no longer reprinted or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them."

With respect, first of all, to the "old laws", it has already been intimated that the *Coutume de Paris*, probably the single most important *statut* of the private law of Lower Canada, had never been the object of any legislative action on the part of governmental authorities. Its only publication in a *quasi*-official form occurred in the 1770's, when a committee was entrusted with the task of estab-

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[44] There is no "authoritative" indication of the language in which any article was drafted; the account given by McCord on this point however can now be confirmed on the basis of the *Minutes* (*infra* note 45). For an example of the kind of slip mentioned here, *cf. O'Meara* v. *Bennett*, (1918), 28 B.R. 332, at p. 338, per Pelletier, J.

[45] The whole of *Book Third, Of the Acquisition and Exercise of Rights of Property* (now art. 583-2177 C.C.) was drafted originally in English by Commissioner Day with the exception of the titles on *Successions, Gifts inter vivos* and *Wills, Marriage Covenants, Suretyship, Privileges, Hypothecs, Registration*, and *Prescription*; all of *Book Fourth, Commercial Law*, was also drafted by him in English. In the *Reports*, the language of original drafting is indicated (incidentally) by the fact that the authorities are given only in that language version; while this is not in any way officially acknowledged to be the case, the *Livre des Minutes* confirms this breakdown, also given in McCord, *op. cit., Preface*, pp. viii-ix.

lishing (but only in French) an *Abstract* of those parts of the *Coutume* received and practised in Lower Canada during the time when the colony was ruled by France.[46] It did not form part of the work of the commission entrusted with the revision of the statutes and ordinances of Lower Canada up to the time of the creation of the Province of Canada in 1841.[47]

There is, in effect, no indication that its re-publication, translation or revision was ever envisaged by the government of Lower Canada — a state of affairs, it should be mentioned, that has since been duplicated in the case of the present Civil Code which has never been re-issued in an official edition since 1866. Portions of French royal legislation concerning Canada as a French possession, and domestic legislation of the *Conseil supérieur* and intendants, were published in the early years, and again, in expanded form, in the middle years, of the last century, but the publication of these materials, mostly administrative in character and of limited relevance to the private law, was motivated more by antiquarian interests than professional legal need.[48]

The lack of re-publication, revision or translation of relevant legislative materials and the absence of judicial reports during the first part of the century also explain, in large part, the want of systematic doctrinal works dealing with such sources as living law in their Canadian context. The point made by the preamble as to the difficulty of obtaining relevant French commentaries would certainly have been applicable, for example, to the work of de Ferrière whose *Commentaire sur la Coutume de Paris,* the classic writing on the subject, had not been re-published since the end of the eighteenth century;[49] on the other hand, Pothier, also a standard author, had been re-edited many times during the first part of the nineteenth century.[50] It is not surprising therefore that other works, even those principally treating the new *Code civil* and only incidentally

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[46] *An Abstract of those parts of the Custom of the Viscounty and Provostship of Paris which were received and praetised in the Province of Quebec in the time of the French Government* "drawn up by a select committee of Canadian gentlemen well skilled in the laws of France" was published in London in 1772, and continued by a *Sequel to the Abstract* in 1773 but neither contained an English translation, *cf. supra* note 35.

[47] *Cf. supra* note 39.

[48] The first edition, 1803-1806, in 2 vol. (Québec); the second, 1854-1856, in 3 vol. (Québec).

[49] The last editions of de Ferrière's *Commentaire* appear to have been in 1770 and 1788.

[50] Pothier's works were re-edited and published at least seven times prior to the Bugnet editions of 1845-1848 and 1861.

dealing with the former law, those for example of Maleville and Merlin published in the early 1800's,[51] had some currency before the courts of Lower Canada.

But all these, while undoubtedly the classic explanations of the *ancien droit* or of many of its principles as contained in the new French Code, were not written with the growing complexities of the Canadian scene in mind; their rarety, if such indeed were the case, was exceeded by their increasing unsuitability to the difficulties and immediate needs of local society. At this level, and not surprisingly in view of the absence of organized structures for the teaching of law, there was no doctrinal production, in either quantity or quality, able to accomplish the work of systematization that might normally have been expected, to some degree at least, to have emerged from the responsible exercise of legislative authority. There was no Canadian Pothier to synthesize this confused body of uncodified law.[52]

iv) *Availability of Foreign Models*

The essential aim of any compilation of laws, whether in the form of a consolidation or a codification (and the distinction between these two techniques, with reference to the work of the Lower Canada Commission, is examined below) is, above all, to facilitate the means of gaining access to the law itself. It is true that the desire for legal reform, or the wish to unify the law, have also figured to a varying extent in the ambitions of those who have promoted codification at different times and in various countries, and such ideas certainly had some application in the case of Lower Canada. Reform of "lois vieilles et anomales", the cutting away of old institutions, the reconsideration to be given to some more recent in date, and the need to modify the laws relating to commerce

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[51] Merlin's *Répertoire de jurisprudence* containing explanatory notes on the changes brought about to the former law by the new French Codes was in its 5th edition by 1827-28; that of Maleville, *Analyse raisonnée du Code civil*, indicating the conformity of its toxts to the former law, was in its 3rd edition by 1822.

[52] Henry des Rivières Beaubien was the earliest author to aspire to such a position in his *Traité sur les lois civiles du Bas-Canada*, 3 vol., (Montréal, 1832), in which he purported to present the state of the law in the form ("en réunissant et co-ordonnant dans un cadre étroit et par ordre des matières") of the *Code civil* (i.e. in the same arrangement as its three *Livres*: *Des personnes, Des biens*, and *Différentes manières dont on aequiert la propriété*); not much later Doucet, in his *Fundamental Principles of thc Laws of Canada* (1841-1843), also presented a *Civil Code* (vol. II, pp. 37-152), more concise than that of Beaubien and which, while observing a sinnilar ordering of materials, also included chapters on "actions" and "commercial maritime laws" (the whole divided into twelve *chapters*).

in the light of North American commercial ties, all these were put forward by the author of the 1846 article in his plea for general legal re-construction.[53] Allusion has already been made to the thought of some that uniformity of the laws of Upper and Lower Canada should have been the principal aim of any general code at this time. But neither of these objectives, reform or unification, is expressly mentioned in the preamble to the 1857 Act. The policy of this legislation was to secure this first goal: the organization and co-ordination of the whole *corpus* of Lower Canada's private law, as it then existed, in the simplified and readily accessible form of a code.

In what ways was codification a suitable means of resolving the problems sketched out by the Act?

The nineteenth century was the period when the *technique* of codification — merely one legislative formula for achieving a systematization of the law — was finally perfected. Codification was the fulfilment of a development in continental Europe that had stretched over many previous centuries. But with respect to this evolution the law of Lower Canada was, so to speak, an orphan — it was an off-shoot of the same general tradition and yet cut off from it, both in time and in space. The genius of Cartier was to have recognized that Lower Canada's law was nevertheless still susceptible of the same treatment. The idea is reflected in the part of the preamble of the 1857 Act which concludes by referring to the "great advantages which have resulted from codification, as well in France as in the State of Louisiana, and other places" and which, therefore, rendered it "manifestly expedient" to provide for the codification of the laws of Lower Canada.

The specific reference to these two codes was quite natural. As the leading example of the legislative technique of codification, the French *Code civil* enjoyed an enormous prestige throughout the western world at the time. For Lower Canada it possessed the natural advantage of having been drawn, in large part, from the same elements which formed the basis of its private law. The Code of Louisiana, as well as sharing much of the same legal tradition

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[53] *Loc. cit.*; at p. 340 the author suggested "Peut-être notre statut provincial a-t-il étendu au-delà des bornes la faculté de tester? du moins c'est un sujet qui mérite d'être reconsidéré, après l'expérience acquise par un laps de plus de quarante années." He is referring to the Lower Canada statute, 41 Geo. III, S.L.C. 1801, c. 4, *An Act to Explain and to Amend the Law concerning Wills*, which endeavoured to clarify the effect of section 10 of the "Quebec Act", 14 Geo. 3, 1774, c. 83, whereby the "freedom of willing" was introduced alongside provisions of the *Coutume* quite incompatible with such concept. The matter does not appear to have been seriously "reconsidered" by the Commission in any of the documentation recording its deliberations.

and particularly impressing Cartier by its merits,[54] had an additional advantage in that, in its first two official editions (1808 and 1825), the texts of its articles were in both English and French.

The essential reasons, therefore, motivating the proposed codification, as exposed by the legislation of 1857, were rooted in this fact: the actual *content* of the legal system of Lower Canada was not easily ascertainable, by way of reference to either an official compilation or suitable doctrinal synthesis. The difficulty existed on two levels: the *substance* of the law was only to be gathered from a multiplicity of different sources which, themselves, existed in a *language* not always accessible to all portions of the population. The classification and organization of the law, to be exposed in the systematic fashion of a code along the lines of two obvious models available, were thus the aims of the new compilation. These objectives, and the method of the Commission appointed under the 1857 Act to carry them out, will now be examined in the following section.

SECTION II:

"Modus Operandi" of the Codification Commission

The provisions of the 1857 Act laid down the essential directives according to which the codification was to be carried out. The philosophy at the basis of the new compilation was, in effect, already fixed in the enabling legislation and in no sense left to the discretion of the Commissioners themselves. To understand its logic one must bear in mind the reasons enunciated in the preamble, and examined above, respecting the diversity and complexities of the sources of law at that time — French and English in language; French, imperial and domestic in origin; customary, statutory and jurisprudential in nature. The extent to which, on the one hand, the elements of existing law were to be retained and, on the other, the degree to which the French *Code civil* in particular, a natural model in view of all the circumstances, would constitute a blueprint for the Commission's work, were basic policy decisions made solely by the legislature itself. The sphere for creative reform left open to the Commissioners was in no way limited by the Act, but such freedom was only to be exercised, if exercised at all, by their proposing distinct amendments to the law such as they found it actually stood.

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[54] Debates, Legislative Assembly, 21 April 1857 (evening session). When the Bill was read for the first time he "dwelt particularly on the merits" of the Louisiana Code and "proposed to follow a similar mode in the codification of the Laws of Lower Canada", *Scrapbook Debates*, vol. 1857, p. 61.

The immediate task of the three Commissioners, Judges Caron, Day and Morin, upon assuming their duties in 1859, was to establish the proper *techniques* for executing these instructions rather than to lay down, according to their own views, similar or other guidelines.

The Commissioners were instructed, according to section 4, to proceed in the following manner:

> ...reduce into one Code, to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada 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...

and, in the terms of section 6, to

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

Finally, section 7, directed that

> The said [Code] shall be framed upon the same general plan, and shall contain, as nearly as may be found convenient, the like amount of detail upon each subject as the French [Code] known as the *Code Civil*...

Three distinct points were thus to form the basis of the Commissioners' method:

1. the *reduction* to organized form of the provisions of civil and commercial law of general and permanent character, held by them to be in force, and the indication of the authorities on which they believed them to be so;
2. the *observation* of the same general plan, and the inclusion of the same amount of detail, as found in the French Civil Code, and
3. the *suggestion* of such amendments to this body of law as they considered "desirable" but in a manner whereby these proposed alterations would be easily distinguishable from the laws actually in force.

They were further instructed to report, from time to time, to the Governor as to their proceedings and progress.

The first and most fundamental feature of the operation was that it should constitute a complete *mis en ordre* of the living elements of the private law. The language employed gave no cause for doubt on this point, and there is ample indication that the Commissioners' first pre-occupation, upon their appointment, was to devise suitable techniques for achieving this end. On this seemingly only technical level, then, of marshalling together the multiple sources of law, some of which reached far into the past, the work assigned

was essentially one of bringing about a *consolidation* of existing law. To characterize it in this way is not to denigrate the work performed: the difficulties of producing such a consolidation, within a framework of sources more explicitly and intimately linked to the past than was the French *Code civil*, were immense. The task, on the whole, was carried out with skill and faithfulness to the basic philosophy laid down. The Commission should not be criticized, as it sometimes is, for its conservativeness on this score. No code can be completely original; it must, to a very great extent, as even the French *Code civil* itself demonstrates, largely rely upon sources offered up by its antecedents and "consolidate" past experience. Innovation or reform is not a necessary handiwork of codification.

The Quebec compilation was nonetheless more than a mere consolidation of past but still existing legal sources; it acquired further the status of a true *codification* in virtue of the second aspect of the instructions outlined above. The Code was to be "framed upon the same general plan" as the French *Code* and, equally important, was to contain a "like amount of detail upon each subject." In other words, in the expression to be given to the law or legal rules, and in the organization of such rules, the Code was to adopt the legislative style most satisfactorily worked out, up to that time, by the Napoleonic codes established in France at the start of the century.

Each of these aspects, the *consolidation* of the laws, the *codification* of the law, and the *reform* of the law, will now be studied in the light of the new materials available for examination.

A. Consolidation of the Laws

The first obligation imposed on the Commissioners was to incorporate only such provisions of the law relating to civil matters of a general and permanent character as they held to be "actually in force" and, in so doing, to give the "authorities" on which they believed them to be so. In their minds this could only be safely discharged by first determining what the whole range of sources of law in Lower Canada actually was. It was to this question — *Quelles sont les loix du pays — de quoi se Composent-Elles* — that Caron, the apparent president of the Commission, first addressed himself in the spring of 1859, in his *Notes Générales*,[55] a collection of private notes and reflections on various aspects of the work to

[55] *Notes générales*, pp. 1 *et seq.*; the same matter is further treated in a fragmentary fashion at pp. 17, 69-72.

be performed. These preliminary thoughts formed the substance of a *Mémoire* on the matter submitted to and approved by the Commission on 10 June of that year.

In its finally adopted form, this *Mémoire*[56] indicates the range, and provides a classification, of the possible sources of law to be integrated into the future Code. Fourteen basic and general categories of materials were listed. It was clearly intended that this list would constitute the blue-print for further and more detailed lists, all of which were seen as preparatory to any actual drafting of articles or even any decision as to arrangement of subjects:

> ...il est... impossible de procéder, avec sûreté à l'incorporation dans notre code, *de toutes les lois en force* et encore moins de les classer dans l'ordre où elles y doivent être, sans qu'au préalable, il ait été fait une liste correcte de toutes les lois en force.

The plan therefore was to commit the analysis of each such category of sources to different persons — "le travail devrait être divisé" — in order that *un état circonstancié* of each might be prepared and accepted by the Commission. Only at that stage, after complete classification of all relevant materials, could the drafting process be undertaken —

> La confection de ces listes est, pour les commissaires, la fondation de l'édifice à construire. Le résultat de ce travail constituera les matériaux dont doit être composé cet édifice. Ce n'est que lorsque les matériaux seront amassés, et pour ainsi dire, mis sur place, qu'il sera temps de commencer la construction, c'est à dire la rédaction des codes et la classification des sujets; c'est alors et alors seulement qu'il conviendra de se faire un nouveau partage de l'ouvrage, partage auquel il paraît prématuré de penser pour le moment.

Two further and distinct preparatory operations were also envisaged: the first to consist of a compilation of all provisions dealing with "commercial matters", also to form part of the Code in either a distinct title or book "qui tiendrait lieu du Code de Commerce français"; the second, an operation in the form of an essay into the comparative technique, was to consist of a compilation of a comparison of the French and Louisiana Codes, with a view to establishing their similarities and differences and to determining to which of them, on specific points, preference might be given for proposed reforms. The Louisiana Code, it was remarked, since it was completed after the French, was likely to contain provisions that ought to be adopted in amendment to the law of Lower Canada.

The *Mémoire* concludes by stating that these lists and collections of materials might form the subject of a first report to be submitted

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[56] As recorded in the *Livre des Minutes*, pp. 15 *et seq.*

to and approved by the Governor.[57] They do not, however, appear to have been published in any form, and the manuscript versions, if in fact ever fully compiled, have not been recovered. Except in the case of the *Coutume de Paris*, certain indexes to the statutory legislation which were independently compiled and a *Répertoire alphabétique* containing (an incomplete) analysis of the articles in the French *Code* and correspondingly proposed for that of Lower Canada, it may very well be that no such lists were, in fact, ever fully established. The speed with which the first drafts were produced would seem to belie the possibility that a task as considerable as that proposed here could have been completed previously. The chronology of events, as outlined in *Appendix II*, indicates that although the Commissioners, in addition to the secretaries, were to undertake "les études préparatoires qui leur étaient indispensables," and although a meeting some six months later (on 27 October) was devoted to reviewing these matters, Judge Day was nevertheless ready with a first draft of the title *Of Obligations* in late February of the next year (i.e. 1860). From this time onwards the members of the Commission met regularly to consider methodically their various drafts, and no further mention is made of such lists. It is likely, therefore, that this plan was dropped and that the initial drafting process was begun before they were ever completed. An examination of Day's drafts does not suggest that he was relying on any such aid.

Indeed the compilation of such lists and the gathering together of source material, as conceived by Caron, would ultimately have been of only limited value. A summation of the existing law, in the form of draft articles arranged by *subject matter*, the method actually used in the drafts themselves (which drafts we now possess)

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[57] The Act did not impose a duty to make any such report, but it appears, from the Assembly debates of 21 April 1857, that some members believed it was intended that the Executive Council might exercise some sort of supervision of the work at this or later stages (*Scrapbook Debates, loc. cit.*). Section 8 of the Act did require that reports be made to the Governor "from time to time" and imposed on the Commission the duty to be guided by the instructions of the Governor "in all matters not expressly provided for by this Act"; Caron, in his *Notes*, mentions only one letter received from Cartier containing suggestions as to how to proceed (at p. 9: "Que le Code d'instruction criminel (français) contient aussi certaines dispositions d'un caractère mixte tenant au civil & au criminel & il [Cartier] ajoute [qu'] il sera important que nous ne perdions pas de vue l'examen de ce Code ainsi que du Code pénal dans lequel il peut y avoir des dispositions qui affectent la matière du recours en Dommages & Intérêts civils résultant des Délits & quasi-délits"); the *Minutes* do not reveal that any other suggestions or instructions were received during the whole course of the work.

and, subsequently, in a somewhat altered form, in the *Reports* as published, whereby the relevant source authorities were gathered together and cited,[58] accomplished the same purpose.

In order to demonstrate the breadth of material sources deemed relevant at this stage, most of which did in fact figure in the drafts to some extent, the list contained in Caron's *Mémoire* is reproduced below with appropriate annotations.

Quelles sont les lois du pays actuellement en force, et qui partant doivent toutes entrer dans les codes à faire?[59]

I. La Coutume de Paris,[60] les lois françaises en vigueur,[61] et la jurisprudence suivie dans le ressort du Parlement de Paris en 1663,[62]

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[58] The arduousness of doing so was universally observed: at the time of the first reading of the 1857 Act, by different members of the Assembly, *Scrapbook Debates, loc. cit.*; by the Commissioners themselves, who remarked in their *Second Report* (22 May 1862) that there resulted an "increase of the work... and an expenditure of time, which the anticipated advantages will not compensate" (2nd ed., p. 141); on the other hand. Caron, in 1859, welcomed this obligation imposed by the Act ("Je n'aime guère à être exempté de l'obligation qui nous est imposée de citer les autorités qui nous font croire que les lois que nous rapportons comme étant en force le sont effectivement," *Notes Générales*, p. 87); Cartier felt obliged to defend the idea even as late as 1865-1866 (in his speeches of 31 January 1865 and 26 June 1866), although he considered that the results justified the amount of labour involved.

[59] *Mémoire* in *Livres des Minutes*, p. 16; the drâft of this list in the *Notes Générales*, p. 1, refers to Doucet, *op. cit.*, at p. 6, which provides essentially the same elements, although Doucet placed at the head of it "first,... the Roman jurisprudence, when the other laws are silent" which Caron relegated to the last position.

[60] The English-speaking Secretary, T.K. Ramsay, was entrusted by the Commissioners in the spring of 1859 with the task of examining each article of the *Coutume* with a view to establishing which were "encore en force, quels sont ceux qui ne le sont plus, s'ils ont été rappelés, abrogés, modifiés ou s'ils sont tombés en désuétude —" (*Notes Générales*, p. 10); the results of this research were published by Ramsay as *Notes sur la Coutume de Paris* in 1863, after his removal from his post in 1862, see *Appendix II infra*). He established that, of the 362 articles contained in the 1580 version of the *Coutume*, only 198 still retained any "effet législatif" at all and that 50 of these had been affected by legislation in various ways — there remained therefore only 148 articles which actually contained the law as it then was; other local editions of the *Coutume* are listed *supra*, notes 35 and 46.

[61] This expression covers those *édits* and *ordonnances* of the 16th and 17th centuries (prior to 1663) by means of which French royal power began its efforts to unify and reform *le droit privé* (those of *Villers-Cotterêts*, 1539; *Moulins*, 1566; *Blois*, 1579, etc.).

[62] About a dozen *arrêts* based on the French *ancien droit* are cited in the *Reports*.

date de l'acte de création du Conseil supérieur qui a introduit ou reconnu l'introduction de ces lois dans le Canada.[63]

II. Les édits et ordonnances des Rois de France, décrétés et promulgués spécialement pour le Canada, depuis cette époque (1663) jusqu'à la Conquête du pays en 1759.[64]

III. Les ordonnances et règlements *généraux* du Conseil supérieur depuis sa création (1663) jusqu'à la Conquête.[65]

IV. Les lois, édits et ordonnances promulgués par les Rois pour la France, depuis l'époque de la création du Conseil supérieur jusqu'à la Conquête qui ont été enregistrés au Canada par ordre du Conseil supérieur, (tels sont v.g. les ordonnances de main-morte, de 1667). Ces lois ainsi enregistrées, n'étant cependant en force que de la manière qu'elles avaient été enregistrées, et avec les modifications que le Conseil jugeait à propos d'y faire.[66]

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[63] The *Edit* in question (*supra*, note 1) refers only to "les loix et ordonnances de notre [i.e. Louis XIV] royaume" but that of the following year (*ibid.*) refers expressly to the *Coutume*; *cf.* A. Gérin-Lajoie, *Introduction de la Coutume de Paris au Canada*, (1941), 1 R. du B. 61.

[64] The instances of the survival of such law (to 1859), other than various royal instruments respecting concessions of land to particular individuals or bodies, are rare; however, see e.g., the *Déclarations* of 15 décembre 1721, 1er octobre 1741 and 1er février 1743 respecting minors, marriage and tutorship, *Edits et Ordonnances*, t. 1, pp. 438, 557, 563, (*Second Report*, 2nd ed., at p. 285, for art. 7, now art. 172 C.C., and at p. 316 for art. 4, now art. 249 C.C.).

[65] A few of these are cited by the Commissioners: e.g., respecting servitudes, an *Ordonnance* of 12 mars 1709 imposing a general obligation "aux Habitants de faire les Clôtures le long de leurs habitations," *Edits et Ordonnances*, t. 2 (*Arrêts et Règlements du Conseil supérieur*), p. 270 (*Third Report*, 2nd ed., p. 484, art. 7, now art. 505 C.C.); respecting the tithe (*dîme*) payable to Roman Catholic curés, an *arrêt* of 18 novembre 1705, *op. cit.*, t. 2, p. 133 (*Third Report*, 2nd ed., p. 524, art. 52, now art. 2219 C.C.).

[66] Of all the post-1663 *grandes ordonnances* of the 17th and 18th centuries only the *Ordonnance du mois d'avril 1667*, on procedure, is generally considered to have been in force by way of registration, *Edits, Ordonnances*, t. 1, p. 106 (with the observations of the *Conseil* made in 1678) and the *Edit* of juin 1679 respecting its execution, *loc. cit.*, p. 236; these played a role in the compilation of the Code of Civil Procedure of Lower Canada only somewhat less siguificant than that of the *Coutume de Paris* in the elaboration of the Civil Code. The *Déclaration ... concernant les Ordres Religieux et gens de mainmorte* of 25 novembre 1743, *loc. cit.*, p. 576, is incorrectly placed in this category since it was directed to corporations in the French colonies (*cf.* category II in the text). The other principal *ordonnances* (*Commerce, Marine, Testaments*, etc.) were nevertheless cited by the Commissionrs as statements of the law (*cf.* the remarks of Caron: "L'Ordonnance de commerce... n'ayant pas été enregistrée au pays n'y est pas en force comme loi — Mais il faut remarquer qu'elle est à peu près un résumé du droit commercial français existant à l'époque où cette ordonnance a été promulguée en France — ainsi il faut la consulter en évitant d'adopter ce qui est de droit nouveau." *Notes Générales*, p. 26).

V. Tous les Statuts du Parlement anglais, passés depuis la cession du pays, pour le Canada nominalement, ou dans lesquels il est nommé spécialement (tels sont v.g. l'acte de Québec,[67] (14 Geo. III, ch. 83); l'acte constitutionnel de 1791;[68] le Canada Trade Act,[69] et plusieurs autres[70]).

VI. Les lois, s'il y en a, (ce que je ne pense pas), promulguées pour le pays, par le gouvernement militaire, qui l'a régi depuis la conquête jusqu'à la création du Conseil législatif, par l'acte de 1774.[71]

VII. Les lois et ordonnances passés par le Conseil législatif, depuis sa création, (1774) jusqu'à son abolition par l'acte Constitutionnel de 1791.[72]

VIII. Les Statuts Provinciaux passés pour le Bas-Canada, par la Législature créée par cet acte de 1791, jusqu'en 1840 qu'a eu lieu la réunion des deux Provinces, d'après l'acte d'Union.[73]

IX. Les ordonnances du *Conseil Spécial*, passés par le Corps portant ce nom, auquel le droit de législater pour le pays avait été donné par le Parlement Impérial, pendant la suspension de la Constitution de 1791, jusqu'au temps de la réunion des Provinces, (1840).[74]

X. Les actes relatifs au Bas-Canada seulement, ou au Bas et au Haut-Canada tout ensemble, passés par notre Législature actuelle, créée par le Statut impérial de 1840.[75]

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[67] 14 Geo. 3, 1774, c. 83, *supra* note 2.

[68] 3 & 4 Vict., 1840, c. 35.

[69] *An Act to regulate the Trade of the Provinces of Lower and Upper Canada, and for the Purposes relating to the said Provinces*, 3 Geo. 4, 1822, c. 119. This was the first legislative step towards the abolition of the tenure of lands *en seigneurie* (although it provided for voluntary conversion only, s. 31), completed finally through the effect of the legislation of 1854, *supra* note 5.

[70] The extent to which imperial statutes "devront être mêlés aux Codes" was a problem for the Commission and a subject on which, with respect to one point at least, Commissioner Day dissented from the majority opinion (*cf. infra* category XIII in the text and note 78); Caron proposed to rely on the list of such statutes given in *Revised Acts and Ordinances of Lower Canada* to 1841 (Montreal, 1845) and a "collection" of them prepared by the Commissioners then working on a further revision, *infra* note 75 (*Notes Générales*, p. 33).

[71] None is cited by the Commissioners in their *Reports*.

[72] The Governor and Legislative Council passed ordinances from 1777 (i.e. until an Assembly was established by the Act of 1791), a re-edition of which appeared in 1825; important measures respecting jury trials and proof were introduced during this period, *infra* note 77.

[73] These were regularly published as *Provincial Statutes of Lower Canada*, 15 vol., 1792-1838.

[74] Its ordinances for the period 1838-1841, including a much needed reform of the system of registration of land titles upon which many of the Code's provisions were to be based, were issued in 6 volumes.

[75] The "Act of Union", 3 & 4 Vict., 1840, c. 35, creating the new Province of Canada out of the former Provinces of Upper and Lower Canada, nevertheless

XI. Les lois criminelles anglaises, dans l'état où elles étaient en 1774, époque où fut passé l'acte Impérial qui les introduisait au pays; sauf les changements nombreux qui y ont été faits par nos diverses Législatures, tant avant que depuis la réunion des deux Provinces.[76]

XII. Les règles anglaises de témoignage, dans les affaires de Commerce, ainsi que décrété par le même Statut Impérial de 1774.[77]

XIII. Les lois publiques anglaises applicables à tout l'Empire, et affectant, ainsi, l'état, la condition et les droits des habitants du pays, comme Sujets Britanniques.[78]

XIV. Quant aux sujets sur lesquels l'on ne trouve dans les diverses catégories que l'on vient d'énumérer, aucunes dispositions générales, il faudrait avoir recours: —

1° A la jurisprudence suivie en France avant la Révolution de 1789, ainsi qu'à celle du pays, depuis son établissement; celle de France telle qu'on la trouve exposée dans Pothier, Domat, Merlin et les

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maintained the private laws of each which, in addition to the general legislation applicable to the new Province of Canada, were consolidated in three distinct volumes, 1859-1861; the statutory consolidation respecting the old Province of Lower Canada, or "Canada East", was impatiently awaited by Caron who, according to his *Notes Générales* (pp. 5, 37), was in communication with G.W. Wicksteed (Law Clerk of the Provincial Legislative Assembly and the person charged with this work) as to the progress being made; he expected that the consolidation, finally produced in 1861, "nous ôtera beaucoup de responsabilité & d'ouvrage."

[76] The criminal law was not, of course, included within the scope of the codification; it had been dealt with more extensively by works in the French language (*infra* noto 83) than had the civil law in works written in English.

[77] Caron was mistaken as to his sources on this point: the "Quebec Act" of 1774 (*supra* note 2), in section 18, had only extended to the new possession the effect of English acts regulating "Trade or Commerce" in the British North American colonies; it was rather through the ordinances of Governor Carleton that the rule, as finally expressed in art. 1206 C.C., was introduced along with trial by jury in commercial actions (17 Geo. III, 1777, c. 2, s. 7, and 25 Geo. III, 1785, c. 2, s. 10: "In Proof of all Facts concerning Commercial Matters Recourse shall be had, in all the Courts of Civil Jurisdiction in this Province, to the Rules of Evidence laid down by the Laws of England"; subsequently C.S.L.C. 1861, c. 82, s. 17). Caron sketched the measure of the problem: "Il n'y a que les lois de *Témoignage* anglaises qui soient en force dans le pays, même dans les affaires de commerce — dans ces cas c'est la preuve seulement qui doit être faite & conduite d'après le système anglais, mais [quant à] l'application de la loi aux faits prouvés, c'est d'après notre loi qu'il doit être statué... Le *statut des fraudes* fait pour nous partie des règles de Témoignage, mais non le *statut des Limitations.*" *Notes Générales*, pp. 25-26.

[78] According to Caron, this category had been added at the suggestion of Day (*loc. cit.*, p. 4) who, however, subsequently did not agree that its substance should be placed within the Code: "The Codification ought not to include any branch or rules of law upon which the Provincial Parliament has no power to legislate." *Second Report*, 2nd ed., *Special Report* of Day, p. 237, respecting what became art. 19-23 C.C.

autres Jurisconsultes semblables;[79] celle du pays telle qu'on la trouve dans les décisions de nos tribunaux, dans nos rapports et dans le petit nombre d'auteurs qui ont écrit sur notre droit, tels que LaFontaine,[80] Beaubien,[81] Doucet,[82] Crémazie,[83] Perrault,[84] Bonner,[85] et quelques autres peut-être.[86]

2° La jurisprudence des arrêts, aux mêmes lieux et époques, telle qu'elle se trouve exposée dans les arrêtistes français et dans nos propres rapports;[87] Revue de Législation,[88] Rapports du Bas Canada,[89] Pyke's Reports,[90] Stuart's Reports,[91] Le Juriste[92] et quelques autres.[93]

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[79] The term *jurisprudence* is used here in the sence of *la doctrine* — i.e., the writings of jurisconsults, of which those of French authors (whether of the *ancien régime* or commenting upon the *Code civil* of 1804) constituted probably more than half the total number of authorities cited (*cf. supra* note 58), although English and American authors are not infrequently given as well.

[80] L.H. LaFontaine, *Analyse de l'Ordonnance du Conseil spécial sur les bureaux d'hypothèques*, (Montréal, 1842).

[81] See *supra* note 52.

[82] See *supra* notes 35, 52.

[83] J. Crémazie, *Manuel des notions utiles*, (Québec, 1852); *Les lois criminelles anglaises ... telles que suivies au Canada*, (Québec, 1842), a compilation and translation based on works of Blackstone, Chitty and Russell.

[84] J.F. Perrault, *Questions et Réponses sur le droit civil du Bas-Canada*, (1810), probably published in Quebec City.

[85] J. Bonner, *An Essay on the Registry Laws of Lower Canada*, (Quebec, 1852).

[86] As Caron suggests in this catégory (XIV-1°), some of *la doctrine* was to be found in the decisions of the courts (see note following), but other doctrinal work *stricto sensu* of this period included: F.-J. Cugnet, *Traité des Ancienes Loix de Propriété en Canada aujourd'huy Province de Québec*, (Québec, 1775), dealing with seigneurial tenure on the basis of the *Coutume;* J. M'carthy, *Dictionnaire de l'ancien droit du Canada*, (Québec, 1809); A. Gorrie, *Synopsis of the Laws of Letting & Hiring*, (Montreal, 1848); E.L. Montizambert, *Leeture on the Mercantile Law of Lower Canada*, (Montreal, 1848); F.-M. Bibaud, *Commentaires sur les lois du Bas-Canada*, 2 vol., (Montréal, 1859-1861); E.L. de Bellefeuille, *Thèse sur les mariages clandestins*, (Montréal, 1860); D. Girouard, *Essai sur les lettres de change*, (Montréal, 1860).

[87] Only 95 decisions are cited in the *Reports* relating to the civil and commercial law of Lower Canada; Professor Morel estimates that 72 decisions are invoked with respect to only sixty-four articles in the *Reports* on the first three Books of the Code, *Apparition de la succession testamentaire*, (1966), 26 R. du B. 499, at p. 502. The reporting of decisions was still very much in its infancy at this time: there were only 32 volumes of judicial reports for Lower Canada at the end of 1865 upon which the Commissioners could draw material; they cite only 9 unreported decisions.

[88] *Revue de législation et de jurisprudence*, 3 vol., 1840-1848.

[89] *Décisions des tribunaux du Bas Canada / Lower Canada Reports*, 19 vol., 1850-1867.

[90] *Cases argued and determined in the Court of King's Bench, for the District of Quebec ... during Hilary Term*, 1 vol., (1811), for 1809-1810.

> 3° Enfin, le droit Romain tel qu'adapté au droit français par Domat, Argou, Prévost de la Jannès, Bretonnier, Pocquet et tant d'autres.[94]

This list sets out in a roughly chronological order the range of possible sources which the Commissioners were bound to examine by the terms of their mandate. The sheer volume of such material is alone somewhat staggering; the Commissioners themselves complained that much labour was required to verify these sources — "sources so varied, and more numerous perhaps with us than in any other country."[95] According to my own calculation, there were over three hundred and fifty different sources cited in the final edition of the *Reports*,[96] and this estimate reduces what otherwise would be the absolute number since it is based only on the number of named authors or works cited (at least once) and, by counting as only one source a number of general categories such as provincial or imperial legislation, *arrêts français*, etc. French materials naturally make up the greatest part of this collection.[97]

It may also be remarked that this list is composed exclusively of *written* sources (whether in the form of *loi écrite*, i.e. legislation *lato sensu*, doctrinal writings or judicial decisions). At no point do the Commissioners appear to have considered the possibility that unwritten sources, that is to say oral customary law, might have to be determined.[98] While the enabling Act of 1857 referred only to the gathering together of the *provisions* (*dispositions*) of the laws of Lower Canada and provided no mechanism whereby an investigation

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91 G.O. Stuart, *Reports of Cases*, 1 vol., (1834), for 1810-1835 (*sic*).

92 *Lower Canada Jurist / Collection de décisions du Bas-Canada*, 35 vol., 1856-1891.

93 There were only two others: *The Law Reporter / Journal de Jurisprudence*, 2 vol., (1854), for 1853-1854; *Montreal Condensed Reports / Précis des Décisions des Tribunaux du District de Montréal*, 1 vol., (1854), for 1853-1854.

94 For Roman law, Caron regarded as "avantageux à consulter" the work by J.B. DeLaporte and P.N. Riflé-Caubray, *Pandectes Françaises*, (Paris, 1803) where the texts of the proposed French *Code civil* were placed alongside the elements of Roman law, the *ordonnances*, etc., upon which they were based.

95 *Second Report*, 2nd ed., p. 141.

96 Professor A. Morel, *op. cit.*, at p. 501 estimates 300 "titles".

97 Caron recorded in the spring of 1859 that he had received over twenty cases of books on French law alone from the Library of Parliament! *Notes Générales*, p. 106. But numerous English and American authors are cited as well.

98 Caron, in his *Notes* (at p. 103), merely transcribed a short passage from the *Pandectes Françaises* (see note 94): "Le droit non écrit est celui qui résulte des coutumes ou usages, qui, comme le disait très bien les auteurs du projet du Code civil, sont le supplément des loix", and added "Quand la loi ne parle pas il faut... se conformer à ce qui est généralement reçu."

of oral custom might be carried out, it would, presumably, have been within the function of the Commission to do so had it considered that oral custom continued to exist as an autonomous and contemporary source of law (custom *praeter legem*) in Lower Canada at that time. As examined and observed elsewhere, it is, for a number of reasons, almost certain that this was not so,[99] save in the area of commercial usages with respect to which the Commissioners did expressly refuse to attempt any complete statement.[100] The future role of usage or custom as a suppletive source of legal rules was nevertheless acknowledged by way of express provisions in the Code itself (custom *secundum legem* [101]).

One must not be misled, however, by the sheer *number* of such written sources, which appear, at first sight, to be overwhelming. The sources of *loi écrite* of the French *ancien régime* (categories I and IV), although of central importance, were not in fact extensive, and the single most important element, the *Coutume de Paris*, when analyzed under instructions of the Commission, showed that only 148 of its 362 provisions were still relevant.[102] Purely "legislative" materials of a general and permanent character dating from the same period, whether metropolitan French or domestic in origin (categories II and III) accounted for little of the Code in the final analysis.[103] Decisions of the courts also played only a small role in this quantitative analysis, because they had not been regularly published up to the middle of the nineteenth century.[104] The living statutory materials, derived from the legislative activity of the preceding one hundred years (categories V to X, XII and XIII), although extensive and touching on a variety of matters, were established by another body, working indepently of the Commission.[105] The vast bulk of actual law to be included in the provisions of the future Code was thus contained in the commentaries of a myriad of French writers of the seventeenth and eighteenth centuries.[106] It must be realized therefore that the consolidation to be made was not merely of legislative texts of positive law (whether statute, *ordonnance* or customary), but of a body of "unwritten law" — unwritten in the sense that it was to be found not in any authoritative written text legislatively sanctioned, but

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[99] *Cf.* P. Azard, *Le problème des sources du droit civil dans la province de Québec*, (1966), 44 Can. Bar Rev. 417, especially at pp. 425 *et seq.*

[100] Preface to *Book Fourth, Seventh Report*, 2nd ed., pp. 214-217.

[101] E.g., art. 531, 1635, 1864, 1978 C.C.

[102] *Cf. supra* note 60.

[103] *Cf. supra* notes 63 to 66.

[104] *Cf. supra* notes 87 te 93.

[105] *Cf. supra* note 75.

[106] *Cf. supra* note 79.

primarily in the doctrinal writings of jurists. Curiously enough this important class of materials, in Caron's hierarchy of sources, is only acknowledged subsidiarily, in the final and "catch-all" category (XIV).

In discharging its obligation of incorporating, without alteration, the laws of general and permanent character actually in force, the Commission performed a work complete in itself: the Code brought about a consolidation of the "living" law of Lower Canada on the basis of the varied sources just examined. The Commissioners themselves had no doubt about the intention of the Legislature, as expressed in the 1857 Act, on this aspect of their work:

> ...il faut avoir un travail duquel nous puissions dire: Voici le code que nous étions tenus de faire — contenant et ne contenant que les dispositions en force — Si vous êtes satisfait de votre droit tel qu'il est, adoptez ce que nous vous présentens.[107]

All of this was ultimately accomplished: a compilation was produced amounting to a statement of the laws in force in civil and commercial matters. Whether or not it was any more than a digest, a mere summation of the existing laws, depended on their conception of the manner in which the other aspects of their work, as laid down by the Act, were to be carried out. How, in effect, was a *code* created?

B. Codification of the Law

What is it about the Civil Code of Lower Canada, a statement of the existing law as it stood 1 August 1866, that makes it a compilation properly described as a *code* rather than a mere consolidation or revision of laws?

It would be interesting to know if the members of the Commission ever held discussions on this subject: on how the task of creating a code differed from that of compiling a consolidation of laws, especially in view of the tenor of their instructions. It is not improbable that it have taken place. They began their work at a time when general legislative revision and consolidation was underway throughout the whole Province of Canada. Caron himself appears to have given some thought to the question whether a consolidation or a "révision bien exécutée" was preferable to a codification. He was aware that the "advantages" of the one or the other were debated in other countries, especially England and the United States,[108]

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[107] *Notes Générales*, annexed [*Document A*], p. iv.

[108] *Notes Générales*, p. 59. Caron refers to an article, *Lord Brougham and Law Reform* in the April 1859 number of the *London Quarterly Review* (p. 278), where the French and New York examples were analyzed with a view to suggesting a suitable course in the case of England.

and he referred to the *Revised Statutes of Nova Scotia* which, he noted, "ressemble beaucoup à une codification".[109] There is no record unfortunately, of any discussion on this matter on the part of the three Commissioners. It is, therefore, on the basis of the instructions as framed in the 1857 Act, and the Commission's interpretation and execution of them in the light of their papers and the completed Code itself, that the distinctions to be drawn between these legislative techniques must be made.

Today at least, if not in the mid-nineteenth century, there should be no confusion between statutory revision and consolidation on the one hand and codification on the other. Revision and consolidation are merely the re-printing of statutory provisions — the first according to a wholly chronological order, the second following a subject classification, irrespective of date of enactment.

Revision is the presentation of statute law as is stands at any particular moment in time; the statutes are reprinted in the order of their original enactment, with the parts repealed (either expressly or by implication) expunged from the text. It is essentially no more than the ascertainment of what law is in force and its re-printing as such. In the first half of the nineteenth century there were six such revisions in Upper and Lower Canada. These revisions were not enacted by the legislative authorities which had ordered them, although they were published under the authority of such bodies, since a revision in no way disturbed the original and subsisting arrangement or terms of such statutes.

Consolidation of statutory materials amounts to their re-classification, not by order of time but by order of subject matter. It too involves the excision of repealed and the retention of living statutory materials (and in this respect resembles revision). But it also effects a re-arrangement of such materials according to subject matter, through the consolidating or bringing together of all relevant provisions from a number of different statutes respecting the same object, the transposing of clauses or parts thereof, and the re-numbering of the sections of the whole in order to improve the total arrangement. The process may also demand — and this was normally the case in the consolidations of the middle of the last century — certain improvements or alterations in language to preserve a uniform mode of expression and the supplying of deficiencies or the correction

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[109] *Notes Générales*, p. 24; *The Revised Statutes of Nova Scotia* [1851], the first systematic revision in that colony since the organization of the Legislature a century earlier, had attempted a "philosophical and comprehensive" arrangement of the law "in one uniform Code", and was avowedly inspired by American precedents, Commissioners' *First Report* (16 January 1850), p. vii.

of inconsistencies. The final result requires, unlike mere statutory revision, that the new version of the statutes be brought into force as though it were a new enactment because, while the actual substance of the law is unaltered, the original arrangement of the individual statutes has been disturbed. There would otherwise be an unauthorized version, a new compilation of statutes made through public authority but wanting the necessary sanction to its new form. The statutory consolidations of the late 1850's, and those subsequent, were, therefore, invariably brought into force under the authority of statute. Finally, a consolidation, while not in substance new law, does, upon its coming into force, carry the repeal of those statutes consolidated in their new form. It is declaratory of the statute law as it existed in those original enactments and to which it is, in principle, substituted. The same effect is therefore given to the consolidated provisions as was given to the statutory provisions in their earlier form.

Codification in Lower Canada resembled the process of consolidation in a number of ways. First, as already examined, it involved the incorporation of only the living law into a single text, although on this first point the "living law" was drawn from many more sources than statutory enactment. The content of the Code's provisions was the result of a consolidation of the substance of the law, but this substance was not found exclusively in statutory or enacted law. Indeed, as Caron's list so vividly demonstrates, many of its various elements derived from historical periods when this single "source" of law was not even paramount. Secondly, the Code was brought into force, on 1 August 1866, in the same manner as a consolidation of statutes, that is, by way of proclamation under the authority of a statute providing for its enactment.[110] Thirdly, the effect of the coming into force of the Civil Code, declaratory of the existing law, was to abrogate the law in force at that time when it expressly or impliedly had that effect. In each case, however, it is legitimate, if the new text requires interpretation, to refer to the "previous" law in order to ascertain the original intention of the legislature in the case of a consolidation or, in the case of the Code, the effect of the prior law.

This rule, as expressed in article 2613 C.C., is not a mere transitional provision, nor is it simply a rule of interpretation; in

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[110] *An Act respecting the Civil Code of Lower Canada*, 29 Vict., S.C. 1865, c. 41 (sanctioned 18 September); the enabling Act of 1857 provided that the completed draft and *Reports* be laid before the Legislature and be made law by a later enactment; the 1865 Act provided that the Code "have effect as law" as of the date fixed by the Governor in Council (s. 6); see *Appendix II infra.*

so far as it leaves open the possibility of a continued appeal to the former law, it constitutes a departure from the French Code, upon the coming into force of which there was a complete abrogation of the *ancien droit*. In France itself the solution was admitted only after some debate,[111] but with confidence that judges and jurists would direct the application of the Code where its written text alone proved deficient.[112]

Why was the logic of this position, according to which a code constitutes a "fresh start", an exclusive source of law, not adopted in Lower Canada where the French model was so faithfully followed in other respects? The answer cannot lie in an unwillingness to admit that judges be entrusted with filling the gaps of enacted law through creative interpretation since the Lower Canadian Code adopted a rule similar to that of the French *Code civil* respecting the duty of judges to adjudicate despite the insufficiency of the texts of the Code itself.[113] The Commissioners do not explain their reasoning for the adoption of article 2613, other than that it was intended "to explain in what cases the [Code] affects the ancient laws."[114] We can only conclude that, in their minds, it represented a principal means whereby the Code's omissions could be supplied and its uncertainties corrected, much as in the case of a statutory consolidation, by relying on the previous law. In retrospect, however, it may be termed an excessively conservative view to have taken of

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[111] Maleville, one of the French codifiers, put the dilemma this way: "Comme ce Code ne renferme pas toutes les décisions justes et raisonnables que l'on trouve dans les lois romaines, les ordonnances et les coutumes, il s'ensuivrait que si on abrogeait toutes ces lois pour ne donner aux juges d'autre règle que le Code, on serait livré à l'arbitraire pour une infinité de contestations.

"Mais d'autre part, si on laisse subsister ensemble et ce Code et ces lois, en abrogeant seulement ce que ces lois ont de contraire au Code, on n'aura fait qu'ajouter à cette immense législation dont nous étions accablés." Fenet, *Recueil complet des travaux préparatoires du Code civil*, t. 1, (Paris, 1827), *Précis historique*, p. lxxxj. The law of *26 ventose, an XII, provided*, at art. 7: "A compter du jour où ces lois sont exécutoires [i.e. the new code], les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlemen[t]s, cessent d'avoir force de loi générale ou particulière, dans les matières qui sont l'objet desdites lois composant le présent Code."

[112] *Cf.* e.g. the remarks of Portalis, *Discours préliminaire* in Fenet, *op. cit.*, t. 1, pp. 466, 476.

[113] *Cf.* art. 11 C.C. and art. 4 C.N. to the effect that a judge cannot refuse to adjudicate "under pretext of the silence, obscurity or insufficiency of the law" ("sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi"). Caron proposed in his original draft: "A défaut de loi précise, le juge doit juger suivant l'équité et les usages reçus", which Day objected to as "unnecessary", S. 779.

[114] *Supplementary Report* of 21 November 1864, p. 369.

the importance of their own work. By not permanently stopping off for the future such sources as were offered up by the past, the Lower Canadian Commissioners made of the Code only a primary, not the exclusive, source of law in Quebec's hierarchy of sources.[115]

In other major respects, however, the French model was followed — pursuant to section 7 of the 1857 Act — and the features of a simple consolidation had correspondingly less importance. In its organization, that is, its plan and divisions, as well as in the style of its legislative expression, the Code of Lower Canada was to conform to the French Code. The methods adopted by the Commissioners in these two respects show how literally these instructions were executed. The *Mémoire sur le mode à suivre*, adopted at the meeting of 10 June 1859 stated, in a paraphrase of section 7, that the French code was "le cannevas sur lequel il faut travailler; il faudra en suivre le plan et les divisions, et comme règle générale en adopter, même quant à la rédaction, tous les articles qui nous conviennent."[116]

Two concurrent and complementary operations were thus decided upon by the Commissioners as necessary: (1) the *deletion from* the French Code of whatever could be considered "new" law and thus not in force in Lower Canada (while at the same time noting those provisions that might be retained as proposed amendments); and (2) the *addition to* the French Code of whatever in the permanent and general laws of Lower Canada was found particular to it and thus not in the French Code. This second operation (admitted to be "d'une exécution assez difficile" and one requiring "la plus stricte attention"), accounts for whatever degree of originality the Code of Lower Canada may possess when compared to the French Code. The first operation seemingly explains the considerable degree of similarity, indeed in many instances identity, between the two codes. But how much this similarity represents an excessively zealous attention to the French Code, rather than a result of the fact that that Code itself incarnated the natural arrangement and expression of the private law tradition to which the bulk of Lower Canada's private law also belonged, is a matter requiring a more detailed comparison than is possible here. It must suffice for present purposes to outline several principal points in relation to both the arrangement of its *plan and divisions* and its style of *legislative expression*, upon which our new documentation sheds some light.

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[115] *Cf.* P.B. Mignault: "...il n'y a pas, à proprement parler, de droit ancien ni de droit nouveau en cette province." *Le Droit civil canadien*, t. 1, (Montréal, 1895), p. 52.

[116] *Mémoire sur le mode à suivre* in *Livre des Minutes*, p. 15; very similar language is found in the 1846 article, *supra* note 24, at pp. 338-339.

i) *Plan and Divisions*

The evolution of the French drafts and the final organization of the French and Louisiana Codes into their respective books, titles, chapters and sections, was studied by Caron in a preliminary way early in 1859.[117] There was so little doubt, however, that the basic organization of the French Code would be observed that Commissioner Day was able to entitle his drafts on *Obligations*, the first subject completed, in the same way as the French Code, that is, as the third title of the third book of the future Code. Its division into three books dealing with the state of persons, the classifications of property and the means of acquiring property (of which *Obligations* formed so important a part), was quite naturally observed. The French arrangement was already considered classic, even by its own draftsmen, at the time of its drafting, one "née de la nature des choses" and "conforme... à la marche naturelle des idées".[118] The relationships of private persons as individuals, consorts, parents and children, the things which fall within the commerce of men and how such things are affected by social transactions — these were the traditional subjects of the *droit civil*, and were therefore the most highly perfected in the evolution of the Romano-Germanic legal system, and naturally formed the subject matter of its private law codes.

In this respect, the content of the Civil Code of Lower Canada was easily distinguishable from any statutory consolidation of the time. These dealt with a wide range of public or quasi-public, administrative and procedural matters and only partially or incidentally touched on private rights and relations. In the 1851 *Revised Statutes of Nova Scotia*, for example, to which Caron referred as "resembling" a codification, less than 10% of its content was devoted to private law matters in the civilian sense. While its formal arrangement into titles, chapters and sections, and the consecutive numbering of its provisions, suggested the form of a continental code, its content was made up principally of such subjects as the internal administration of government, judicial organization, criminal law and its administration, etc.[120] — all foreign to the tradition of a

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[117] *Notes Générales*, pp. 78, 98.

[118] *Cf.* the remarks of Tronchet and Jaubert in Fenet, *op. cit.*, t. 1, pp. lxix, cxiij; and the interesting history of the *Motifs de la méthode que l'on a suivie dans la distribution du Code civil*, in the draft of Cambacérès and Jacqueminot, *ibid.*, p. 12.

[119] David & Brierley, *op. cit.*, nos. 58 *et seq.*

[120] Of 160 chapters, only 18 were devoted to real and personal property, domestic relations and other matters connected with private rights. The *Revision* was claimed to be "the first of its kind in a British colony."

Code civil. The editions of "Consolidated Statutes" of Upper and Lower Canada, in 1859 and 1861 respectively, somewhat less sophisticated in arrangement, were similar in content, despite the differences in their private law origins. On the other hand, not all the subject matters contained in the Lower Canada consolidation of 1861, under, for example, the rubrics "private and personal rights" or "real property and rights", necessarily found a place in the completed Civil Code for the simple reason that corresponding categories were not features of the plan of the French *Code civil.*

Only a comparison of the table of contents of the two Codes can demonstrate both the full degree of similarity between them and the exact range of subjects thought suitable for inclusion in a private law code of their tradition. Whatever differences there are between them do not seriously lessen this affinity. The Code of Lower Canada, for example, unlike the French Code, was to have no titles on *divorce* or *adoption* but did contain titles devoted to *emphyteusis, corporations, substitutions fidéicommissaires* and the *registration of real rights.* These differences are explained by the configuration of the existing law of Lower Canada at the time. What is more remarkable, perhaps, is the absence of any suggestion among the Commissioners that the existing law be amended to include totally new provisions on divorce and adoption within the Code, where they would naturally and reasonably be found. There is no record of any discussion on such matters.[121]

We know that on other points there was some disagreement among the codifiers which did reflect, to a degree, different views on the proper scope of a civil code. Caron, for example, in his private notes, considered the possibility of including provisions relating to "la confection, promulgation et distribution des lois" only to reject it: first, because such matters had been omitted in the statutory consolidations of Upper Canada and the Province of Canada and

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[121] On the subject of divorce, Caron noted: "Le divorce n'a jamais existé pour nous comme faisant partie des lois françaises. Nous ne l'avons pas plus d'après les lois anglaises, qui ne l'admettent pas en Angleterre, puisque là il faut un acte du parlement pour chaque cas particulier & cet acte n'est accordé que dans le cas d'adultère seulement. Cependant depuis un an ou 2 il y a une Loi qui crée une Cour Spéciale pour les divorces [the *Matrimonial Causes Act,* 1857]. Notre Législature a exercé le droit de passer un Bill pour accorder un divorce à Beresford pour adultère [*An Act for the relief of William Henry Beresford,* 16 Vict., S.C. 1853, c. 267]. Le Bill réservé à la sanction royale a été sanctionné en Angleterre, [14 June 1853]. Mais toujours le divorce n'existe pas & ne doit pas faire partie du Code. C'est en vertu du pouvoir législatif que les Chambres ont agi dans les 3 ou 4 cas qui leur ont été soumis." *Notes Générales,* p. 55.

secondly, and more *à propos*, because they belonged "aux lois politiques [du] pays plutôt qu'aux lois civiles."[122] Nevertheless, in his own drafts of *Book First*, he did propose a series of articles for a preliminary title (now articles 1-5 C.C.) on the subject. Day objected on the ground that such matters touched constitutional law and did not properly form part of the Code:

> I would omit [these] articles which relate not to the civil law strictly so-called but to constitutional law. We are to codify the rules of law but not the rules for making the law.[123]

Commissioner Day did not persist in his objections, however, because his minority *Special Report*, containing his dissenting views on the draft of this portion of the Code, does not touch upon this matter. It may be that the example of the French *Code civil*, which contained a similar preliminary title, was enough to sway his opinion. It is nonetheless anomalous that both *private* law codes included such provisions of a *public* nature and, moreover, in the case of the Lower Canada Code, a *schedule* of definitions (at article 17 C.C.) much like that in a statutory consolidation. The explanation presumably lies in the fact that there was no Interpretation Act specifically applicable to the private law of Lower Canada at the time, although the Code's provisions on the subject were duplicated by independent legislation shortly afterwards.[124] Day was more steadfast in his views on a number of other matters, however. He objected to the inclusion of articles, proposed by Caron, providing a definition of those to be classed as British subjects (*cf.* articles 18 C.C. *et seq.*), those containing penal provisions (*cf.* article 53 C.C.), those comprising "merely police regulation" (*cf.* article 69 C.C.) and a number of others touching upon procedural rules — all of which, he considered, "ought not to find place in a codification of the civil law."[125]

Apart from these details, the over-all arrangement of the Lower Canada Code was that of the French Code with one major exception: the inclusion of a *Book Fourth* devoted to *Commercial Law*. A distinct code of commercial law, as in France or Lousiana, was excluded by the terms of the 1857 Act, but the manner in which such laws were to be included within a single code was a matter for the Commission

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[122] *Ibid.*, pp. 38-39, 91-92.

[123] Day's notation on his copy of Caron's draft, S. 779, p. 4.

[124] The first *Interpretation Act* in Quebec was enacted by 31 Vict., S.Q. 1868, c. 7; *cf.* C.S.L.C. 1861, c. 1.

[125] *Vis-à-vis* many articles of Caron's draft, in Day's copy, the latter had written such remarks as: "The articles are clearly out of the limits of our Commission" and "Procedure!"; *cf.* to the same effect his *Special Report* appended to the *Second Report*, 2nd ed., pp. 237 *et seq.*

itself. In September 1862 it was decided that matters relating specially to commerce, in so far as they deviated from and were not already included within "la loi commune civile" and could not be covered by provisions common to both, would be placed at the end of the Code in a separate title or special book which, in form and content, would observe as much as possible the French *Code de Commerce* as a "cadre et model." [126] Although the distinction between civil and commercial matters was retained on a number of points, and different rules made applicable to each class, there was thus an early effort to assimilate these two areas of the law of Lower Canada, the economic ties of which suggested such a course,[127] and which, since the mid-nineteenth century, has been a feature of developments taking place in other civilian countries.[128]

ii) *Style of Legislative Expression*

In addition to a similar arrangement of subjects, the Civil Code of Lower Canada was to contain, according to section 7 of the enabling legislation of 1857, "as nearly as may be found convenient, the like amount of detail upon each subject as the French [Code], known as the *Code civil...*"

The function of a code, in the view of the French draftsmen, was to trace the leading principles of law in general terms, which judge and jurist would then direct in their detailed application:

> L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière.
>
> C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, à en diriger l'application.[129]

The French *Code civil* was not a compilation in which it was attempted to foresee every possible case and situation, and in the application of which one could rely on merely mechanistic or purely deductive methods. It endeavoured to frame the expression of the legal rule at the proper level of abstraction — not so abstract as to

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[126] *Mémoire No. 2 pour MM. les Secrétaires* in *Livre des Minutes*, pp. 193-194, instructing the secretaries to prepare the draft for which, however, Commissioner Day was ultimately responsible; the original idea of a separate section had already been put forward in 1859 by Caron, *Notes Générales*, p. 25.

[127] The author of 1846 (*supra* note 24, at p. 339) had emphasized the need that the commercial law approximate as much as possible that of its most important trading relations: "Notre position doit nous faire désirer d'assimiler autant que possible notre code de commerce à ceux d'Angleterre, des Etats-Unis et du Haut-Canada, en raison de nos rapports commerciaux avec eux."

[128] David & Brierley, *op. cit.*, no. 65.

[129] Portalis, *Discours préliminaire* in Fenet, *op. cit.* t. 1, p. 470.

be incomprehensible or meaningless, nor yet so concrete that it would be inapplicable to a wide variety of cases or over a long period of time. The expression of the law, to paraphrase another of the French draftsmen, was to be "dogmatic" and neither a "reasoning process", nor a "dissertation".[130]

Because the French *Code civil* was used as its model, the Civil Code of Lower Canada is situated within the same tradition of legislative expression (although in a number of instances the wording of the Louisiana Code, somewhat more prolix, was preferred, if not *verbatim*, then at least for the suggestion of possible change). The pre-fixed format of the books or *cahiers* in which the drafts took shape, settled upon early in the Commissioners' discussions, is in itself ample evidence of their definite intention to adopt, in the spirit of the Act, the very wording of the French Code wherever possible, although, at least in the case of Commissioner Day, such wording was not always accepted without careful scrutiny.

These *cahiers* (fully described in *Appendix I*), containing the successive drafts of the Commissioners, were arranged in the following way: a double open page was devoted to each draft article and divided into four columns entitled "Existing Law", "Corresponding Article of the Civil Code of France", "Proposed Amendment" and "Remarks". The intention was, as in the case of the arrangement of subjects, to be able to delete from the French Code's wording whatever amounted to "new" law, but to retain such wording in all other cases when successfully tested against the summation of the existing law contained in the first column. The third column contains drafts of the amendments (as proposed in the textual portions of the *Reports*) and the fourth, the substance of the commentary found in their explanatory remarks. The document entitled *Plan à suivre dans la codification*, originally drafted by Caron, laid down this method as follows:

> Pour remplir cette deuxième obligation (celle de se conformer autant que possible au Code français) on la remplira en mettant en regard de chaque article contenu en la 1ère [colonne], l'article de Code relatif au sujet indiquant s'il est conforme à notre droit actuel, s'il en diffère. ou s'il garde le silence sur le sujet.
>
> Mais pour remplir plus exactement cette seconde obligation, il faut suivre le Code français: entrer chaque article, adopter ceux qui sont conformes à notre droit lorsqu'ils y sont conformes, tout en y faisant, suivant l'occasion, tels changements crus nécessaires pour les rendre plus claires et plus conformes à notre droit.[131]

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[130] Jaubert in Fenet, *op. cit.*, t. 1, p. cxvj.

[131] [*Document A*] in *Notes Générales*, at pp. V-VI.

In many instances a comparison of the two texts does indicate that the contents of the first column ("Existing law") are little more than a copy or, as the case may be, a tentative translation into English of the French article, accompanied by a list of sources which, in effect, serve as authority for the article of either the French or the Lower Canada Code. There is nothing surprising in this, for the reasons outlined above. Opinions may differ, on the other hand, as to whether changes made to certain texts in the Lower Canada Code, *in the absence of different law,* have made our texts any clearer than those of the French Code. For example, in Day's drafts for the title *Of Obligations,* on the "requisites to the validity of contracts", his inclusion of the word *consideration* in the drafts dealing with the concept of the *cause* of contracts appears to be no more than an effort to provide an alternative mode of expression to a single concept, rather than the introduction of an analogous, but more limited, concept of the common law. The difference with the French Code, Day wrote in the *First Report,*[132] was only in "the form of expression"; and in his notes he merely remarks:

> I have included articles of the C.C. 1131 and 1132 in one article as I see no reason why two should be made when a more concise and legally precise expression can be given to the whole subject in one.[133]

It is interesting to observe that in his first drafts (of our present articles 989 and 991 C.C.) the word "cause" was first included, then struck out and replaced (by Day) with "consideration", as it now reads. In the same way Day observed in his remarks relating to our present article 1053 C.C.:

> I have joined [the] two articles of the Code [i.e. C.N. 1382, 1383] in one and have added 'capable of discerning right from wrong'. This is certainly the rule of our law and is I suppose understood in the arts. of the C.N. I think the word fault sufficently implies that the act must be illegal — for he is not in fault who does what by law he has a right to do.[134]

A desire for concision and an effort to reduce the substance of a legal concept to its essence, while avoiding at the same time those legal definitions of the French Code which he often regarded as "truisms" and "tautologies", characterize most of the portions of the Code for which Day was responsible.[135] His drafts contain a running commentary and criticism, sometimes severe but always respectful, of the French Code upon the expression of which he evidently hoped to improve. Some of his remarks in his first *cahier*

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[132] *First Report,* 2nd ed., p. 10.
[133] S. 764, p. 33.
[134] S. 764, pp. 111 and "o".
[135] *Cf. supra* note 45.

devoted to *Obligations* merit full reproduction, for they contain the philosophy of codification upon which his drafting was animated and, implicitly, his view of the judicial function in which the completed Code would play such an important role. With respect to his rejection of the series of definitions of different kinds of contracts contained in articles 1101 to 1107 of the French Code, he remarked:

> Every Code of Laws however full & complete it may be necessarily presupposes not only the existence but also the knowledge... of certain primary and fundamental principles. There are laws of God, of Nature and of common sense which must underlie and sustain all positive legislation. There are also general [maxims] and rules which have acquired a prescriptive authority and enter into the habits of thought and mode of reasoning of educated lawyers and constitute a kind of universal legal education. — These it would be unwise to disturb by attempting to provide specific laws to cover all cases. It is obviously impossible to do so — no care or human foresight can secure such comprehensiveness and precision in Legislation as to render unnecessary principles of reasoning based upon the experience & knowledge which in every civilized community lie outside of any [reach] of law...[136]

There are few better testimonies to the fact that the Civil Code of Lower Canada was not conceived in a spirit of legal positivism, or in the belief that the law can be laid down exclusively in a series of legal rules amounting to no more than a system of legislative norms.

C. Reform of the law

Codification, it was suggested above, is not in its essence a technique for bringing about a revolution in the content of the law. Contrary to what may have been thought in the nineteenth century, in a number of non-civil law countries, when certain radical advocates

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[136] S. 764, pp. 6, 8. Substantially similar language was employed in the conclusion to the *First Report*: "Every code of laws, however complete, necessarily presupposes the obligation of certain primary and fundamental principles which must underlie and sustain all positive legislation; and no care or foresight can secure such comprehensiveness and precision as to render unnecessary processes of reasoning and inference based upon these, and upon the experience and knowledge which lie outside of the expressed law" (2nd ed., p. 32). On the draft rules respecting the interpretation of contracts, to which he objected, he states: "The whole of this section falls within the scope of the observations I have made on the subject of definitions... The rules of interpretation are not a legitimate subject of positive legislation but belong to the critical and logical exercise of the reasoning faculty... The attempt to provide rules having the inflexibility of laws for directing and [controlling] the mind of the judge in his search after the true meaning of a contract through its obscure & doubtful expression is obviously unwise" (*ibid.*, p. 55). *Cf. First Report*, 2nd ed., p. 12.

of law reform (one thinks of Bentham, for example) coupled their proposals for substantive reform with the presentation of the law in the form of a code, codification does not necessarily involve a total re-casting of the law without any heed or adherence to its ancient structure and content. Nor does it necessarily rest on the idea (or the hope) that the promulgation of a code will supersede, for the future and despite changing circumstances, the need for judicial construction or even that for continuing legal reform. Such in any event were not the foundations upon which the codification of the law of Lower Canada proceeded.

Does this mean on the other hand, however, that the codification of the civil laws did not amount to a reform of the law?

In several very important respects it was a step of law reform. Codification implied an undertaking to so organize and systematize the law that a large measure of general improvement was necessarily brought about. The law was simplified and rendered more uniform, a large number of separate deficiencies were supplied and useless or archaic rules removed. On the whole, however, the codification amounted to casting together various elements into a practical summary of the law, differing as little as possible from what it formerly amounted to and what was actually in use.

No general mandate was given to the Commission by the enabling legislation of 1857 to bring in wholesale reform. While the Commissioners were authorized to "suggest such amendments as they think desirable," these proposed changes were to be stated, according to section 6, "separately and distinctly, with the reasons on which they are founded." Thus, while scope was given to creative law-making, the primary intention of the Legislature, according to Caron, was to "contrôler l'action des Commissaires et les empêcher de faire les innovations."[137] As he remarked elsewhere, the Act indicated

> ...l'intention manifeste de la législature de retenir nos ancienes [*sic*] loix qui sont encore en force, de n'innover qu'avec précaution et réserve, en distinguant les changements que l'on voudrait faire & surtout en comprenant avec soin toutes les Loix qui sont encore en force.[138]

All that was introductive of new law in the French *Code civil* could not form part of the draft Code — "puisque ce n'est que le droit ancien français qui nous régit et non le droit nouveau tel qu'établi en France par le Code."[139] The "new" solutions of the French Code, therefore could only be proposed in the form of amendments by the Commission.

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[137] *Notes Générales*, p. 87.
[138] *Loc. cit.*, p. 72.
[139] *Ibid.*, p. 90.

It was thus necessary for the Commission to proceed in a manner by which the Legislature, or others to whom the work might be referred, would be enabled to make the decision on the final content of the Code; more specifically, as to whether the present law was to be retained, or the "new law" in the French Code be preferred or, finally, whether the law as suggested by the Commission itself be adopted.[140]

At one stage in their deliberations serious consideration may very well have been given by the Commissioners to the possibility of a major reform of all branches of the law. Caron, in his *Notes Générales*, outlined a form of presentation of their work to the Legislature which suggests that more than a series of single modifications to the existing law may have been contemplated:

> ...Pour se conformer à la clause 6e du statut, et en même temps pour éviter les inconvénients, le manque de suite, de liaison et d'ensemble qui résulterait de la suggestion qui serait faite à part & comme hors d'oeuvre les amendements que nous croirons devoir proposer, il serait probablement mieux & peut-être causerait moins de travail de faire doubler les titres, chapitres, sections ou articles que nous voudrions énumérer.
>
> Une des rédactions montrerait le travail tel qu'il devrait être d'après la loi existante et l'autre tel qu'il devrait être d'après nos suggestions.
>
> Ce mode augmentera l'ouvrage mais sera nécessaire pour bien faire apprécier & comprendre les changements que nous voudrions faire.
>
> Si ce plan était adopté il pourrait être mis à l'exécution sans qu'il fut nécessaire de faire amender la loi [i.e. the 1857 Act]. — En le suivant nous nous conformerons à la lettre & à l'esprit de la loi. Nous mettrions la Législature ou le gouvernement qui aura finalement à se prononcer sur l'adoption des Codes que nous leur aurions soumis en état de faire sans peine la comparaison entre la loi existante & celle que l'on voudrait lui substituer.[141]

But, as the working papers of the Commission now reveal, by the time the actual drafting process was underway, any thought of overall reform of the type Caron may have contemplated, appears to have been abandoned.

Apart from a considerable number of individual amendments, proposed in order to harmonize and simplify the existing law (succinctly analyzed by Thomas McCord in his *Synopsis*, already referred to [142]), the Commissioners were reluctant about re-thinking some well-established institutions or suggesting that certain gaps in the law be filled. It is clear that they did not consider themselves authorized, according to the terms of section 6 of the Act, to make any such suggestion respecting the inclusion of whole new sections on,

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[140] [*Document A*] in *Notes Générales*, at pp. VI-VII.
[141] *Notes Générales*, pp. 86-87.
[142] *Supra* note 15.

for example, divorce or adoption.[143] The subject of divorce, at any rate, would certainly have provoked public feeling in this predominantly Roman Catholic and far from anticlerical society where the religious form of marriage had always been, and was to remain in the Code, the rule.[144]

No re-thinking appears to have been given to the possibility of restraining the principle of the freedom of willing, introduced by imperial and provincial legislation,[145] in the codification of the existing law on successions. Indeed the logical observance of this principle was so strict that it led the Commission to conclude, although not without some misgivings, that *substitutions fidéicommissaires* might be extended perpetually, that is, for more than three generations as in the former law. The old rule was however restored by the Legislature.[146] In the same way, while they recognized the need for some mechanism, similar to that provided for by the English Court of Chancery or the former *procureurs du roi*, to protect eventual interests under the provisions of bequests for charitable, pious or benevolent purposes, the Commissioners refrained from making any concrete suggestions on what they termed a matter of such basic public policy.[147]

On the other hand, some changes of capital importance were suggested, relating to both the free disposal of property by contract and the stability of rights acquired by contract. On the first matter, the principle established by the French Code (article 1138), that consent alone suffices to convey the ownership of property without any delivery, was adopted. The old and general rule *traditionibus non nudis pactis dominia rerum transferuntur* was thus abolished by the adoption of articles 1025 and 1027 C.C. and the specific extension of the principle to sales and gifts (articles 1472, 777 C.C.). It was apparently admitted with little debate among the Commissioners themselves,[148] although it appears to be the only instance

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143 Caron's remarks on divorce are reproduced *supra* note 121.

144 In French law, before the *Code civil*, only parish priests had the authority to celebrate marriages; provincial statutes entrusted this duty to ministers of different religious denominations who, for this purpose, were considered civil officers; *cf.* art. 129 C.C.

145 *Cf. supra* note 53.

146 *Fifth Report*, 2nd ed., p. 191; the restoration of the old rule thus appears as "new" law in the official Code of 1866, as art. 932 C.C.

147 *Fifth Report*, 2nd ed., p. 181; art. 869 C.C.

148 Day recorded: "This rule of the new law that the consent alone perfects the transfer [of] the property I would adopt in all its simplicity & integrity with respect to real estate and would carefully avoid any expression which could cast a doubt upon its abstractness" (S. 764, pp. 38-39); *cf. First Report*, 2nd ed., p. 14.

where a petition from an outside interest group opposing the adoption of reform was presented to the Legislature.[149]

Other important changes relate to the integrity of contracts. The first, departing from the rule in the French Code, was the abolition of lesion (i.e. lowness of price) as a cause of nullity in contracts between persons of major age (article 1012 C.C.) upon which a "long and earnest discussion" arose. Day, in his consideration of the French authors, remarked that their objections to the continuance of the rule in the French Code

> ...appears to me to be well-founded and ... far more applicable to this country where land is every day made an article of commercial speculation & is bought & sold as freely as merchandise... I can see no reason why ... a vendor should be protected from his imprudence any more than any other imprudent man. The reason argued for the Law is its humanity...[150]

This same individualist philosophy prevailed as well respecting the stipulation of a fixed and certain sum to be paid as damages for the inexecution of contractual obligations. It was proposed by Day that, contrary to the old rule, such sum not be liable to modification by the courts:

> I have departed from our Law in this article and adopted the simple and just rule of the Civil Code. The jurisprudence which had grown up in France by which the Courts constantly modified and disregarded the clear stipulations of [a] contract for the purpose of applying uncertain equity in the settlement of the rights of litigating parties, I have always felt to be an evil and have yielded [to] in my own judicial decisions always with reluctance. It is very doubtful, notwithstanding the opinion of Pothier ... whether that jurisprudence was sustained by any true construction of the text of the Roman law relied upon... But however that may be, it is certain that the doctrine of judicial interference with the plain meaning

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[149] McCord recorded that this amendment "created at first some alarm in the minds of persons who had not brought to bear upon the subject as much study, knowledge and reflection as the... Commissioners... Among these was the Quebec Board of Trade, which, in a petition to the Legislature, objected to the then proposed amendment..." (*Synopsis*, p. v).

[150] S. 764, pp. 25 *et seq.*; he continued: "To this end the French commentators add a reason founded upon the assumption that in commutative contracts there must always be an equality or an approximative equality in the value of the thing given and that received: but this is a mere fiction for everybody knows that such equality does not universally exist and indeed is less frequent than the majority. The true idea is that each party receives in consideration not that which is really of equal or proximate value but that which he consents to consider as an equivalent for that which he gives. Moreover both the reasons argued for [this departure] from the integrity of contracts go too far. If they are good for anything they should [further] be applicable [to] inequality in all contracts."

of contracts is regarded with disfavour by modern jurists and it ought not to be continued in our modern law.[151]

It may, on the whole, be concluded that the Civil Code of Lower Canada was not primarily a code of reform. Its philosophy as expressed in the instructions to the Commissioners and their execution of them, rested upon this principle: that a code based upon the experience of the past, rather than upon a calculation of new advantages which theoretical speculation may suggest, is the most likely means to promote the realization of justice.[152] Since they were instructed to distinguish any suggestions of their own from the statement of the law actually in force, and this is clearly set forth in their *Reports*, the extent to which they did suggest reform is easily established.

The total number of amendments suggested by them for the whole body of civil and commercial law amounts to only slightly more than two hundred and sixty.[153] The vast majority of these was accepted when, according to the 1857 Act, the whole of the draft Code was laid before the Legislature and studied by a "Select

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[151] *Ibid.*, pp. 50-51; art. 1076 C.C.

[152] The same philosophy, it is sometimes forgotten, was also at the basis of the French codification: "...au lieu de changer les lois, il est presque toujours plus utile de présenter aux citoyens de nouveaux motifs de les aimer..." Portalis, *Discours préliminaire* in Fenet, *op. cit.*, t. 1, p. 466.

[153] Our calculation in absolute numbers (counting consequential as well as principal proposed amendments) is 265 as against 2,567 articles purporting to contain the existing law. The breakdown is as follows:

Report	*Subject*	*Arts. of existing Law*	*Proposed Amend-ments*	*to actual law*	*as new law*
I	Obligations	271	26	20	6
II	Prelim. Title & Book I	359	44	24	20
III	Property & Prescription	307	53	47	6
IV	Sale, Exchange Lease & Hire	228	29	25	4
V	Succ., Gifts, Wills, Marriage Covenants	587	86	76	10
VI	Special Contracts, Priv., Hyp. & Regist.	481	18	16	2
VII	Commercial Law (Book IV)	334	1	1	—
Supp.	(Corrections)	—	8	4	4
		2,567	265	213	52

In the final version and official (Queen's Printer, 1866) edition of the Code there were 2,615 articles.

Committee" of the Legislative Assembly. Very few changes or additions were made by this Committee to the texts which represented the existing law [154] and even fewer by the Legislative Assembly itself when studying the Code in a committee of the whole.[155] None was made in the Legislative Council.[156] The participation of the *corps législatifs*, contrary to French experience, was minimal.[157]

The Commission worked free of other controls or pressures as well. The government during this period, to which the Commissioners were obliged from time to time to submit their *Reports*, appears to have left them complete independence of action, although there was some impatience that the work be finally concluded.[158] And, according

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154 The Bill respecting the Civil Code of Lower Canada (subsequently 29 Vict., S.C. 1865, c. 41) through the enactment of which the draft Code became law, was introduced on 31 January 1865; the Bill, and the final edition of the *Reports* were referred to this Committee (*Appendix II infra*) which, according to McCord (*Preface*, p. vii) made "very few changes and additions" to the text of the actual law and discussed only the proposed amendments. The amendments suggested by the Commission and accepted by the Legislature, and its changes or additions to either the existing law or to the proposed amendments are contained in 217 Resolutions reproduced as a *Schedule* to the 1865 Act (pp. 175-220).

155 Three minor changes were made 31 August - 1 September, 1865, *Legislative Proceedings*, pp. 3-4.

156 The Commission then embodied all the amendments proposed by them which had been adopted, made such other changes or modifications as were required in the consecutive re-numbering of all articles and the correction of clerical errors, and constituted the printed "Roll" thereupon deposited in the office of the Clerk of the Legislative Council. Certain anomalies in the text, however, have been pointed out: for example, art. 1056 C.C., never mentioned in the drafts, *Reports* or Resolutions, must necessarily have been inserted into the Code sometime *after* its examination by the Legislature and its Committee, and yet it does not appear as "new" law in the Queen's Printer edition of 1866 (indicated by [ ]). *Cf.* P.B. Mignault, *Le Code civil de Québec et son interprétation*, (1935-36), 14 R. du D. 583, at p. 588. This addition (and any other changes) were confirmed, however, by the *Quebec Interpretation Act*, 31 Vict., S.Q. 1868, c. 7, s. 10, which provides that the Code "as printed before the Union, by the queen's printer of the former province of Canada [was] and [is] in force as law in this province."

157 The French *Code civil* was technically a "réunion des lois civiles en un seul corps de lois sous le titre de *Code civil*"; each of the three *Livres* of the Code was made up of as many *titres* as there were individual laws (36 in all) which were debated, assented to and promulgated *seriatim* before their final arrangement in the Code itself with its consecutive numbering of articles.

158 *Cf. supra* note 57. In the Assembly Cartier reported that he "had never found such an error in their [i.e. the codifiers'] statements of the law as to require a notification... that the law was not being correctly set forth." *Parliamentary Debates*, 25 August 1865, in *Legislative Proceedings*, p. 9. As to governmental impatience, *cf. infra Appendix II*, under 3 November 1862.

to the 1857 Act, the members of the judiciary, to whom it was intended that these *Reports* be submitted with a view to controlling the accuracy of the texts, were evidently extremely reluctant, from the very beginning, to collaborate in this way.[159] There is, finally, no evidence that the Commission was in any way interested in seeking out, or obliged to contend with, expressions of general public or professional opinion as to the suitability of the Code.[160] The Commission, in effect, enjoyed the most complete freedom and responsibility in all of its work.

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[159] The scheme of their participation in the 1857 Act was as follows: the printed *Reports*, submitted to the Governor, would then be transmitted to "each of the Judges of the Court of Queen's Bench and Superior Court for Lower Canada, with a request that he will return the same, with his remarks" (s. 8) containing "his opinion whether the Law as it then stands is correctly stated" (s. 9). When this measure was before the Assembly in 1857, Sir L.H. LaFontaine, Chief Justice, and other judges, laid a petition before the House on 23 April 1857 "alleging that they are unable to perform the duties proposed to be imposed upon them by the... Bill; and praying that that part of the Bill relating to the codification of the Laws, which imposes upon them the duty of revising the work of the Commissioners, may not be adopted." *Journals*, 1857, p. 254. As McCord reports (*Preface*, p. ix), and the *Minutes* confirm, the judges did not furnish their observations (whether because they did not receive the *Reports* or did not return them is unknown), although Cartier affirmed in the Assembly that "[N]o one could suppose that the 24 judges of Lower Canada to whom the partial reports of the codifiers were submitted could have ignored their contents" (*Legislative Proceedings*, p. 9). Only one judge is known to have fully co-operated: Mr. Justice Winter (Gaspé), "with the concurrence" of Mr. Justice Thompson (New Carlisle), commented upon the first two *Reports* (*cf. Appendix II*, note 22). According to McCord (*ibid.*), Mr. Justice Meredith also collaborated "by means of notes occasionally handed in, and... frequent personal interviews" (a procedure envisaged by the 1857 Act, s. 11), but these papers have not been recovered.

[160] In 1865 Cartier stated in the Assembly that the draft Code, when the *Reports* were published, was "used and applied as fast as it came out of the hands of the codifiers" — i.e. *before* its coming into force — and was "as commonly quoted during the last two or three years as any other portion of the law of the land" (*Legislative Proceedings, loc. cit.*). But contemporary professional comment upon the draft was not abundant: McCord (*ibid.*) reported the following: a pamphlet by T. Ritchie containing observations upon the title *Of Obligations* (*n.d.*); a newspaper article by J.A. Hervieux, Registrar of Terrebonne, on the provisions of the title *Of Registration* (*n.d., adde* his *Observations et commentaires sur les titres XVII et XVIII*, Montréal, 1870); E.L. de Bellefeuille published a series of articles entitled *Législation sur le mariage* on the drafts respecting marriage and civil death, 1864 Revue Canadienne, pp. 602, 654, 731 and 1865 Revue Canadienne, p. 30; C.F.S. Langelier wrote a series of articles (*n.d.*) on *Book First* in the *Journal de Québec*; *adde*: M. Bibaud, *Observations sur le projet de Code Canadien* in *Exégèse de Jurisprudence*; D. Girouard, *Contrainte par Corps*, 1865 Revue Canadienne, p. 87.

This is in no way surprising. The codification, such as it was contemplated, was a work for full time legal experts — and one that required, in the end, over five years of labour. The Legislature could too easily have destroyed the completed Code had it interfered with a wide number of matters or any number of its basic tenets. The Code, therefore, in both its statement of existing law and its "new" law content, was essentially the work of its three Commissioners, Caron, Day and Morin (and their secretaries). It was, perhaps, the full realization of the real weight of their responsibility that prompted them, in their final *Report,* to recommend that, in future, "special reports" be made to the government as imperfections and deficiencies in the law were revealed, and that "periodical revision" of the Code be provided for as a permanent part of Quebec's legal system.[161]

Conclusions

The problems of Quebec civil law today are certainly not those of a hundred years ago. But no proper assessment of them can be made without an examination of the role of the Civil Code itself during the intervening century. Two broad questions for study particularly stand out. The first: whether the Code itself has retained its proper place as the primary source of civil law in the Quebec legal order and, if not, what accounts for a development contrary to the parting advice of the 1859 Commission that may explain its decline. The second, but not subsidiary, question is whether the courts over a century of judicial practice have understood the role devolving to the Civil Code and properly used it as an instrument in the practical search for just solutions.

This history of the civil law since the promulgation of the Civil Code is necessarily the object of further and distinct investigations because the advent of the Code has materially changed the context within which the civil law itself has had to develop and function. Our assessment on these points, however, whether favourable or not, is clearly distinct from any appreciation of the Code's true accomplishments within its own contemporary context.

Viewed, then, in its context, we have, first of all, concluded that the codification was undertaken primarily for legal rather than political motives. The state of Quebec civil law required a massive consolidation of its sources, and this re-casting, quite naturally, took the form of a code. And since codification is largely a technical

[161] *Seventh Report,* 2nd ed., pp. 262, 264.

process, a task for experts, it was confided to a Commission of judges (rather than the Legislature itself) whose primary preoccupation was to provide a practical statement of existing law. Its testing against public opinion, as distinct from professional legal opinion, was not envisaged nor, in effect, was it required because major policy change was not contemplated; indeed in order to ensure that the Code was first and foremost a technically correct statement of the existing law there were two "checks" imposed on the Commission: the intended examination of its work by members of the judiciary in order to assure its accuracy as an affirmation of *droit positif*, and the style of their *Reports* which imposed that a careful distinction be made so as to show clearly any suggested policy changes. The 1866 Code, therefore, in accomplishing an essential but basically technical task, was not subversive of prevailing notions.

Reviewed from our present context, what lessons can now be extracted from this first experience? That there is a need for a revision of the civil law of Quebec is universally accepted. It is a step to be taken for a wide number of legal, social and economic reasons — and not, once again, one to be initiated for any obviously political motives. The civil law, in so far as it is represented by the Code, is not "threatened" unless it be internally, that is to say, by reason of its neglect at the hands of the Legislature or by reason of its distortion or misuse by the judiciary. Purely "legal" reasons for a fresh codification do exist: as in the nineteenth century, there is a need for a "consolidation" of subjects into the Code (whose dimensions may well be extended beyond what they were in 1866) and their formulation into its legislative style, whether such subjects are regulated at the present time by individual statutes, have developed through judicial decisions, or will be drawn from foreign experience.

The best method of doing so undoubtedly remains what it was. The task must be confided to a corps of experts who, if themselves only legally trained, will be assisted by experts in fields of economic and social studies, largely unexplored one hundred years ago, which today have brought about an awareness of new problems and of the need for creative law-making in new areas. Nor can this *reform* of the Quebec civil law — for this is the key-note — remain largely untested against public opinion, as it was, for good enough reasons perhaps, a century ago. The reform of Quebec's Code must amount to more than an effort to find new ways to instill a love for old laws.

APPENDIX I

Bibliographical Note

For the purposes of providing a published record of the new documentation referred to in this general description, there follows a short bibliographical note on the fifty-seven items deposited in the Quebec Provincial Archives and the Archives of the *Séminaire de Québec*. Copies of these papers are also now available in the Library of the Faculty of Law of McGill University[1] which possesses in its own right the original of one other small item.

QUEBEC PROVINCIAL ARCHIVES
MUSEE DE QUEBEC

In the collection known as *Papiers R.-E. Caron* (Carton 2), there are three items related to the Quebec codification.

— *Notes Générales sur les lois en force* 108 pp., 13" x 8¼"

Although neither signed nor dated, internal evidence[2] indicates that this item may be attributed to R.-E. Caron and dated some time during the spring of 1859. It contains what are essentially the preliminary thoughts of Caron who, as apparent president of the Commission for the codification of the laws of Lower Canada, was primarily responsible for the organization of the working methods of the Commission. Entries in the form of memoranda of varying length are made in twenty-four different rubrics ranging over a wide number of subjects — from the details of the "établissement de la commission" itself in Quebec City and the salaries payable to the Commissioners, the authors to be consulted and the constitution of a library, to substantive legal questions in connection with

[1] I am very much indebted to Monsieur B. Weilbrenner, who at the time (summer, 1966) was the Provincial Archivist of the Quebec Archives, and M. L'Abbé Honorius Provost, archivist of the *Séminaire de Québec*, for their very kind assistance in locating and making available these materials and allowing copies, whether by micro-film or xerox, to be made and deposited at McGill.

[2] The title on the first page — in full, *Notes Générales sur les lois en force, R.-E. Caron, 1859* — is clearly in a different (and modern) handwriting from that used in the volume itself; it may certainly be dated as *circa* June 1859 on the basis of letters recorded and referred to, and as the work of Caron from the wording of certain memoranda which, in later versions, are acknowledged to be his in the *Livre des Minutes* (S.817).

the legal sources to be consulted and particular subject matters.[3]

The volume also contains a number of inserts: 1. the first, herein designated [*Document A*], in the same hand as the principal item, entitled *Plan à suivre dans la codification* and itself apparently based on certain entries contained in the *Notes*, is a draft of the *Mémoire sur le mode à suivre* found in the *Minutes* (S. 817, p. 15); 2. [*Document B*], the proposed agenda of the first meeting of the Commission; 3. several newspaper cuttings, notations as to miscellaneous accounts and the French text of the 1857 Act, heavily underscored but not annotated.

— *Articles réservés ou à soumettre de nouveau* 87 pp., 15" x 19½"

This item, evidently the first of a series in French and in the hand of a copyist, is devoted to the first titles of the draft Code (laws in general, civil rights, acts of civil status, domicile and absentees); its pages are divided into two colums in order to indicate the sources of the draft articles, comments thereon and their subsequent history. From internal notations it was evidently the property of Judge Caron.

— *Index du Code Civil Liv. I* 104 pp., 15" x 19½"

The first volume of the draft of an index, in French, to the words and terms contained in the completed articles of the Code as finally numbered; the entries are complete only from *A* to *Violence*.[4]

SEMINAIRE DE QUEBEC

The Archives of the *Séminaire de Québec* possesses the more important collection of documents relating to codification, but the *Séminaire* is unable to indicate its original provenance. It is known however that R.-E. Caron acted as legal counsel to this institution; and since, at the time of his death in 1876, there was no publicly organized provincial depositary for materials of this type, it is altogether likely that they were confided to the care of the *Séminaire*

[3] The contents are as follows: I. Quelles sont les loix du pays; II. Loix codifier; III. Notes diverses; IV. Minutes des procédés de la Commiss.; V. Salaires, Rémunération des Comm. VI. Préambule de l'Acte; VII. Auteurs à consulter; VIII. Promulgation des Loix; IX. Commerce (Code de); X. Enregistrement (Loix relatives à l'); XI. Statuts impériaux; XII. Procédure (Code de); XIII. Livres à se procurer; XIV. Dépenses de la Commiss.; XV. Actes choisis — & Divorce; XVI. Questions diverses; XVII. Hypothèques (note sur les); XVIII. Codification (*modus operandi*); XIX. Etablissement de la Comm.; XX. Code Napoléon; XXI. Amendements à faire à la loi; XXII. Droit nouveau (dans le Cod. Nap.); XXIII. Code de la Louisiane; XXIV. Coutumes, Usages.

[4] This item is very probably the draft of the *Analytical Index* to the Civil Code published in 1867 by G.E. Desbarats (Ottawa).

by Caron himself or his heirs which supposes, of course, that he retained possession of them after completion of the work of the Commission. As suggested below, however, the authorship of the majority of these items cannot therefore be attributed to Caron.

This collection is made up of fifty-four items bearing the *Séminaire*'s archival numbers 764 to 817; the bulk of these, items 764 to 813, is made up of the *cahiers*, each approximately 8" x 10", containing the manuscript drafts, in various stages of evolution, of most of the articles subsequently incorporated in the Codifiers' *Reports* and thence into the Civil Code. The final item is the *Livre des Minutes* of the meetings of the Commission devoted to these drafts.

— *The "Cahiers"*

The fifty-two *cahiers* [5] undoubtedly constitute a large portion of the "working-papers" of the Commission itself; the principal subject matters missing from the series are the law of property (as now found in *Book Second*, art. 374-582 C.C. and the General Provisions of *Book Third*, art. 583-595 C.C.) and the articles on insurance (art. 2468-2593 C.C.); those of greatest interest are the eleven items on the law of obligations and those devoted to the so-called "special contracts". There are three items relating to the Code of Civil Procedure.

Format. The pages of the *cahiers* are usually divided into four distinct columns: 1. a summation of the existing law; 2. the corresponding article of the French Civil Code; 3. the amendment or modification proposed; and 4. remarks and observations. It sometimes happened however that while the right-hand (*recto*) side of the open *cahiers* are devoted to one subject, the left-hand (*verso*) side, upon reversing the book, was used for the drafts of some quite different subject.[6]

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[5] These are identified herein by catalogue numbers preceded by the letter *S*. The authorities of the *Séminaire* kindly allowed me to re-arrange the order in which these materials were numbered with a view to bringing about some correspondence to the original sequence in which the Codifiers carried out their work, according to the *Minutes* and the *Reports* themselves. Full indications as to the internal order, arrangement and pagination are provided in frontis-pieces to the micro-film copies on deposit in the McGill Law Library.

[6] This is the case for example with S.884 the *recto* of which contains the draft entitled *Corporations VI Judge Day* whereas the *verso* relates to *Life Rents, Transaction*; similarly S.780, 790, 794, 801, all of which are identifiable as belonging to Judge Day. Of course the only difficulty arising from this is a bibliographically descriptive one; appropriate indications are thus provided in the list following in the text.

There are, further, the usual features found in manuscripts of this type not intended for publication. Sometimes pages have been cut out, clearly with the intention of deleting whole sections of the draft;[7] there are insertions in the form of *feuilles volantes* the contents of which do not necessarily relate to the *cahier* in which they are found;[8] and occasionally the entries are defaced or illegible.[9]

As indicated in the following list both language versions are not normally contained in the same draft, although occasionally there are remarks inserted in the other language.

Authorship. To determine the authorship of the drafts on the basis of these materials alone would be an impossible, and indeed a needless, task. Impossible, first, because while they sometimes do contain indications that they belonged to one Commissioner (by way of initials or names inscribed on the cover or elsewhere) it does not follow that the Commissioner so named was responsible for the draft itself; the working method of the Commission evidently involved distributing *copies* (in this format) to each Commissioner of the original *version* drafted by one of them — and we do not possess all the copies of each such version. A great number appears to have belonged to Judge Day — either because they were the original versions actually drafted by him (as in the case apparently of S. 764-774) in English or because they are the copies, remitted to him, of drafts in French drawn up by another (S. 779, 781, 782, 783, 784, 785). It is in any event needless to establish authorship solely on the basis of these documents since the *Livre des Minutes*, described below, is explicit on such points.

Following is a list of the *cahiers* chronologically arranged and thus according to the sequence of the main subject divisions found in the subsequently published *Reports* themselves:[10]

REPORTS	CAHIERS
I OBLIGATIONS	S. 764-774 (11 items); all in English and apparently the drafts of Judge Day; extensive comments.
II PRELIMINARY TITLE, PERSONS	S. 775-779, 780 *recto*, 781-784 *recto* (10 items); in French save S. 775, 780 *recto;* some commentary in English.

[7] S.787 *recto* entitled *De la Vente II* (right-hand column).
[8] S.768, 778, 779, 786, 800.
[9] S.801 *verso*.
[10] Omitted from this list are the three items (S.813-815) containing French language drafts on procedural matters.

III PROPERTY[11] & PRESCRIPTION[11a]	S. 785, 801 *verso* (2 items); in French with some comments in English.
IV "SPECIAL CONTRACTS"[12]	S. 786, 787 *recto*, 788, 789, 790 *recto*, 791 (6 items); all in English save S. 788 which is in both languages; several items with considerable comments.
V SUCCESSIONS, GIFTS, WILLS, MARRIAGE COVENANTS	S. 792-794 *recto*, 795-799 (8 items); in French, save 794 *recto*; some commentary in English.
VI "SPECIAL CONTRACTS"[13] (cont'd) and PRIVILEGES, HYPOTHECS & REGISTRATION	S. 784 *verso*, 787 *verso*, 800, 801 *recto*, 802-804 (7 items); in English with some commentary. S. 805-808 (4 items); in French with some remarks in English.
VII COMMERCIAL LAW[14]	S. 780 *verso*, 790 *verso*, 794 *verso*, 809-812 (7 items) in English, save 811-812 (*Concordance du Code de commerce avec le droit du Bas-Canada*).

— *Répertoire alphabétique* S. 816, 4½" x 10", in English.

A note-book divided into columns in order to indicate the correspondence between the proposed articles of the Civil Code of Lower Canada and those of the French Civil Code; entries have been completed to the letter *V*.

— *Livre des Minutes*[15] S. 817, 409 pp., 8½" x 13", in French.

This important item contains a record of the 206 regularly recorded meetings of the Commission itself from 27 October 1859 to 19 December 1864 devoted to the Civil Code (pp. 29-408) and

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[11] For this portion of the *Third Report* (the present Civil Code *Book Second*) no drafts have been recovered.

[11a] See also the *cahier* on this subject in the possession of the McGill Law Library (text *in fine*).

[12] Sale, Exchange, Lease & Hire.

[13] Mandate, Loan, Deposit, Partnership, Life-Rents, Transaction, Gaming Contracts, Suretyship, Pledge.

[14] The drafts on Bills & Notes, and Bottomry & Respondentia alone have been recovered; a small number of entries on insurance is contained in S.791.

[15] The complete title on the first page is *Livre des Minutes des procédés de la Commission de la Codification des Lois à ses réunions régulières Tenues d'après la clause 19 de l'acte de 1857, Chap. 43, 1859.*

one completed[16] entry for 15 May 1865 for the Code of Civil Procedure (p. 409). As a prefix to the minutes themselves there is also recorded the *Mémoire* of Caron entitled *Notes sur le plan à suivre dans les travaux préparatoires de la Codification.* There are two special entries in the form of memoranda (at pp. 191-4) instructing the secretaries to draft the articles on Privileges and Hypothecs and the elements of the future Book IV (*Commercial Law*).[17]

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One *cahier* containing the draft articles and some commentary in French on the subject of prescription, bearing on its cover *No. 2 Titre de la Prescription Cahier I*; the provenance of this item was an Ontario bookdealer.

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[16] The final entry for 16 May 1865 terminating the book is incomplete.

[17] Included as inserts are several copies of the form employed to record the votes of the members of the Special Committee of the House named to study the draft of the Civil Code. The composition of this Committee is given *infra Appendix II*, n. 38.

APPENDIX II

Chronology of the Codification of the Laws of Lower Canada

1857	10 JUNE	Assent given to *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure,* 20 Vict., S.C. 1857, c. 43.
	28 NOV.	Hon. G. E. Cartier [1] offers the position of President of the Commission to L. H. LaFontaine.[2]
	1 DEC.	LaFontaine declines becauses "de trop fortes raisons s'y opposent: la première, qui est la seule qu'il me suffit de donner, est l'état de ma santé..."[3]
1858	SEPT.-DEC.	Cartier absent in England.
1859	4 FEB.	Appointment [4] of Commissioners: Hon. R.-E. Caron,[5] puisné judge of the Court of Queen's Bench, Hon. C. D. Day [6] and Hon. A.-N. Morin,[7] puisné

[1] The Hon. G.E. Cartier (1814-1873), then Attorney General for Lower Canada, relates this matter himself in his speech of 31 January, 1865, as reported in *La Minerve* of 4 February, 1865, and reproduced in *Parliamentary Speeches and Debates* in *Legislative Proceedings.*

[2] Sir L.-H. LaFontaine (1807-1864) was Chief Justice of Lower Canada at this time.

[3] Cartier maintains he re-iterated his offer upon his return from England, *loc. cit.,* p. 4.

[4] These appointments by commission or by letter and the subsequently cited materials are drawn from the recording in the *Livre des Minutes* (S.817).

[5] René-Edouard Caron (1800-1876) was admitted to the Bar of Lower Canada in 1826 and pursued a political career until his appointment to the Superior Court in 1853; in 1855 he was named to the Court of Queen's Bench. He was made Lieutenant-Governor of Quebec in 1873. For his life, see L. LeJeune, *Dictionnaire général du Canada,* (Ottawa, 1931), vol. I, p. 310.

[6] Charles Dewey Day (1806-1884) was admitted to the Quebec Bar in 1827, a member of the Military Court constituted to judge the 1837-38 rebels and then a member of the Special Council during the suspension of normal legislative rule; he was Chancellor of McGill University from 1852 until his death. For his life, LeJeune, *op. cit.,* vol. I, p. 478.

[7] Augustin-Norbert Morin (1803-1865) was called to the Bar in 1828 and, after a turbulent career in the troubles of 1837-38, practised law in Quebec City and was named to the bench in 1855. He died after the completion of the

judges of the Superior Court for Lower Canada; letters to this effect received by them from the office of the Provincial Secretary in Toronto requiring that they give their "undivided attention to the Codification from and after the 1st of April next," by which time they will be expected to have "disposed of all matters hitherto submitted to you in your judicial capacity."

Day is in fact absent in England at this time and Morin is described as "souffrant d'une maladie grave."

10 FEB. Appointment of Secretaries J.-U. Beaudry [8] and T. K. Ramsay [9] as French and English-speaking Secretaries respectively.[10]

MARCH Declaration of Judge Caron defending his decision to continue sitting as judge until 1 April, 1859 against the objections of two of his fellow judges that he was, because of his nomination as codifier, "incompétent d'agir comme juge."[11] He will in fact withdraw from his activity of judge in the face of pressure from his colleagues.

Civil Code but before its enactment. For his life, see L.-O. David, *L'Hon. A.-N. Morin,* (Montréal, 1872) and A. Béchard, *L'Hon. A.-N. Morin,* (St. Hyacinthe, 1885), and LeJeune, *op. cit.,* vol. II, p. 318.

[8] Joseph Ubalde Beaudry (1816-1876) (McCord gives the name as Baudry, *Preface,* p. vi), advocate, and at this time Clerk of the Court of Appeal; upon the death of Morin in 1865, Beaudry replaced him as Commissioner. For his life, see P.G. Roy, *Les juges de la Province de Québec,* (Québec, 1933), p. 37.

[9] Thomas Kennedy Ramsay (1826-1886), advocate, and later (1870) named to the Bench, was the founder of the series *Lower Canada Jurist/Collection des décisions du Bas Canada* (1857-1891) and author of the *Digested Index to Reported Cases of Lower Canada,* (1865), as well as an earlier work on the *Coutume de Paris, (infra* n. 15). For his life, see Roy, *op. cit.,* p. 459.

[10] The Act of 1857 expressly provided that "one... shall be a person whose mother tongue is English but who is well versed in the French language, and the other a person whose mother tongue is French but who is well versed in the English language" (s.1). No such requirement was made in the case of the Commissioners.

[11] Reported in *Le Courier du Canada, Le Journal de Québec* and as reproduced in the *Minerve* of 10 March, 1859. The 1857 Act provided that any judge of the Court of Queen's Bench might be appointed as a Commissioner (s. 2) and further that an "Assistant Judge" be named to "supply his place... for and during the time that [he] continue to be such Commissioner"; the judge in these circumstances — "while acting as such" — was to receive no remuneration as a Commissioner except the *excess* (if any) of the remuneration of a

20 MAY — First informal meeting of the Commission; a memorandum dated 21 May 1859 is sent to the governor "au sujet de l'organisation de la commission;" a reply dated 27 May authorizes the rental of premises in Quebec City and the employment of a messenger.[12]

10 JUNE — Second informal meeting "aux fins de s'entendre sur le meilleur plan à suivre" at which Judge Caron puts forward for approval his "Mémoire comprenant ses vues".[13]

A division of the preliminary work is made as follows:

— Secretary Beaudry is to make a compilation of the judicial decisions relating to commercial matters;[14]

Commissioner over his salary as judge (s. 18). The claim that Caron was "incompetent" to dispose of or continue such matters as were before him in his judicial capacity seems unfounded on the basis of the Act itself and indeed the instruction received from the Provincial Secretary's Office; there is no evidence that it was urged in the case of either Day or Morin.

The maximum payments of $16 *per diem* ("while employed in the performance of his duties"), or $5,000 *per annum* provided for in s. 17, were put to close calculation by Caron since in his capacity as judge he was paid only $4,000 (*Notes Générales*, pp. 15-6).

[12] The *Notes Générales* (pp. 73-7) reveal in fact that the premises rented for the use of the Commission belonged to Caron himself for which he collected rental of $680 as of 1 May 1859 and that he drafted the terms of the *bail*.

[13] The document, reproduced in the *Livre des Minutes* (S.817), at p. 15, entitled *Mémoire sur le mode à suivre par les Codificateurs dans leurs procédés préliminaires adopté à leur séance du 10 juin 1859* is discussed in the main portion of this article. The *Notes Générales* contain what are undoubtedly the preliminary draft of portions of this *Mémoire* (at p. 1: *Quelles sont les Loix du pays*; p. 5: *Loix à codifier*; p. 69: *Codification* (*Modus operandi*) and the annexed [*Document A*]).

[14] This compilation has not been recovered; the *Mémoire* of 10 June mentions only that a compilation is to be made of the "*dispositions* qui sont relatives et particulières au commerce" (pp. 24-5). It is possible moreover that this phase of the preliminary work may have been delayed until the fall of 1862, for on 4 September of that year (meeting no. 97) a memorandum is recorded (p. 193) instructing the secretaries to begin their work on the "partie spéciale destinée à traiter du Commerce, en autant que chaque matière n'aurait pas déjà été comprise sous une règle générale ou comme exception dans les autres parties du Code." In fact Judge Day appears to have been responsible for much of the drafting in this area which he presented in early 1864, but the work of the secretaries may be item S.811 (*Conférence & Concordance du Code de Commerce avec le droit du Bas-Canada*).

— Secretary Ramsay is to establish which articles of the *Coutume de Paris* are still in force;[15]

— The Commissioners agree to undertake the "études préparatoires qui leur étaient indispensables, avant qu'ils puissent, avec avantage, se livrer à la discussion régulière." (It must have been at this point that it was agreed that Judge Day would produce the preliminary draft on *Obligations*,[16] and the work otherwise divided as indicated below.)

27 OCT. First formally recorded meeting of the Commission in Quebec City (at which the above events and matters were reviewed).

1860 21 FEB. Day submits [17] his *projet d'articles* on the draft title of *Obligations*.

23 FEB.[18] to 1861 2 APRIL Meetings (nos. 3-48) devoted to the study of the draft on *Obligations;* the final version is declared ready on 2 April 1861 after a re-consideration of the articles was made "suivant la nouvelle numération de l'imprimé"; [19] the subsequent events relating to this *Report* are as follows:

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[15] The result of this survey was the 1863 publication by Ramsay — the year following his destitution as secretary — entitled *Notes sur la Coutume de Paris*, (Montréal, 1863).

[16] *Livre des Minutes* (S.817) p. 32; McCord (*Preface*, p. vi) mentions it had been decided to begin with this portion "because of its importance, as being the basis of the greater portion of the whole Code..."

[17] These drafts, items S.765-7 *(Cahiers A — Nos. 1, 2, 3)* were declared to form part of the minutes at this meeting; the very first item of the series, S.764 (entitled *No. 1 Obligations*) bears the following statement on its cover "This draft submitted to [here follows a word to be rendered either as "Courts" or "Comms."] at Que. 21 Feb. 1860"; no provision had been laid down that the drafts were to be submitted to the judiciary at this stage.

[18] No meetings were held from May to November 1860.

[19] This entry in the Minutes is puzzling since *Cahier No. 1 Obligations* (S.764) bears the inscription — "Completed and sent to printer 13 July 1861"; while it is known that there were two editions of this *First Report* (as in the case of, eventually, the first four *Reports*), there is no record of a printing *earlier* than 2 April (the date of the minute entry) or 13 July (the notation of Day) of 1861. It may be that a preliminary printing was made for the use of the Commission itself; in any event the first published edition of the *First Report* is not dated but must be fixed as the summer of 1861.

	13 JULY	*First Report* completed and sent to printer [20]
	12 OCT.	*First Report* submitted [21] to government
	11 DEC.	Executive Council orders the transmission of the *Report* to the judges of the province for their remarks requesting its return on or before 15 May 1862.[22]
	4 APRIL to	Meetings (nos. 49-96) devoted principally to the drafts of Judge Caron on the *Preliminary Title*
1862	12 MAY	and *Book First* (*Of Persons*).
	22 MAY	*Second Report* on these matters adopted together with the *Special Report* of Judge Day.[23]
	4 SEPT.	Instructions to secretaries to begin preparatory work on privileges, hypothecs, registration and commercial matters.[24]
	9 SEPT.	Consideration begun of the drafts on *Prescription* prepared by Morin which continues until 2 Dec. (meetings nos. 97-113). Secretaries instructed to begin their preliminary studies for the Code of Civil Procedure.[25]

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[20] See preceding note.

[21] McCord (*Preface*, p. vi) gives this date as the date of the *First Report* whereas in fact it is undated; the *Second Report* (p. iii) specifically mentions that the first was *submitted* in "October last" (i.e. 1861) to the government.

[22] This procedure was envisaged by sections 8-12 of the 1857 Act but McCord attests that it was observed only in the case of the first two *Reports* (*Preface*, p. ix) and Cartier affirmed that while the Commissioners had complied with the Act only one judge, Mr. Justice Winter, of Gaspé, had co-operated by returning the *Reports* with comments (Speech of 31 January, 1865, *loc. cit.*, p. 6); the *Bibliothèque de l'Université Laval* possesses Judge Winter's copies.

[23] McCord incorrectly gives the date as 28 May (p. vii); Day was alone in submitting a dissenting *Report* which was however allowed for by the 1857 Act (s. 16).

[24] *Memoranda* nos. 1 & 2 forming part of the Minutes (S.817, pp. 191-4). These instructions appear to have been suspended (at least temporarily) in view of the entry of 9 September following.

[25] *Memorandum* (S.817, p. 195) "ayant en vue le progrès fait dans la préparation des différentes parties du Code civil, et l'avantage qu'il y aurait à faire avancer en même temps la préparation du Code de procédure, [les commissaires] décident maintenant de suspendre toute action sur ces memorandas, et de donner instruction aux Secrétaires de dévouer au Code de procédure telle partie de leur temps qui ne sera pas occupé par d'autres devoirs."

	25 OCT.	Destitution of T. K. Ramsay as English-speaking secretary.[26]
	3 NOV.	Request from the government for the draft of the Code.[27]
	6 NOV.	Reply of the Commission announcing that the *Third Report* containing *Book Second* (*Of Property*) and the title *Of Prescription* will soon be submitted.[28]
	29 NOV.	Thomas McCord named as English-speaking Secretary to replace Ramsay.[28a]
	10 DEC.	*Third Report* adopted.[29]
1863	11 DEC. to 13 FEB.	Meetings (nos. 114-129) devoted to Judge Day's drafts on *Sale, Lease & Hire.*
	20 FEB.	*Fourth Report* completed.[30]
	21 AUG. to 26 DEC.	Meetings (nos. 130-154) devoted to Judge Caron's drafts on portions of *Book Third* (*Successions, Marriage Covenants* and those of Judge Morin relating to *Gifts* and *Wills*).

[26] The precise reasons for his dismissal are not known. McCord mentions (*Preface*, p. vi) that it was "in consequence of a quarrel between him and the Ministry of the day, which had originated in political causes"; Cartier in his speech of 31 January 1865 confirmed that it was for "causes politiques"; the formal notification to the Commission is recorded (S.817, p. 230).

[27] Attorney-General L.V. Sicotte wrote in these terms: "The Government is very desirous of being enabled to place before the Country, as soon as possible, substantial evidence of progress in the Codification of the Laws of Lower Canada and with this view, I would be extremely gratified if the Commissioners could put it in my power to lay before Parliament, during the coming Session, the draft of the proposed *Code civil...*" (S.817, p. 230).

[28] The reply, drafted by Caron, stated that the Commissioners wished to express "aucun doute qu'il pourront alors [*viz.*, at the time of the next session], comme ils peuvent aujourd'hui, satisfaire le Gouvernement et le pays que [*sic*] la tâche qui leur a été confié[e] n'a pas été négligé[e], et est dans un état de progrès satisfaisant."

[28a] Thomas McCord (1828-1886) had been at the Bar twelve years at the time of his appointment, subsequently was named Law Clerk of the Legislature and was named to the bench in 1873. For his life, Roy, *op. cit.*, p. 359.

[29] *Report* so dated; McCord (p. vii) gives 24 December; the *Minutes* of 1 & 2 December record final approval to both language versions of the *Report* and texts.

[30] So dated. McCord gives 25 February (p. vii) but no meeting of the Commission is recorded between 13 February and 21 August.

1864 19 JAN. *Fifth Report* completed.[31]

20 JAN. to 26 FEB. Meetings (nos. 155-177) devoted to Judge Day's drafts on *Partnership, Mandate,* and the "petits contrats" as well as various matters of a commercial nature, and Judge Caron's draft on *Suretyship.* At this time Judge Day proposes "de former un quatrième livre intitulé 'Commercial Law' comprenant une disposition préliminaire."[32] The order of the titles in *Book Third* is also finally settled at the last meeting of this phase.

3 MARCH to 10 JUNE Meetings (nos. 178-189) devoted to the drafts of Beaudry on *Privileges, Hypothecs* and *Registration.*

11 JUNE to 19 DEC. Meetings (nos. 190-206) devoted to a general revision of the whole Code as well as to Judge Day's drafts on *Insurance.* No meetings are held in July and August, although the *Sixth Report* is dated 1 July 1864 [33] (containing *Mandate, Loan, Deposit, Partnership,* etc., as well as *Privileges, Hypothecs* and *Registration*). The balance of the time is devoted to general revision and the contents of *Book Fourth.*

15 NOV. *Seventh Report* [34] containing the whole of *Book Fourth* devoted to matters of a commercial nature.

21 NOV. *Supplementary Report* containing the changes to the texts of the whole Code and explanations thereon.

However, the work of general revision is recorded as having continued for the last three

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[31] McCord (p. vii) gives 19 January which is confirmed by the *Minutes* (no. 152), although the *Report* itself is not dated.

[32] S.817, p. 351. The idea however had been put forward much earlier, *cf. supra,* n. 14.

[33] McCord here again (p. vii) gives a different date — 8 July; from the *Minutes* the work on this portion was apparently over by 10 June.

[34] McCord gives 25 November (p. vii). The *Minutes* give no date, but either the process of general revision was carried on after the formal dating of the last two *Reports,* or alternatively, they were ante-dated upon printing.

	meetings of the Commission held 1, 13 and 19 Dec.[35]
1865	Reprinting of the first four *Reports* and first printing of the last four *Reports*.[36]
31 JAN.	Cartier introduces the bill entitled *An Act respecting the Civil Code of Lower Canada* which is then read for the first time.[37]
3 FEB.	Second reading and nomination of the Select Committee for the purpose of studying the *Reports* and draft Code "with all convenient speed and with power to send for persons, papers and records."[38]
7 FEB. to 9 MARCH	The Committee meets 21 times during this period and on six occasions sends for all or some of the Commissioners.
13 MARCH	Report containing the 217 resolutions framed by the Committee submitted to the House.
25 JULY	Death of Commissioner A.-N. Morin.
18 & 31 AUG.	The House in Committee adopts the Resolutions of the Select Committee with very few amendments.

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[35] The *Minutes* end with an incomplete entry on the last page recording two meetings of 15 & 16 May 1865 devoted to Beaudry's draft on procedure; a separate minute book was probably then constituted for subsequent meetings but this item has not been recovered.

[36] The reprinting of the first four *Reports* is not of course recorded in the *Minutes*. McCord relates that only the text of the articles was revised for the second edition, not the authorities.

The second printing was carried out in Ottawa in 1865, by George E. Desbarats in three bound volumes: *First, Second & Third Reports* (565 pp.), *Fourth & Fifth Reports* (471 pp.) and *Sixth, Seventh & Supplementary Reports* (399 pp.).

The original printing of 1861-1863, in which the pagination is different, by "Stewart Derbishire and George Desbarats, Imprimeur des Lois de sa Très-Excellente Majesté la Reine" in Quebec, only covered the first four *Reports*. Confusion sometimes arises from the fact that *Reports* from the earlier printings have been bound together with those of the second to make complete sets.

[37] His speech upon this occasion was reported in the *Minerve* of 4 February 1865 and reproduced in *Legislative Proceedings*.

[38] The composition of the committee was as follows: Att. Gen. Cartier, Sol. Gen. Langevin, Messrs. Alleyn, Rose, Dorion, Cauchon, Huntington, Abbott, Laframboise, Evanturel, Dunkin, Archambault, Webb, Geoffrion, Dufresne, Irvine, Joly, Taschereau, Harwood, De Niverville.

	1 SEPT.	Third reading in the Legislative Assembly.
	4-6 SEPT.	Passage of the Bill in the Legislative Council.
	18 SEPT.	Assent given to the Bill which becomes 29 Vict., S.C. 1865, c. 41, containing the Schedule of Resolutions showing the amendments to be made to the printed "Roll" of the Civil Code of Lower Canada.[39]
1866	15 APRIL	*Report* on the *Code of Civil Procedure.*[40]
	25 MAY	Order in Council settling upon 1 August 1866 as the date for the commencement of the Civil Code.
	26 MAY	Proclamation of Governor General Monck published in the *Canada Gazette* fixing this date.
	1 AUG.	The Civil Code comes into force.

[39] The 217 Resolutions are printed immediately following the text of the Act itself in the sessional volume of 1865 (pp. 175-220), but were not reproduced by McCord in his edition of the Civil Code; the Schedule is also found in the *Legislative Proceedings in relation to the Civil Code of Lower Canada.*

[40] This *Rcport* was only submitted 21 June 1866 and brought into force on 28 June 1867 by a proclamation of 22 June of that year.