COMMENTS
COMMENTAIRES

CONSTITUTIONAL LAW—PROPRIETARY RIGHTS AND THE CONTROL OF NATURAL RESOURCES.—The question of whether the Dominion or the provinces control natural resources came before the Supreme Court of Canada in the recent *Potash* case,[1] and although the court did not directly answer the question the decision rendered went some way towards an answer.

The court was concerned with the Dominion's trade and commerce power[2] and the result of the decision was that the wide interpretation of the power was still the preferred opinion with the judges. As a result the ability of the provinces to control natural resources found within their boundaries is severely limited. The Dominion's power to control interprovincial and international trade, coupled with the fact that all resources of any importance will move in external trade, means that the area of local trade left to the provinces does not provide them with a sure foundation upon which to control the resources. But the subject of this comment is not the trade and commerce power; rather it is the statement made by the Chief Justice in the course of his judgment for the court in the *Potash* case. Chief Justice Laskin said that the government of Saskatchewan had not been acting under proprietary right, but "in pursuance of legislative and statutory authority directed to the proprietary rights of others".[3]

The implication from the remark of the Chief Justice is that different considerations would come into play had a proprietary right been asserted. By proprietary right one obviously means public property, which in the western provinces covers a considerable amount of the mineral holdings, as compared to eastern Canada

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[1] *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan* (1978), 88 D.L.R. (3d) 609 (S.C.C.).

[2] The British North America Act, 1867, 30 & 31 Vict., c.3 (U.K.), s.91(2), hereinafter cited as the B.N.A. Act.

[3] *Supra*, footnote 1, at p. 630.

where the land and mineral rights have been conveyed in large measure to private persons. Although in eastern Canada private ownership dominates, it can of course be converted to public ownership. As well proprietary rights can arise through public ownership of resource corporations. The difficulties involved in the acquisition of property by the provinces through expropriation or nationalization of companies is beyond the scope of this comment—it is the significance of proprietary rights held by the provinces, however acquired, that is the concern.

The question is what would have been the result in the case had the government of Saskatchewan been acting under proprietary rights?

The issue is not the revenue which arises from owning mineral resources, but rather the ability to control the resource in a manner which is denied the province by the trade and commerce power. That the revenue goes to the province is not contested, although the amount will be affected by policy with respect to control over the resource. An easy example is Alberta and the revenue which could accrue to the province in the absence of Dominion policy over exportation of oil.

When considering the question of proprietary rights and the control of natural resources there seems to be an assumption operating that the province can control its public lands and natural resources in the same way as any private owner could do.[4] In other words Central Canada Potash could have established a corporate policy which would directly affect external trade, for instance that it would only sell within Canada or Saskatchewan and deny orders from outside the country or province. At present there is nothing illegal being done by the implementation of such a policy, although legislation enacted by the Dominion under trade and commerce could make such action illegal. The province, seen as a private person with respect to natural resources, could deal with its property in the same manner as the potash company mentioned above, but it too would be subject to Dominion legislation. There is no question at present that property rights of the province do not immunize the province from Dominion laws enacted under the trade and commerce power.[5]

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[4] The assumption appears in the following writings, either directly or indirectly because the writer cites *Smylie* v. *The Queen* (1900), 27 O.A.R. 172, in which the assumption is made. *Smylie* will be discussed *infra*. The following is not to be considered as exhaustive: LaForest, Natural Resources and Public Property under the Canadian Constitution (1969); Thompson and Eddy, Jurisdictional Problems in Natural Resource Management in Canada, in Background Study for the Science Council of Canada, May 1973, Special Study No. 27, Essays on Aspects of Resource Policy, p. 67; Crommelin, Jurisdiction Over Onshore Oil and Gas in Canada (1975-76), 10 U.B.C.L. Rev. 86; Gibson, Constitutional Jurisdiction Over Environmental Management (1973), 23 U. of T. L.J. 54.

[5] *A.G. B.C.* v. *A.G. Can.*, [1924] A.C. 222.

The trade and commerce power can have two effects: first, there is its affirmative effect, namely it gives the Dominion power to enact certain laws, second, it has a negative effect on provincial power. When considering proprietary rights the result is that the negative effect which the trade and commerce power can have on provincial legislation would be nullified and the focus would be on the affirmative assertion of power by the Dominion. This is the optimum degree of control by the province through the exercise of proprietary rights.

Since the assumption mentioned above has been held by so many for so long it is perhaps no longer capable of being challenged, but I am going to suggest that it is not correct. Obviously the assumption could acquire the force of law by simply existing whenever the question arose for decision by a judge, or its long standing nature could be recognized and since it has been taken for granted for so long the maxim of the law *communis error facit jus* could arise, but the maxim should give way if the assumption is clearly contrary to authority.[6]

The traditional tool upon which to base a legal opinion is of course previous cases and in this area two cases are brought forward as substantiating the assumption, and if controlling we would no longer have an assumption but precedent upon which a judge could base his decision. It should be pointed out at this point that the Supreme Court of Canada is no longer bound by its previous decisions; consequently the existence of precedents is no longer a guarantee, if it ever was, that a certain result will follow. The two cases used to support the view that a province can deal with its land in any manner are *Smylie* v. *The Queen*,[7] a 1900 decision of the Ontario Court of Appeal, and the 1923 decision of the Judicial Committee in *Brooks-Bidlake & Whittall Ltd.* v. *Attorney General of British Columbia*.[8]

The *Smylie* case involved the "manufacturing condition".[9] Ontario had amended its *Crown Timber Act*[10] in 1898 by providing that licences issued to cut timber on ungranted Crown lands would be subject to the condition that all pine which might be cut into logs or otherwise was to be manufactured into sawn lumber in Canada. Smylie was an American lumberman who brought the action on behalf of American lumbermen to have the manufacturing condition ruled invalid. The litigation thus began with legislation which appeared to be attempting to create industry in Canada, rather than

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[6] "Common error makes law", Broom's Legal Maxims (10th ed., 1939), pp. 86-87.

[7] *Supra*, footnote 4.

[8] [1923] A.C. 450.

[9] See generally Nelles, The Politics of Development (1974), Ch. 2.

[10] S.O., 1898, c.19; see now The Public Lands Act, R.S.O., 1970, c.380. The provision specified Canada, although the obvious impact was on Ontario.

having the industry reside across the border in the United States and leaving Canadians as hewers of wood, being challenged by Americans who had licences to cut timber and who wanted the licences renewed without the "manufacturing condition" attached. The trial judge held that the legislation was valid and Smylie appealed to the Court of Appeal.

During argument before the Appellate Court the principle which loomed large in the minds of the judges was clearly articulated by two of them (Moss and Lister JJ.A.): "The timber belonged to the people and the legislature could do with it as they pleased".[11] This is the assumption stated clearly. It is clear, especially in the judgment of Mr. Justice Osler, that the motive behind the legislation was of great weight, and he did not see it as a regulation of trade and commerce, but rather as a regulation of a local business with an effect on trade and commerce. Shades of the *Potash* case appear, and it is doubtful that today one would consider that it was not a most direct regulation of external trade. Maclennan J.A. maintained that the extent of the trade was not a consideration,[12] a position which may once have had merit[13] but which cannot be sustained today.[14] But the key to the judgments which were rendered was the principle mentioned above—the province was dealing with its own property.

The constitutional provision which provided the authority for the provincial legislation was section 92(5) of the B.N.A. Act, "the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon". The judges of the Ontario Court of Appeal clearly considered that it was to section 92(5) alone that they were to look.

The idea that section 92(5) allows the provincial legislature to enact laws untrammelled by section 91 is astonishing, since the same principle does not apply to the other heads of power in section 92. It is trite constitutional law that sections 91 and 92 are to be read together, one modifying the other, and trade and commerce, in section 91, cannot be legislated upon within section 92. Thus, the principle articulated in *Smylie* that the legislature can legislate under section 92(5) as it pleases, flies in the face of every decision ever rendered on the question of provincial legislative power under section 92. The decision is without doubt wrong. Osler J.'s view that the legislation was not a regulation of trade and commerce is clearly not tenable today. I submit that no valid rule of law can be gleaned from the case.

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[11] The Globe, 8 Feb. 1900.

[12] *Supra,* footnote 4, at p. 188.

[13] *The King* v. *Eastern Terminal Elevator Co.,* [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

[14] *Re Farm Products Marketing Act,* [1957] S.C.R. 198, 7 D.L.R. (2d) 257; *Murphy* v. *C.P.R.,* [1958] S.C.R. 626, 15 D.L.R. (2d) 145; *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan, supra,* footnote 1.

In *Brooks-Bidlake,* timber was coincidentally involved again, and the dispute centered about a condition attached to licences to cut and remove timber "that no Chinese or Japanese shall be employed in connection therewith". The condition was ordered to be attached by the provincial government under the general terms of the Crown Lands Act[15] following a resolution of the legislature that it should be inserted in all contracts, leases, and so on. The absence of a specific legislative provision as in *Smylie* should make no difference since the power delegated under the Crown Lands Act could not be wider than that possessed by the legislature itself.[16]

The constitutional provision which it was argued was infringed by the condition was the Dominion power over "naturalization and aliens" in section 91 (25), of the B.N.A. Act, but twenty years earlier, in *Cunningham* v. *Tomey Homma,*[17] the Privy Council had decided that the extent of the power in section 91(25) was simply that of deciding who was an alien and who would be a naturalized citizen; the consequences of being either an alien or a naturalized citizen was left to the provinces. In *Tomey Homma* members of the Japanese race were denied the vote in British Columbia and the Privy Council upheld the law. It is true that a few years before *Tomey Homma* the Judicial Committee had decided in *Union Colliery Co.* v. *Bryden*[18] that provincial legislation, again of British Columbia, which prohibited the employment of Chinese below ground in coal mines was invalid, but in both *Tomey Homma* and *Brooks-Bidlake* this case was explained away by holding that the legislation was not really aimed at coal mines, but aimed at prohibiting the continued residence in British Columbia of Chinese by prohibiting the earning of a living in the province. It seems fairly obvious that even with the explanation there was a conflict between *Tomey Homma* and the *Bryden* case, and in 1914 the Supreme Court of Canada chose *Tomey Homma*;[19] the Privy Council in *Brooks-Bidlake* made the same choice.

In *Brooks-Bidlake* the Privy Council dealt only with the issue of the Chinese, and when, on the basis of *Tomey Homma,* the condition was valid with respect to them, the licence held by the plaintiffs was not subject to renewal since the company had employed Chinese and so had broken the condition.[20]

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[15] R.S.B.C., 1911, c.129.

[16] The plaintiffs in the case who wanted the condition removed from their licences were met with a considerable problem, namely, if the condition was invalid then the licence was void. If the condition was valid, they had breached it.

[17] [1903] A.C. 151.

[18] [1899] A.C. 580.

[19] *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440.

[20] The issue of the effect of the Japanese Treaty Act, S.C., 1913, c.27, on the prohibition against the employment of Japanese did not have to be decided.

Smylie and *Brooks-Bidlake* are the only cases which are directly on point, but in the end *Smylie* must stand alone, and I submit it does not do so very well. The other cases concerning provincial proprietary rights have involved an assertion of power by the Dominion: *A.G. B.C.* v. *A.G. Can.*,[21] in which Dominion customs law was held to apply to provincial property; *A.G. Que.* v. *Nipissing Central Ry*,[22] in which it was held that Dominion legislation could validly authorize the taking of provincial public lands for railway purposes. In this latter case Viscount Cave L.C. for the Board made the point clearly: "While the proprietary right of each province in its own Crown lands is beyond dispute, that right is subject to be affected by Dominion legislation passed by the Parliament of Canada within the limits of the authority conferred on that Parliament."[23]

I submit that Dominion authority over trade and commerce not only has the affirmative effect on provincial control over natural resources, but it also has a negative effect when the province is acting under section 92(5) of the B.N.A. Act. The only authority to the contrary is *Smylie* and I submit it was wrongly decided. Even if correctly decided it would not be binding authority on the Supreme Court of Canada, where the issue will obviously go when it arises.[24] Of course, as already indicated, the Supreme Court has freed itself of *stare decisis* in any case.[25]

Since there are no precedents upon which to base a decision it would seem essential that section 92(5) be considered, and its origins. The provision in the constitution has its beginning in the 1837 legislation of New Brunswick[26] and Upper Canada.[27] Under pressure from the Colonial Secretary, Lord Glenelg, New Brunswick, first, and then Upper Canada enacted legislation dealing with public or Crown lands.[28] Lord Glenelg was of the view that settled principles should be adopted in all parts of British North America with regard to administration of public land. One of these principles was the participation of the legislature in the formulation of rules. In a despatch to Governor Head he stated: "The principle that the land granting system is to be made the subject of local

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[21] *Supra*, footnote 5.

[22] [1926] A.C. 715.

[23] *Ibid.*, at p. 723.

[24] Research has failed to uncover the reason why an appeal to either the Supreme Court of Canada or Privy Council was not taken in 1900. In fact The Globe reported that an appeal was inevitable.

[25] *McNamara Construction (Western) Ltd.* v. *The Queen* (1977), 75 D.L.R. (3d) 273 (S.C.C.).

[26] 8 Wm. IV, c. 1.

[27] 7 Wm. IV, c. 118 (in force 1838).

[28] See Gates, Land Policies of Upper Canada (1968).

legislation is beyond the reach of debate."[29] The authority for the legislation was section 42 of the Constitutional Act, 1791 and later, for Canada, section 42 of the Union Act, 1840. In Canada the 1837 statute was replaced after the union by an 1841 statute.[30] The last statute of Canada prior to Confederation was entitled an Act respecting the Sale and Management of the Public Lands[31]—the words of section 92(5). The statutes which were enacted may have given the executive a wide discretion, but the authority for land administration was within the legislative authority and has by section 92(5) been given to the legislature of each province since 1867.[32]

There remains a further base for provincial control of natural resources through proprietary rights and that is the possibility of the existence of a residual prerogative of the Crown existing outside of section 92(5). Only one case has directly involved the question of such a possibility and that was *A.G. Canada* v. *Higbie*.[33] Of the five judges of the Supreme Court of Canada who heard the appeal, two, Rinfret C.J. and Taschereau J., held that such a residual prerogative did exist; two others, Kerwin and Hudson JJ. outlined the arguments but said that they would not come to a conclusion upon the issue. The remaining judge, Rand J., said only that "in the absence of legislation, such a residue may remain in relation to dealings with [property] in a provincial aspect";[34] the implication being that in a Dominion aspect, which could include trade and commerce, there would be no residual power. Therefore it is Chief Justice Rinfret's judgment, rendered for himself and Mr. Justice Taschereau, that one is left to consider. Obviously two judges out of five do not create a strong precedent.

In *Higbie* the Attorney General of Canada was seeking to obtain certain land in British Columbia on the basis that it was part of a public harbour prior to 1871, and therefore by section 108 of the B.N.A. Act the property of the Dominion. British Columbia joined in the litigation in support of the Dominion. In issue was an Order in Council of the British Columbia Government made in 1924 which stated that certain harbours were public harbours for the purpose of the B.N.A. Act, a statement which covered the land in question.

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[29] P.A.C. G1 series, Vol. 78, p. 313, Glenelg to Head, 4 Oct. 1836, quoted by Gates, *ibid.*, p. 189.

[30] 1841, 4 & 5 Vict., c.100.

[31] 1860, 23 Vict., c.2.

[32] During the Confederation Debates the only contentious issue with respect to public lands appears to have been who should control them, the Dominion or the provinces.

[33] [1945] S.C.R. 385.

[34] *Ibid.*, at p. 432.

Rinfret C.J., for himself and Taschereau J., held that as a question of fact the land was part of a public harbour. This was enough to conclude the litigation, but he went on to support his conclusion on other grounds. First, there was legislative authority for the order-in-council; second, the statement in the order was an admission which could be used to determine the issue of fact of whether or not the land was part of a public harbour; and lastly, there existed a residual prerogative power under which the provincial executive could deal with the land. This latter ground is the one of interest.

Kerwin J., for himself and Hudson J., based his decision on the order being an admission of fact. He reviewed the arguments for and against the residual prerogative power, but as mentioned earlier, expressly came to no conclusion. Rand J. also held that there was an admission of fact.

Rinfret C.J. relied heavily on an expression of opinion by Mr. Justice Newcombe in the *Saskatchewan Natural Resources Reference*.[35] He considered the opinion binding, or at least, due to the expertise of Newcombe J., worthy of the "greatest weight and authority".[36] The Privy Council, on appeal to that body, had agreed with the judgment rendered by Newcombe J. for the Supreme Court of Canada. The opinion expressed was:[37]

> It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provisions, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

Kerwin J. pointed out that in the *Natural Resources Reference* the order in Council had been authorized by statute. In Rand J.'s opinion Newcombe J. was not dealing with the authority to make the transfer, but simply the mechanics by which the transfer was to be made. Rand J. said: "He was distinguishing action by order in Council between co-ordinate advisers and action by grant under letters patent between Crown and subject."[38]

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[35] [1931] S.C.R. 263, aff'd [1932] A.C. 28.

[36] *Supra*, footnote 33, at p. 403.

[37] *Supra*, footnote 35, at p. 275.

[38] *Supra*, footnote 33, at p. 434.

The authority in which there was alleged to be a denial of the existence of a residual prerogative power was a statement made by Lord Watson in the *St. Catherine's Milling* case, where he said:[39]

> In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be and is subject to the control of its legislature, the land itself being vested in the Crown.

For Rinfret C.J. this was simply a statement of law that the provincial legislature had the power to legislate with respect to such lands, and the key words, "subject to the control of its legislature" do not appear in section 109 of the B.N.A. Act. Kerwin J. noted that the words could be *obiter* dicta, and,

> . . .might be taken as referring merely to that control which a provincial legislature may undoubtedly exercise and not that it is the sole branch of a Provincial Government to act under all circumstances.[40]

As counter authority to Lord Watson the view of Lord Davey in *Ontario Mining Co.* v. *Seybold* was offered. Lord Davey said, after quoting Lord Watson:[41]

> Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

Rinfret C.J. included the above quote in his quotation from Newcombe J.'s judgment. Kerwin J. said:[42]

> These words in themselves might be taken as expressing the opposite view but Lord Davey may have intended only to emphasize that the Sovereign's representative could not act except upon the advice of his constitutional advisers.

For Rand J., Lord Davey was,

> . . .dealing only with the question of the particular executive by whose action an alienation to a subject could be made; there is no reference, nor in that case could occasion for it have arisen, to the actual authority of the executive in any case to make a grant and much less the question of authority of the executive to make a jurisdictional transfer.[43]

Rinfret C.J. makes a point which should be dealt with now before examining more closely the cases referred to above. In his view the prerogative of the Crown cannot be affected except by clear

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[39] (1889), 14 App. Cas. 46, at p. 56.

[40] *Supra*, footnote 33, at p. 425.

[41] [1903] A.C. 73, at p. 79.

[42] *Supra*, footnote 33, at p. 425.

[43] *Ibid.*, at pp. 434-435.

legislative enactment, referring to the Interpretation Act of British Columbia.[44] Obviously the provincial Interpretation Act cannot govern the B.N.A. Act, but as pointed out by Rand J. the point made could be true of the B.N.A. Act and the Imperial prerogative. However in Canada, Rand J. states, the Crown in right of the Dominion and the Crown in right of the province are subject to the B.N.A. Act, a point that "is necessarily involved in a federal distribution of plenary powers".[45]

It becomes necessary to examine the three cases referred to in *Higbie, St. Catherine's Milling and Lumber Co.* v. *The Queen, Ontario Mining Co.* v. *Seybold,* and *Re Saskatchewan Natural Resources Act.*

In the *St. Catherine's Milling* case the issue was whether Indian land upon being surrendered belonged to the Dominion or the province in which the land existed. The Privy Council held that on the basis of section 109 the provinces acquired the beneficial interest. The quotation referred to in *Higbie* occurs as part of a discussion of the effect of the B.N.A. Act. Lord Watson notes that prior to 1867, and after the Union Act of 1840, all the beneficial interest in land, such as was in issue, passed to the provinces. The B.N.A. Act divided property between the respective provinces and the Dominion, as well as dividing legislative power. The conflicting claims to the land were thus dependent upon the provisions of the B.N.A. Act. Then occurs the quoted passage. Lord Watson goes on to consider sections 108 and 109, and later states:[46]

> The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117.

In the quotation Lord Watson is discussing what effect the B.N.A. Act had on the distribution of property between the Dominion and provinces and his reading of the Act led to the statement which was mentioned in *Higbie*, and his repeating of the opinion as indicated above. Clearly his understanding of the B.N.A. Act was that public lands were "subject to the administration and control" of the legislature of each province.

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[44] R.S.B.C., 1936, c.1, s.35; now R.S.B.C., 1960, c.199, s.35: "No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby."

[45] *Supra,* footnote 33, at p. 433.

[46] *Supra,* footnote 39, at p. 57.

The *Seybold* case also concerned Indian lands. The issue was whether the Dominion could create a reserve out of surrendered land. It was held that the Dominion could not do so since it has no proprietary rights in the land, only legislative jurisdiction over it until surrendered. Lord Davey points out that on the authority of the *St. Catherine's Milling* case the province acquires full beneficial interest in the land upon extinguishment of Indian title. He then quotes Lord Watson and makes the statement referred to in *Higbie*. It is unclear why the comment was made. It should be noted that the governments had come to an agreement on the issue which made the appeal unnecessary, and it is interesting to note that legislation was used.

In the *Natural Resources Reference*, the issue was a demand by the province of an accounting by the Dominion to the province for its dealing with the land within Saskatchewan from 1870 to 1905. The year 1870 refers to the date of the admission of Rupert's land and the Northwest Territories into Canada. In his judgment for the court, Newcombe J. outlines the provincial argument that in 1870 the land became territorial land and not Dominion land; sections 109 and 92(5) were said to apply and the Dominion never had authority to administer the land by its own legislation. The beneficial interest was alleged never to have resided with the Dominion. Always it is legislative power that is referred to in the judgment. Counsel for the Dominion was not heard. The conclusion was that the Dominion did have proprietary rights and the quote was in reference to the distinction between proprietary and legislative control, it being alleged by the province that only legislative control had been given to the Dominion. As the quote indicates the point which was attempted to be made was that there was no grant or conveyance, to which Newcombe replied that that was unnecessary:

> It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.[47]

He then quoted Lord Davey.

Of the three cases referred to in *Higbie*, it is only Lord Watson in the *St. Catherine's Milling* case who addresses himself to the issue being considered in this comment, and his conclusion would deny

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[47] *Supra*, footnote 35, at p. 275.

the existence of an executive power to deal with land outside of section 92(5).[48]

So far I have been concerned with provincial ownership of resources and attempts at control which could be made through conditions in leases or grants of mineral rights. What if the province owned a corporation involved in the resource industry? In the potash industry this is the plan that Saskatchewan is undertaking. Earlier in this comment it was said that a corporation could legally implement a corporate policy to restrict external trade, in the absence of prohibitory Dominion legislation. It is difficult to think of an example of when such a policy would be considered to be in the best interests of the corporation and the shareholders, although it may be in the best interests of the country. If such a policy were necessary for the national welfare then in all probability there would be legislation concerning the matter, such as laws dealing with trading with the enemy in times of war. The only corporation that would adopt such a policy voluntarily would be the provincially owned corporations whose shareholders might be thought of as the residents of the province who wish control over the natural resource. I consider that the answer to the question of whether such a device is possibly a way by which the province could control its natural resources is easily reached. It is an established constitutional doctrine that what cannot be done directly by a province cannot be done indirectly.[49] The courts have and will look behind the scheme and recognize it for what it is; the provincially owned corporation with the desire to establish a corporate policy of restriction of external trade is obviously not the same as a private corporation.

In the interpretation of the trade and commerce power the Supreme Court has since 1957 and the *Farm Products Marketing* case expanded the Dominion's power from the attenuated position given it by the Judicial Committee of the Privy Council. By the expanded power, economic control over natural resources has passed to the Dominion, leaving the province only with the control over local matters which contain little in the way of extra-provincial elements. Having thus, at least partially, achieved an economic unit within the country it would not seem feasible that the same court, as long as a majority of the judges maintain the same interpretation of

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[48] The quotation of Lord Watson's comment was made by Duff J. in *Burrard Power Co.* v. *The King* (1910), 43 S.C.R. 27, at p. 51. In addition see Duff J.'s comments in *Cunard* v. *The King* (1910), 43 S.C.R. 88, at pp. 95 *et seq.* In both cases it could be assumed that Duff J. considered that only a legislative power existed with no residuary executive power.

[49] *A.G. Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328; *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ltd.,* [1941] S.C.R. 573, [1941] 4 D.L.R. 209.

the trade and commerce power, should take with one hand and give back with the other by allowing proprietary rights to overcome the restriction on provincial power achieved through the trade and commerce power. Possibly the allowance of provincial control through the exercise of proprietary rights could be viewed as a compromise position, in that the exercise of proprietary rights has only the effect of nullifying the negative impact of the trade and commerce power and not the affirmative impact. Thus the provinces, through their proprietary rights, would be able to control natural resources in the absence of Dominion legislation on the topic. But in order to create that so-called compromise position the court would have to give section 92(5) of the B.N.A. Act an interpretation which to date has not been given to any other provision in the constitution. Thus section 92(5) would have to be interpreted to allow the province to legislate in relation to trade and commerce because it is dealing with provincially owned property.

The court could also compromise by recognizing the ability of the province through the corporate form to regulate natural resources. This would cause the least interference with established constitutional doctrine. The decision would involve not differentiating between a corporation which is privately owned and one which is provincially owned.

A change in the trend of interpretation of trade and commerce would, of course, make concern with proprietary rights of less importance, but in the absence of such a change the exercise of proprietary rights by the province is the last hope for the provinces to directly control natural resources.

The statement made by the Chief Justice which prompted this comment should be taken as a recognition that different considerations will arise when proprietary rights are the basis for provincial assertion of control over natural resources, and those considerations were not present in the case, which dealt solely with the trade and commerce power. The statement cannot be taken to imply that by the exercise of proprietary rights the province could deal with the property as it pleased. The major point which should be made is that the assumption which has been made when considering proprietary rights should no longer be an assumption. It is capable of serious challenge, and at best it is an open question whether through the exercise of proprietary rights the provinces will be able to control their natural resources.

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CONTRACT—RELIANCE INTEREST—*CULPA IN CONTRAHENDO* AND PUBLIC AGENCIES—OFFER AND ACCEPTANCE.—Karl Llewellyn once wrote, "the rules of Offer and Acceptance have been worked over; they have been written over; they have been scraped and rubbed smooth with pumice, they wear the rich deep polish of a thousand class rooms; they have a grip on the vision and indeed on the affections held by no other rules 'of law', real or pseudo".[1] Professor Llewellyn was canvassing the desirability of these rules being re-examined in order to make legal doctrine more accurately reflect what he described as the "life situations" with which these rules had to deal. A recent attempt by the majority of the Court of Appeal to effect some limited reform has been thwarted by the unanimous judgment of the House of Lords in *Gibson* v. *Manchester City Council*.[2] There are indications however that the rules are unsuited to the needs of a reliance based theory of civil liability notwithstanding their Lordships' views on the merits of what they variously described as the conventional approach.

Mr. Gibson wanted to buy his council house and in 1970 the Tory controlled Manchester City Council adopted the policy of selling council houses to sitting tenants and issued a brochure and a form setting out the terms and procedures available to interested tenants. Mr. Gibson completed the form and returned it to the council. On February 10th, 1971 the City Treasurer replied by letter stating that "the corporation may be prepared to sell the house to you at the purchase price of . . . £2,180". The letter went on to give details of a corporation mortgage but added that the letter "should not be regarded as a firm offer of a mortgage". The letter requested Mr. Gibson to complete an enclosed application form, although Mr. Gibson did not fill in the price, hoping that the council would revise the quoted price in the light of the poor condition of the tarmac path leading to the house.

The council replied on March 12th, 1971 that the price had been arrived at taking into account the condition of the property and that it would not be adjusted. On the 18th the tenant requested that the corporation continue with the purchase. In May 1971, the Tory Council were defeated in local elections and the new Labour Council reversed the policy of selling off its housing stock. Mr. Gibson of course pleaded that a binding contract had been made with him and both the county court judge and the majority of the Court of Appeal ordered specific performance.

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[1] On Our Case Law of Contract: Offer and Acceptance, I (1938-9), 48 Yale L.J. 1, at p. 32.

[2] [1978] 1 W.L.R. 520, [1978] 2 All E.R. 583, rev'd by H. of L., [1979] 1 W.L.R. 294.

In the judgment of the majority in the Court of Appeal, Denning M.R., and Ormrod L.J., the correspondence between the parties was held to constitute a legally enforceable contract. The Master of the Rolls advanced the view that it was a mistake to analyse the case by applying the rules of offer and acceptance for not all contracts are capable of being so treated. Instead the view was advanced that a court:[3]

> . . .should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms which was intended thenceforward to be binding, then there is a binding contract in law even though all the formalities have not been gone through.

The correspondence between the parties and conduct of the defendants after the supposed date of the agreement were in Denning M.R.'s view irreversible proof of a binding agreement. Ormrod L.J. in agreeing with Denning M.R. added somewhat mysteriously that the fact that this was a sale by a local authority to a tenant as the result of a policy decision by the council was important. Further it was clear to Ormrod L.J. that the parties were *ad idem* on all the material terms. Alternatively, Ormrod L.J. held the letter written by the council on Februrary 10th, 1971 constituted an offer which was accepted by Mr. Gibson at some later, unspecified date. Nor were the majority of the Court of Appeal deterred by the problem of incompleteness. The council in such a case inserted a clause requiring the purchaser not to sell or lease the property within five years or use the property other than as a dwelling house. In Denning M.R.'s view such a term should be imparted into the correspondence, that is, be an implied term or included in the decree of specific performance. This seems yet another example of Denning M.R.'s insistence on inserting into a contract terms that are seen as being reasonable to the judge.[4]

The dissenting judgment of Geoffrey Lane L.J. demonstrates the orthodox approach to the question of formation of a valid contract. By adopting the rules on offer—counter-offer and acceptance and examining only the correspondence between the parties he concluded that even if it were possible to interpret the council's letter of the 10th February as an offer—and Geoffrey Lane L.J. found it impossible to accept it himself—then Mr. Gibson's response was not a firm and unequivocal acceptance but constituted a counter-offer which destroyed the original offer. Mr. Gibson's direction on the

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[3] [1978] 2 All E.R. 583, at p. 586 n.

[4] See *Irwin* v. *Liverpool City Council*, [1975] 3 All E.R. 658, [1975] 3 W.L.R. 663, subsequently aff'd in part by the H. of L. although Denning M.R.'s reasoning doubted: [1976] 2 All E.R. 39.

18th could not constitute a valid acceptance of the Council's original offer.

The House of Lords substantially adopted Geoffrey Lane L.J.'s reasoning. In the view of Lord Diplock the majority had fallen into error by ignoring the orthodox approach. Whilst certain contracts may not be capable of being examined in terms of offer and acceptance a contract concluded by way of an exchange of correspondence is not one of these exceptional situations. Thus Lord Diplock, following Geoffrey Lane L.J. in the Court of Appeal, found that the council on February 10th, 1971 had not offered to sell the property to Mr. Gibson, nor had they made a statement inviting Mr. Gibson to apply for a mortgage. The wording of the letter was quite inconsistent with such an allegation:[5]

> The words "may be prepared to sell" are fatal to this; so is the invitation, not, be it noted, to accept the offer, but "to make formal application to buy" upon the enclosed application form. It is, to quote Geoffrey Lane L.J. a letter setting out the financial terms on which it may be the council will be prepared to consider a sale and purchase in due course.

In Lord Diplock's judgment there was no offer from the council which Mr. Gibson could accept and, because there was no suggestion that the council had acted so as to indicate an acceptance, it was unnecessary to consider the possibility that Mr. Gibson had offered to purchase the property.

Lord Edmund Davies took a rather different view of the legal consequences to be drawn from the facts. The response by Mr. Gibson requesting that the price be further reduced in the light of the condition of the path was regarded not as a counter-offer but as a mere exploratory inquiry.[6] Because no offer had been made in the first place this observation was of no practical importance in Mr. Gibson's case.

The conclusions reached by the House of Lords are clearly more attractive. If the majority of the Court of Appeal's analysis were correct this would mean that a valid contract to transfer the property would exist whilst at the same time the council would be entitled to refuse to grant Mr. Gibson a mortgage which in the circumstances would be harsh indeed. This problem was not considered by the Court of Appeal.

Furthermore the reasoning of Denning M.R. and Ormrod L.J. is inconsistent with *Felthouse* v. *Bindley*[7] which indicates that for a valid contract to exist the offeror must normally know of the

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[5] [1979] 1 W.L.R. 294, at p. 298F.

[6] *Stevenson, Jacques and Co.* v. *McLean* (1880), 5 Q.B.D. 346.

[7] (1862), 11 C.B. N.S. 869, 31 L.J.C.P. 204, aff'd (1863), 1 N.R. 401, 7 L.T. 835.

acceptance by the offeree. Denning M.R. in particular stressed that it may be enough to show a common intention to contract but as Lord Russell of Killowen observed when affirming the orthodoxy "I do not see the relevance to the case of general references to consensus in the judgments below." Denning M.R. has illustrated in an earlier judgment[8] that the approach he has advocated may prove difficult to operate, particularly where negotiations are protracted and inconsistent or contradictory statements are bandied about: the totality of the evidence approach favoured by the Master of the Rolls simply invites the court to select for the parties those obligations that are to be enforceable. A criticism of lesser importance is that this approach may be difficult to reconcile with the discredited parol evidence rule[9] which assumes that only one document exists in which the parties have set out the terms of the bargain.

The conventional offer-acceptance analysis is however defective particularly when a court is faced with a plea of reliance. In *Gibson* it was argued that because of the belief induced by the Council's representations, Mr. Gibson, feeling that a sale would emerge, did much to repair and improve the property. Lord Edmund Davies adverted to this plea but held that no evidence supporting the plea existed. The present writer suggests that had Mr. Gibson been able to substantiate this assertion then the possibility of a *culpa in contrahendo*[10] argument would arise although in such a case Mr. Gibson should be entitled to recover only reliance loss and not damages for loss of expectation or specific performance.

Whilst Ormrod L.J., Lord Edmund Davies and to a lesser extent Lord Diplock expressed sympathy for Mr. Gibson's position the latter judge was not far from the mark when he observed that the view one holds about the harshness of Mr. Gibson's case "perhaps depends upon the political views that one holds about council housing policy". No doubt the recent change in Government and Government policy on the sale of council houses will ultimately ensure Mr. Gibson obtains title to 174 Charlestown Road by a more conventional means than that advocated by Denning M.R.

ROBERT W. CLARK*

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[8] *Port Sudan Cotton Co.* v. *Govindaswany Chettiar and Sons*, [1977] 2 Ll. Rep. 5.

[9] See The Law Commission Working Paper No. 70, Law of Contract: The Parol Evidence Rule (1976).

[10] See Kessler and Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Survey (1964), 77 Harv. L.R. 401.

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TORTS—LIBEL—MALICE—NEWSPAPER LOSS OF FAIR COMMENT DEFENCE FOR LETTERS TO THE EDITOR.—The recent decision of the Supreme Court of Canada in *Cherneskey* v. *Armadale Publishers Ltd.*,[1] on appeal from the Saskatchewan Court of Appeal, is an unfortunate precedent in our libel law. It is the contention of this comment that the decision of the majority does not properly apply the concept of malice in reference to the defence of fair comment. As a result of misconstruing the meaning of malice and its relationship to onus of proof, the court has, for newspaper defendants in a libel action, virtually eradicated the defence of fair comment for any opinion matter published by the newspaper in letters to the editor, advertisements (particularly the political kind now becoming more popular) and syndicated columns. It will be argued here firstly that in looking to find an honest belief of a given particular defendant (and not to find a potential honest belief of any honest man based upon the challenged writing), the court is really deciding the issue of whether the defendant was actuated by malice. Secondly, the only possible but unlikely hope which remains for the survival of the fair comment defence in limited circumstances stems from the fact that although the thrust of the majority decision (on a six-three split) appears clear, the reasoning is not internally consistent and the majority has muddied the waters surrounding its desired policy.

This case commenced in Saskatoon, where a municipal alderman (also a lawyer), in conjunction with some neighbourhood representatives, expressed concern over the possible location of an alcoholic rehabilitation centre in that neighbourhood and the type of undesirable persons who would begin to frequent the area.

After this council meeting was reported in the newspaper, two local law students wrote a letter to the editor of that paper. The letter stridently stated that the approach taken by the alderman and the neighbourhood group was "racist", "dominated by ill-conceived and dehumanizing stereotypes," "abhorrent to all concepts of the law", and "unbecoming a member of the legal profession".

The alderman sued only the newspaper and not the letter writers. The paper was refused leave on interlocutory motion[2] to add the authors of the letter as third parties. Neither author was called as a witness at trial.

The trial judge refused to allow the defence of fair comment to be put to the jury, which found the letter defamatory and awarded $25,000.00 damages.

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[1] (1978), 90 D.L.R. (3d) 321 (S.C.C.).

[2] [1974] 6 W.W.R. 162, 53 D.L.R. (3d) 79 (Sask. C.A.).

In the Court of Appeal[3] the majority (Hall and Bayda JJ. A.) allowed the appeal. It was held that for the defence of fair comment to succeed:

> . . .it must be shown that the impugned words (i) constitute comment (as distinct from a statement of fact); (ii) that such comment is fair; and (iii) the fair comment is on a matter of public interest.[4]

The only problem was with test number two: was the comment fair? Bayda J. A. held that three conditions must be satisfied before the comment is fair:

> a) The comment must be based on facts truly stated.
>
> b) The comment must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticized, save insofar as such imputations are warranted by the facts.
>
> c) The comment must be the honest expression of the writer's real opinion.[5]

Test (b) above is an objective test which has been worded differently in other decisions. The classic and leading statement of this test was laid down by Lord Esher M.R. in *Merivale* v. *Carson*:[6]

> The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticized?

This was quoted and adopted by Lord Porter in *Turner (orse Robertson)* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*,[7] with the one modification that: "I should adopt them except that I would substitute 'honest' for 'fair' lest some suggestion of reasonableness instead of honesty should be read in." Thus this test remains objective, but with reference to the honest man, not the reasonable man.

It is the subjective test expressed by Bayda J.A. in (c) above around which this entire case revolved.

In the Supreme Court of Canada, it was the decision of Dickson, Spence and Estey JJ. (dissenting), and is also the position of this comment, that the majority in the Supreme Court confused this subjective test, which is really another way of saying that the defendant cannot be actuated by malice, with the objective test of Lord Esher M.R. This confusion has created a result which falls substantially short of being responsive to our democratic social needs: newspapers have now been effectively stripped of the defence of fair comment for opinions in letters to the editor.

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[3] (1977), 2 C.C.L.T. 298 (Sask. C.A.).

[4] *Ibid.*, at p. 317.

[5] *Ibid.*, at p. 319.

[6] (1887), 20 Q.B.D. 275, at p. 281.

[7] [1950] 1 All E.R. 449, at p. 461 (H.L.).

The evidence at trial was that the newspaper believed that the letter writers honestly believed in the opinions expressed. The editor of the paper naturally enough took the position that, because of the peculiar nature of letters to the editor within the confines of a newspaper, in which divergent opinions were often expressed, it was impossible for a newspaper to say that it honestly believed in the opinions expressed in its letters to the editor. The editor of the newspaper stated that he did not believe the plaintiff to be a racist, and the majority in the Supreme Court placed great significance on this fact. There was no direct evidence as to the honest beliefs of the letter writers.

Bayda J.A. for the majority in the Court of Appeal held that the defendants' state of mind is relevant, and that there was no question that if the newspaper honestly held the opinions expressed and was not actuated by malice, then the defence was established.[8]

However, the majority in the Court of Appeal went further to hold that if the newspaper honestly believed that the opinions expressed represented the real opinions of the writer, and in addition the newspaper was not actuated by malice in publishing the letter, then this would be an acceptable state of mind for the newspaper to establish the defence of fair comment.[9] The court felt that to hold otherwise would require all letter writers to first convince the newspaper of the validity of the opinion expressed, or look to another, more receptive newspaper (often impossible in one and two-newspaper towns), or modify their opinion to comply with that of the newspaper.

> If that were the law, it would seriously deter and often suppress the free publication in the press of correspondence reflecting honest views, often opposite and conflicting, of the reading public on matters of public interest. That is not, in my respectful view, a desirable constraint to place upon the right to free speech, nor is it in keeping with contemporary thinking respecting the need of the public generally to be well informed on issues of public interest, and of a need to ventilate and freely exchange views on contentious issues.[10]

It will be seen that the position of Dickson J. for the Supreme Court dissenters (even though he agreed in the result with the Court of Appeal majority), would be that this approach to the issue of "honest belief" is misguided, because it in effect required the issue of malice to be litigated twice in the same action.

Although Bayda J.A. found no authority either supporting or rejecting his view, he found some comfort in the following

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[8] *Supra*, footnote 3, at p. 322, applying *Slim* v. *Daily Telegraph Ltd.*, [1968] 2 Q.B. 167, [1968] 1 All E.R. 497, at p. 503; and *Lyon and Lyon* v. *Daily Telegraph Ltd.*, [1943] 1 K.B. 746, [1943] 2 All E.R. 316.

[9] *Ibid.*

[10] *Ibid.*, at p. 323.

comments of Lord Denning M.R. in *Slim* v. *Daily Telegraph Ltd.*:[11]

> . . .the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions.

The court specifically noted the principle that no greater privilege attaches to the journalist than to the ordinary citizen, but it stated that, to uphold the trial judge (and the dissenting opinion of Brownridge J.A.) would be to force more restrictive standards on the journalist, who would be required to be not only honest, but also conforming to the view of the letter writer, whereas the letter writer is required only to be honest, but not to conform to the view of any man.[12] The appeal was allowed.

Brownridge J.A. in dissent would have dismissed the appeal because the paper had not affirmatively proved that it honestly held the opinions expressed.

In the Supreme Court of Canada the majority (Martland J., Laskin C.J.C., Beetz, Ritchie, Pigeon, and Pratte JJ.) allowed the appeal.

Martland J. wrote a short decision (concurred in by Laskin C.J.C. and Beetz J.), resting his allowance of the appeal on the simple ground that the defence of fair comment only exists when the comment is the honest expression of the view of the person who expresses it.[13] Since no evidence was presented at trial to show either the honest belief of the letter writers or of the newspaper, this settled the issue.

A more lengthy decision was written by Ritchie J. (concurred in by Laskin C.J.C., Pigeon and Pratte JJ.).

This decision does not grapple specifically with the equivalent relationship between honest belief of any particular defendant and lack of malice of that defendant. By couching the decision in terms of the issue of honest belief (rather than lack of malice), Ritchie J. categorized the issue as one requiring original substantive proof by the defendant. If the issue had been properly categorized as one of malice, it would not only have made more common sense in terms of the nature of a letter to the editor and its place in our society, it

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[11] [1968] 1 All E.R. 497, at p. 503.

[12] *Supra*, footnote 3, at p. 324.

[13] *Supra*, footnote 1, at p. 325.

would have also placed the onus of proof properly on the plaintiff, to be proved only after the defendant had tendered evidence which might satisfy Lord Esher's objective test.

Ritchie J. held that no defendant will establish the defence of fair comment unless that defendant affirmatively establishes his honest belief in the opinions which were published:

> One of these ingredients is the person writing the material complained of must be shown to have had an honest belief in the opinions expressed and it will be seen that, in my view, the same considerations apply to each publisher of that material.[14]

This position was later affirmed:

> If the publication of the libel had been confined to the letter and the writers had been sued, or, alternately, if it had originated with the newspaper and its publisher, it would in either case have been necessary to show honest belief in order to sustain the defence of fair comment. The same considerations would thus in my opinion apply to the newspaper and the writers.
>
> In my opinion each publisher in relying on the defence of fair comment is in exactly the same position as the original writer.[15]

Ritchie J. expressly considered and rejected the findings of Bayda J.A. that it would be permissible for newspaper publishers to simply have an honest belief that the letter represented the honest opinions of the writer. The *obiter* dictum of Lord Denning M.R. in *Slim* v. *Daily Telegraph Ltd.* is rejected both as being mere *obiter*, and on the basis that in that case it appeared probable from the report that both the newspapers and the writer held the honest belief in the opinions.

Unfortunately, there is no discussion by Ritchie J. as to the merits on policy grounds of a rule of law which effectively destroys the defence of fair comment for newspapers with respect to letters to the editor. It is clear from the case law that the defence of fair comment is available because of the importance to our democratic society of strongly divergent opinions being expressed, and that a statement which is *prima facie* defamatory may nonetheless not be actionable because public policy requires that certain defamatory comments be allowed if expressed in opinion which satisfies the test of Lord Esher M.R. in *Merivale* v. *Carson*, and if no malice is present.[16] Ritchie J. did state that:[17]

> This does not mean that freedom of the press to publish its views is in any way affected, nor does it mean that a newspaper cannot publish letters expressing views with which it may strongly disagree.

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[14] *Ibid.*, at p. 330.

[15] *Ibid.*, at p. 336.

[16] *Winnipeg Steel Granary and Culvert Co., Ltd.* v. *Canada Ingot Iron Culvert Co., Ltd.* (1912), 7 D.L.R. 707, at p. 712 (Man. C.A.).

[17] *Supra*, footnote 1, at p. 339.

> What it does mean is that a newspaper cannot publish a libellous letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper.

With all respect to the learned judge, it is submitted that this argument cannot hold, if "libellous" in the last sentence is merely taken to mean "defamatory", rather than "actionably defamatory". Defamatory comments are published on many occasions which are not actionable if a particular defence applies. It is argued here that fair comment should apply as long as the newspaper did not act maliciously (the burden of which proof lies on the plaintiff).

In dissent, Dickson J. clearly addressed both the public policy behind the defence of fair comment, and the technical and historical basis of this defence, and happily found that the traditional law and our democratic traditions can coexist.

From a policy point of view Dickson J. stated:

> The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshold which a statement must pass in order to be defamatory.[18]

> As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press. One can readily draw a distinction between editorial comment or articles, which may be taken to represent the paper's point of view, and letters to the editor in which the personal opinion of the paper is, or should be irrelevant. No one believes that a newspaper shares the views of every hostile reader who takes it to task in a letter to the editor for error of omission or commission, or that it yields assent to the views of every person who feels impelled to make his feelings known in a letter to the editor. Newspapers do not adopt as their own the opinions voiced in such letters, nor should they be expected to.[19]

> The issue is broader than that. A free and general discussion of public matters is fundamental to a democratic society. The right of persons to make public their thoughts on the conduct of public officials in terms usually critical and often caustic, goes back to earliest times in Greece and Rome. The Roman historian, Tacitus, spoke of the happiness of the times when one could think as he wished and could speak as he thought (1 Tacitus, History, para. 1). Citizens, as decision-makers, cannot be expected to exercise wise and informed judgment unless they are exposed to the widest variety of ideas, from diverse and antagonistic sources. Full disclosure exposes and protects against false doctrine.

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[18] *Ibid.*, at p. 342.

[19] *Ibid.*, at p. 343.

> It is not only the right but the duty of the press, in pursuit of its legitimate objectives, to act as a sounding board for the free flow of new and different ideas. It is one of the few means of getting the heterodox and controversial before the public.[20]

In analysing the technical basis for this defence, Dickson J. approves a sequential approach set out in a recent British text book[21] in which the issue of honesty of personal belief of the publisher (which is equivalent to absence of malice), does not come into dispute until preceding objective tests are satisfied. The principles of the defence of fair comment are stated as:

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment, though it can include inferences of fact, must be recognisable as comment;

(d) the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?

(e) even though the comment satisfies the objectives test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.[22]

Test (e) would require that the particular defendant who is invoking the defence of fair comment must not have acted out of malice. To act out of malice means to act for a purpose other than an honest belief in the opinion expressed, and when the test is stated in this manner it can be seen that the test of "honest belief—lack of malice" is flexible enough to protect newspapers in reference to their letters to the editor, because the defence depends upon the circumstances of the case:

> Malice is not limited to spite or ill will, although these are its most obvious instances. Malice includes any indirect motive or ulterior purpose, and will be established if the plaintiff can prove that the defendant was not acting honestly when he published the comment. This will depend on all the circumstances of the case. Where the defendant is the writer or commentator himself, proof that the comment is not the honest expression of his real opinion would be evidence of malice. If the defendant is not the writer or commentator himself, but a subsequent publisher, obviously this is an inappropriate test of malice. Other criteria will be relevant to determine whether he published the comment from spite or ill will, or from any other indirect and dishonest motive.[23]

Ritchie J. cited Lord Porter's decision in *Turner (orse Robertson)* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, as supporting the proposition that a defendant must affirmatively prove honest belief. However, a close reading of *Turner* suggests that Lord Porter was actually talking about the malice which could defeat fair comment:[24]

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[20] *Ibid.*, at pp. 343, 344.

[21] Duncan & Neill, Defamation (1977).

[22] *Supra*, footnote 1, at p. 346.

[23] *Ibid.*

[24] *Supra*, footnote 7, at p. 462.

> My Lords, in the course of this summing-up in the present case, the learned judge undoubtedly in places used language which accurately states the law as I conceive it to be, and, indeed, as it is accepted to be by both parties viz., that it is the honesty of the witnesses' views, not their reasonableness, which decides whether they are malicious or not. I do not think, therefore, that any complaint can be made of the summing-up on this ground. Its early words on this part of the case express exactly what the authorities convey. "Fair comment" (in effect the learned judge says) "has to be an honest expression of the real opinion of the defendants when they wrote it. . . .

Furthermore, Messrs. Duncan and Neill in *Defamation*, cited by Dickson J. in his dissent, state:[25]

> "It seems clear that in *Turner* v. *Metro-Goldwyn-Mayer Pictures Ltd.*, the House of Lords dealt with the issue of fair comment on the basis that malice was capable of destroying the defence. [referring by footnote to the judgments of Lord Porter at 461-2, Lord Greene at 470 and Lord Oaksey at 472].

The authors of *Defamation* further state:[26]

> It is submitted that in every case, including a case where the defence of fair comment is raised, the jury has to decide as to the meaning of the words and then (where appropriate) apply the objective test of fair comment to that meaning. The meaning intended by the commentator may of course become relevant at the next stage, if and when the jury have to consider in relation to a defence of fair comment the issue of malice.

The development of the position of malice in any fair comment defence can be seen by considering the cases of *Thomas* v. *Bradbury, Agnew & Co., Ltd.*,[27] *Winnipeg Steel Granary & Culvert Co. Ltd.* v. *Canada Ingot Iron Culvert Co., Ltd.*,[28] *Bulletin Company Limited* v. *Sheppard*[29] and *Sun Life Assurance Co. of Canada* v. *Dalrymple*.[30]

In *Thomas* v. *Bradbury*, Collins M.R., speaking for a unanimous English Court of Appeal in 1906, firmly rejected "the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations toward the writers of the thing criticized".[31] In this leading case which definitively established the principle, Collins M.R. held that the objective test of *Merivale* v. *Carson* must be qualified by the rule that "proof of malice may take a criticism *prima facie* fair outside the right of fair comment just as it takes a communication *prima facie* privileged outside the privilege".[32]

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[25] P. 80.

[26] *Ibid.*, p. 78.

[27] [1906] 2 K.B. 627 (C.A.).

[28] *Supra*, footnote 16.

[29] (1917), 55 S.C.R. 454.

[30] (1965), 50 D.L.R. (2d) 217 (S.C.C.).

[31] *Supra*, footnote 27, at p. 637.

[32] *Ibid.*, at p. 640.

Collins M.R. compared the concept of malice in libel suits in which qualified privilege is in issue, with libel suits in which fair comment is in issue, and found, firstly, that the malice in question is the same concept, and secondly, that the onus of proof as to malice, (lack of honest belief) falls upon the plaintiff after the defendant has established facts which establish either the privilege or the objective aspects of fair comment:[33]

> If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by precisely the same rules. The only practical difference is that in an action based on a criticism of a published work the transaction begins by the admission, on the part of the plaintiff, implied from the averment by him of publication of the work criticized, that the comment came into existence on a protected occasion. He is placed, therefore, in precisely the same position as he would have been in had he sued in respect of a defamatory writing *prima facie* unprotected and therefore actionable, but had gone on to aver facts which created a privilege strictly so called. Beginning thus at this stage in the transaction, he would have accepted the onus of proving malice in fact. If he had veiled the fact that the writing criticized had become a matter of public interest by publication it would have been *prima facie* libellous, and the defendant would have had to plead such a publication as would let in the right to comment on a matter of public interest in order to bring himself within the protection. This shows that acceptance of the dicta under discussion does not in the slightest degree affect the place of malice in the law of libel and that it is only by leaving out one step in the analysis that the public right, as distinguished from the privilege, may appear to carry with it different incidents.

In 1912, the Manitoba Court of Appeal considered the relationship of malice to a libel action in the *Winnipeg Steel Granary & Culvert Co. Ltd.* case[34] and expressly approved the decision of Collins M.R. in *Thomas*. Approval was also given to a passage from Odgers *on Libel and Slander*:[35]

> The onus of proving malice is on the plaintiff, and any facts that would go to show malice were the defence one of ordinary privilege, may be proved to rebut a defence of fair comment.

The Supreme Court of Canada considered the fair comment defence in the *Bulletin Company Limited* case in 1917. The defence of fair comment was held to apply and consideration was given by the majority only to an objective test of fair and legitimate criticism based upon all the circumstances[36] and not to the issue of honest belief.

The question of malice again arose in the Supreme Court of Canada in 1965 in *Sun Life Assurance Co. of Canada* v. *Dalrym-*

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[33] *Ibid.*

[34] *Supra*, footnote 16, at p. 713.

[35] (1891), cited, *ibid.*, at p. 712.

[36] *Supra*, footnote 29, at pp. 461-462.

ple.[37] This case specifically dealt with qualified privilege but Spence J. discussed malice generally. He stated:[38]

> Malice of course does not necessarily mean personal spite or ill will; it may consist of some indirect motive not connected with the privilege.

He also referred to *Turner*, relied upon by Ritchie J. for the majority in *Cherneskey*. Spence J. in speaking of the onus of proof, quoted both Lord Porter and Lord Oaksey from the *Turner* case, showing that *Turner* was speaking to the issue of malice, not to a duty on a defendant to prove honest belief. Lord Oaksey stated:[39]

> Did the appellant prove that it was more probable than not that the respondents were actuated by malice?

In both *Jones* v. *Brooks*[40] and *Bonham* v. *Pure Water Association*,[41] it has been expressly held that the question of honest belief (or lack of it) is simply another way of looking to malice.

A last confusing aspect of the decision of Ritchie J. in *Cherneskey* is the way in which, after so clearly stating that each defendant invoking the defence of fair comment must affirmatively prove that he personally had an honest belief in the opinion, his Lordship muddied the waters by suggesting that perhaps it might be sufficient for a newspaper publisher to show that the original letter writer had an honest belief in the opinions:[42]

> It appears to me to follow from this that where, as here, there is no evidence as to the honest belief of the writers of the letter, and the newspaper and its publisher have disavowed any such belief on their part, the defence of fair comment cannot be sustained. . . .
>
> These authorities satisfy me that the newspaper and its editor cannot sustain a defence of fair comment when it has been proved that the words used in the letter are not an honest expression of their opinion and there is no evidence as to the honest belief of the writers.

Since the writers were not sued in this case, and the court was thus concerned only with the liability of the newspaper, and since such heavy stress has been laid on the importance of *each* publisher's honest belief, of what relevance to the liability of the newspaper is the belief of the letter writers? Is the court suggesting after all that a newspaper must show only an honest belief by either the paper or the writer?

Even this conclusion would be at variance with the authorities on malice cited above, and it seems a wholly unsatisfactory way to try to protect newspapers, if that was the intention.

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[37] *Supra*, footnote 30.

[38] *Ibid.*, at p. 222.

[39] *Supra*, footnote 7, at p. 470.

[40] (1974), 45 D.L.R. (3d) 413, at p. 423. (Sask. Q.B.).

[41] (1970), 14 D.L.R. (3d) 749, at p. 755 (B.C.S.C.).

[42] *Supra*, footnote 1, at pp. 337-338.

Although it has been argued above that the majority of the Supreme Court in *Cherneskey* wholly misconstrued the relationship between honest belief and malice, and the resultant effect on the onus of proof, this is now largely a dead letter as far as Canadian courts are concerned, because the Supreme Court of Canada has spoken.

What is now required in order to rectify the law is a statutory change by all the provinces in their respective Libel and Slander Acts. Newspapers should be allowed to plead the defence of fair comment where the objective aspects are established, and where there is no malice on the part of the paper, the onus of proof of which should lie on the plaintiff.

The statutory changes should be immediately made, both for the policy reasons so eloquently stated by Dickson J., and to maintain a consistent and rational development of Canadian law.

M.R. DOODY*

* * *

MARRIAGE VOID *AB INITIO*—ANNULMENT—*EX DEBITO JUSTITIAE*—The judgment of the Ontario High Court of Justice in *Batth* v. *Batth*[1] is not easy to follow. With all respect, it conflicts with the basic legal principles governing the annulment of a marriage that is null and void *ab initio*.

The action was for a declaration that the marriage between the plaintiff and the defendant was void because of the plaintiff's prior existing marriage. It was undefended. The facts clearly established that at the time of the marriage the plaintiff was still married to another, and that, in consequence, her marriage to the defendant, which was a rushed affair to prevent the defendant from being deported from Canada, was void *ab initio*. Nevertheless, the court dismissed the action. After stating, that "I have found no case where the plaintiff's conduct has debarred him" from obtaining a declaration of nullity of a void marriage, Grange J. continued:[2]

> This case, in my view, however, dictates a refusal. The Marriage Act of Ontario, R.S.O. 1970, c. 261, forbids the issue of a licence to marry to one who has been divorced without either the production of a decree absolute if the divorce was granted in Canada, or an authorization from the Provincial Secretary (now the Minister of Consumer and Commercial Relations) if the decree was obtained elsewhere. Before a licence is issued the parties to the

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[1] (1979), 9 R.F.L. (2d) 184 (Ont. H.C.).

[2] *Ibid.*, at p. 187

> intended marriage are required to make a statement under oath of their status. It was in that affidavit that the plaintiff declared herself to be a spinster. I see no reason why the court should now assist her in declaring her marriage invalid; indeed I see a very good reason why it should not. Nor is her position improved by the fact that the marriage she now seeks to annul was apparently entered into to confound the immigration authorities.

If it be true that hard cases make bad law, it is also true that moral indignation, however justified, tends to make for bad judgments. As Professor McLeod in his annotation on *Batth* v. *Batth*[3] rightly points out, a void marriage is a non-existing marriage, and the parties may treat it as such even where it has not been formally annulled by a court of law. This being so, it is surely in the public interest that the true status of the parties should be proclaimed from the housetops. Either of them, however reprehensible his conduct may have been, is entitled to a declaration of nullity *ex debito justitiae* and the only case where the court should exercise its judicial discretion to refuse a decree is where the action is instituted by a third party without a status or a pecuniary interest. As Laskin J. (as he then was) said in *Downton* v. *Royal Trust*:[4]

> . . .marital status *per se* cannot be altered or perpetuated by a preclusion doctrine. . . .

No wonder, then, that his Lordship was unable to find a single judgment where the court used its discretionary power to refuse a declaratory judgment to dismiss an action for a decree of nullity in respect to a void marriage.

H. R. HAHLO*

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CIVIL LAW—QUEBEC—NEW DRAFT CODE IN PERSPECTIVE. — In many ways the most distinctive characteristic of the law and legal institutions in late twentieth century Canada is the existence of permanently constituted "Law Reform Commissions" charged with examining and reformulating various areas of the law.[1] Both at the national level and in many common law provinces there has been an

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[3] *Ibid.*, at pp. 184, 185.

[4] (1972), 34 D.L.R. (3d) 403 (S.C.C.), at p. 413.

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[1] Three of the more informative articles in this area are Deech, Law Reform: the Choice of Method (1969), 48 Can. Bar Rev. 395; Lyon, Law Reform Needs Reform (1974), 12 O.H.L.J. 442; and Samek, A Case for Social Law Reform (1977), 55 Can. Bar Rev. 409.

outpouring of studies, background papers and statutory proposals.[2] Nowhere, however, have these efforts proceeded at such a pace as in Canada's one civilian jurisdiction, Quebec.[3] That province's Civil Code Revision Office has, since its creation in 1955, and more particularly since October 1965 when its present chairman took office, brought forth a comprehensive, inter-related series of working papers, reports and draft legislative provisions.[4] This last decade of activity culminated in 1978 with the publication of a *Draft Civil Code and Commentaries*.[5] Bound in three volumes and available in both English and French, this remarkable document is a model of its kind which can be read profitably by every student of the law in Canada, be he trained in the civil law or in the common law, be he lawyer or judge.

It is the object of this comment to introduce the work of Quebec's Civil Code Revision Office to the common lawyer.[6] Of course it is impossible in short compass to present a completely satisfactory picture of either the magnitude of the task accomplished by the Revision Office, or the significance of its achievement; nevertheless a meaningful understanding of the Civil Code revision

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[2] Over the past few years the Dalhousie Law Journal has published a series of articles and notes on the work of various law reform commissions. See especially volumes 2 (1975), 3 (1976), and 4 (1977).

[3] The work of the Quebec Commission is described in Crépeau, Civil Code Revision in Quebec (1974), 34 La L.Rev. 921 and criticized in Slayton, Law Reform in Quebec: a Cautionary Note (1975), 2 Dal. L.J. 473. Other major articles by Crépeau which treat the work of the Quebec commission are: La réforme législative, Canada, droit civil, in Travaux du neuvième colloque international de droit comparé (1972); La renaissance du droit civil canadien, in Livre centenaire du Code civil (1970); La révision du Code civil, [1977] C.P. du N. 335; and Forward in Report on the Quebec Civil Code (1978).

[4] The Civil Code Revision Office was established by An Act respecting the revision of the Civil Code, S.Q., 1955, c. 47. The original chairman, the Rt. Hon. Thibodeau Rinfret, P.C. was succeeded by the Hon. André Nadeau. Following a substantial reorganization in 1965, Me Paul-A. Crépeau became chairman of the Civil Code Revision Office. During its first ten years the Office produced only the Report on the Legal Position of Married Women (1964). Between 1966 and 1976, however, forty-six other Reports covering the entire Civil Code were published and circulated.

[5] Editeur Officiel du Québec (1978). Although the Draft Code and Commentaries reproduces and consolidates all of the Reports produced by the Revision Office, fourteen of these inspired immediate legislative action. Already enacted or incorporated into the Code are proposals relating to the capacity of married women, marriage covenants, adoption, civil marriage, rights of natural parents and children, judicial declarations of death, rights over one's body or cadaver, abolition of civil degradation, lease and hire of things, insurance and parental authority.

[6] For a passionate article decrying the common lawyer's ignorance of Quebec law see Deschênes, On Legal Separatism in Canada (1978), 12 L.S.U.C. Gaz. 1. Many of the references in footnote 4 provide greater amplification of the points here raised.

project can be gained by situating the draft Code in its juridical and historical context, reviewing the goals and methodologies of the Revision Office and highlighting the principal recommendations which it proposes. For once this basic background is acquired, the interested common lawyer will be in a position to work through the *Draft Civil Code and Commentaries* at his leisure.

However, before these themes are addressed it would be amiss not to salute the outstanding contribution of the incumbent chairman of the Civil Code Revision Office. As much as any codification project depends on the efforts of a multitude of people,[7] usually it also rests on the vision and energy of one individual; today, for example, one talks of Hammurabi's Code, Justinian's Code and the Napoleonic Code. In his capacity as director of the revision project, co-ordinator of its various committees and publicist of its activities Professor Paul-A. Crépeau has devoted the past fourteen years to the development of the proposals set out in the *Draft Civil Code and Commentaries*. In themselves they are the most fitting tribute to his efforts.

I. *Codes, cases and the civilian legal tradition.*

The work of the Civil Code Revision Office is obviously coloured by the fact that unlike its common law analogues, its mission is not simply to make recommendations for particular statutory enactments or amendments, but rather to reformulate the entire Civil Code of its jurisdiction. Hence the first questions in the mind of a common lawyer interested in the revision project are "what exactly is a Civil Code? and what is its role as a source of law in a civilian jurisdiction?"[8]

Essentially, codification is a "method for the formulation of written law as opposed to unwritten law".[9] But there are many ways of reducing the law to writing: codes, statutes, regulations, orders-in-council, case reports, texts, and so on. Even in uncodified jurisdictions almost all law is written in one of these forms—the proliferation of statutes, regulations and case reporters attests to this fact. Moreover, it is no longer accurate to claim that most law is

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[7] On pp. 1091-1094 of the Report, the Civil Code Revision Office lists 158 persons who contributed to the project.

[8] This question is formulated in two parts since the common lawyer often mistakenly associates the codification phenomenon exclusively with civilian systems. Such an association would be far from accurate: Scotland and South Africa are leading examples of uncodified civilian systems; Montana and California are two of the many codified common law jurisdictions. See Lloyd, Codifying English Law, [1949] Current Legal Problems 155.

[9] Stone, A Primer on Codification (1955), 29 Tul. L.R. 303. Much of the following four paragraphs derives from this article.

found in the law reports, for even traditional bastions of the common law such as property, contracts, torts, successions and family law are heavily encrusted with statutory provisions.

What then are the distinctive features of codification which bear on the work of the Civil Code Revision Office? First, it should be pointed out that a codification does not necessarily proceed from a desire to radically reform the law: many of the world's great codes have been fundamentally conservative documents oriented to preserving the legal *status quo*. The motive for code revision often is found in a desire to overcome confusion or redundancy in the law, to rationalize conflicting interpretational currents, to restate fundamental concepts when exceptions have swallowed up the rule, to integrate various related themes into a coherent framework or to collect laws found in diverse locations (the code itself, statutes, regulations, orders-in-council, law reports) in one easily accessible location. Thus, unlike most recommendations for statutory enactment proposed by ordinary Law Reform Commissions, the proposals of the Revision Office cannot simply be seen as an incident of legislative *fiat* designed to remedy specific legal problems.

A second important characteristic of a code is the fact that it represents written law which is drafted, organized and interpreted systematically. Codification presupposes a carefully thought-out rational framework for the law, consciously chosen, consistently followed and logically inter-related. Hence, one typically finds Civil Codes divided into large books such as persons, property, modes of acquisition of property, actions, and so on, smaller chapters entitled, for example, ownership, possession, kinds of property, and so on, and detailed sections devoted to for example, moveables, immoveables, and so on, in which all the concepts relating to a given area of the law are logically derived from first principles, meticulously developed and systematically ordered. Consequently, code revision involves rethinking not only the substance of the law, but also its form and presentation.

Moveover, because a code represents the exhaustive statement of the basic fabric of a legal system, it treats such disparate (for the common lawyer) topics as family law, property, successions, gifts, trusts, wills, contracts, restitution, torts, evidence, sale, landlord-tenant, agency, partnership, mortgages and mechanic's liens. Codification rests on the view that the private law of a jurisdiction can be assembled in one place, in a similar format, in a single volume, cross-referenced and inter-connected, with one concordance, and no appendices or references to extraneous texts. Each code article must be read in conjunction with all other code provisions (regardless of what book they appear in) in order to understand completely its scope and nuances. In many codes for

example, one finds elaborate rules respecting the partition of an estate in the book or chapter dealing with successions; yet these provisions are drafted so as to apply wherever the code envisions a partition: partition of matrimonial property, of the assets of a partnership, or of a joint gift. As a result, inherent in the task of the Revision Office is a careful consideration not only of all the particular legal rules and principles of Quebec's private law, but also of fundamental concepts, underlying assumptions and traditional inter-relations of its legal system.

A final distinctive feature of codification projects is the notion that the basic principles of the civil law (that is, those norms and concepts which govern the relations between private individuals) can be written elegantly, with a certain degree of generality and permanency in such a way that they can be read and understood by every citizen. Hence, a civil code usually does not treat matters of passing or temporary interest (such as rent control), highly technical areas of the law (such as interest rates), or the relationship between citizen and state (constitutional, administrative and tax law). Since a civil code is designed to express those basic beliefs and values which sustain the society which it serves, and since it must reflect the moral, political and economic realities of that society, code revision will always be conditioned more by its social context than ordinary law reform.

However important it is for the common lawyer to appreciate that the work of the Revision Office is shaped by the fact that its mandate is to reformulate a Civil Code, in order to understand and evaluate the draft proposals, he must also appreciate how a code functions as a source of law in civilian legal systems.[10] It is often claimed that while there are three obligatory sources of law in common law jurisdictions (custom, legislation, precedent) there are but two in civilian systems (legislation and custom). That is, there is no common law of judicial decisions outside the code.[11] Although this simplistic contrast obscures the influences of treaties, contract, academic writing, supereminent principles, comparison and prerogative as sources of law, nevertheless it does highlight the different role that judicial decisions are called upon to play in the elaboration

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[10] The question of whether Quebec is a true civilian legal system or whether it is a mixed jurisdiction will not be addressed in this comment. For an introduction to this dispute see Baudouin, The Impact of the Common Systems of Louisiana and Quebec in Dainow, ed., The Role of Judicial Decisions and Doctrine (1974).

[11] See, for example, Loussouarn, The Relative Importance of Legislation, Custom, Doctrine and Precedent in French Law (1958), 18 La L.Rev. 235; Azard, Le problème des sources du droit civil dans la province de Québec (1966), 44 Can. Bar Rev. 417.

of legal rules in the two systems.[12] The common lawyer sees a case as the embodiment of the law itself and through the theory of precedent it is the source of individual, specific legal rules (for example, the rule in *Shelley's Case*);[13] in contrast, judicial decisions are, for the civilian, but particular instances which serve to concretize a more general legal rule—a legal rule which is found exclusively in the code.[14]

How is the mission of the Civil Code Revision Office influenced by these underlying differences? First, the question as to whether the courts or the legislature is the more appropriate agency for reforming a given area of the law assumes greater significance. While in some instances courts have been active in creating or reformulating the law, the psychological desire to maintain Quebec as a civilian jurisdiction militates against wide-ranging judicial law reform. Lord Mansfield's elegant metaphor that the law works itself pure through successive judicial decisions is simply less appropriate in a civilian context. Hence a greater responsibility even for incremental legal change devolves to legislative law reform; and a greater role in formulating change must be assumed by the Revision Office.

Secondly, since the vocation of written law in civilian systems is to establish broad legal rules which can be applied functionally by courts, the revision of code articles must always tread the line between over-particularity and over-generality; between very specific provisions dealing with narrowly drawn fact patterns and excessively abstract statements which provide little guidance as to the policy of the law. While the statutory reform process of the common law is explicitly pointed to particular problems, civil code revision implies the development of more general formulae which reorient the direction of the law. Hence, the Revision Office must work to find provisions which enumerate the criteria of reform rather than those which enact specific changes; it must resolve conflicting themes and goals which have arisen and not become bogged down in correcting myriad instances which previously have given rise to concern.

The juridical nature of a code, its function in a civilian jurisdiction and the civil law concept of a legal rule can be seen as fundamental determinants of the task of the Civil Code Revision Office and important features which will distinguish its work from that of its common law counterparts.

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[12] See Tête, The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent (1973), 48 La L.Rev. 1.

[13] (1581), 1 Co. Rep. 93.

[14] An excellent introduction to the problem of formulating the "legal rule" in civilian systems is contained in David, French Law (1972), pp. 71-92.

II. *Civilian legal concepts, the 1866 Code and legal evolution in Quebec.*

Certainly the common lawyer must be sensitive to the underlying legal framework of the Civil Code in Quebec. Yet he must also view the work of the Revision Office in an historical context; the basic legal concepts of the civil law, the fundamental values found in the 1866 Code and the evolution of both that Code and Quebec society over the past century are all elements of this context. While those who wish to gain a deep insight into the civil law tradition must look at the totality of private law, a sufficient knowledge to appreciate the recommendations of the Revision Office can be gained through an examination of the civilian equivalents to the common law subjects of property, contracts and torts. It is in these areas that the conceptual apparatus of the civil law reveals itself most clearly.

While the common lawyer derives his understanding of property from a theory which treats realty and personalty differently, which relies on the concept of "estates" to fractionate the attributes of property and which permits "legal" and "equitable" interests to be distinguished, a radically different theory underlies the civil law. Its salient features are as follows: all property (moveable or immoveable) may be owned outright; all property is possessed of the same legal attributes; these attributes are capable of identical dismemberment (fractionation); this dismemberment does not exist temporally (as in tenurial estates), but functionally. Hence, although the Civil Code distinguishes moveable from immoveable property for certain purposes, this distinction does not rest on a different concept of what constitutes property. Moreover, ownership in the civil law consists of a right which is in principle, absolute, exclusive, individual and perpetual, that is dominium. While certain functional attributes of property (the *usus*, the *fructus*, the *abusus*) may be dismembered, the ownership itself remains intact and must always vest in some person. Consequently, no concept of equitable title may exist, and creation of a device such as the common law trust is impossible.[15]

The civil law also reveals basic differences with the common law in the domain of contracts and torts. Whereas the common law saw these two branches of the law develop separately (from assumpsit and trespass) a unified theory of civil obligation encompassing contract and delict (tort) has traditionally been associated with the civil law. Certain important consequences result. First, in the civilian theory of contract, the analogue of consideration is cause, a concept which rests on a moral notion of promise rather than a commercial notion of bargain. Thus, a moral obligation (for instance past consideration) is sufficient cause to support an onerous

[15] On these points see Marler, The Law of Real Property in Quebec (1932).

contract, and *inter vivos* gifts are seen as gratuitous contracts whose cause is the "intention to bestow a liberality" on the part of the donor.[16] Secondly, the underlying concept of civil wrongs is unified; rather than a conglomeration of nominate torts, delictual liability essentially is treated in terms of one fault-based concept. This open-ended, generic principle of civil responsibility highlights the close inter-relation of contractual and delictual liability and again evidences the moral basis of the law of obligations.[17] Finally, while the common law has struggled with notions such as unjust enrichment, this moral middle ground of civil obligation, and its quasi-contractual cousins—*negotiorum gestio* and the repayment of a thing not due—form an integral part of the civilian law of obligations.[18] Thus, in the civil law, contract, tort and restitutionary liability do not rest on independent restrictive principles and the moral rather than the utilitarian foundation of obligation is stressed.

These civilian concepts of property and obligation became crystallized in the 1866 Code and today continue to constitute the basic juridical building blocks with which the Revision Office must work. But while fundamental legal concepts retain a degree of consistency over time many of the social or political presuppositions which are reflected in particular legal rules undergo substantial change. It has often been said that the 1866 codification was predicated upon three basic values of Quebec society in the nineteenth century—moral authoritarianism, philosophical individualism and economic liberalism—which manifested themselves in an individualistic, paternalistic and religious Civil Code.[19]

The individualistic tendency of the Code could be found in doctrines such as liberty of contract, or no rescission for lesion (unconscionability), and in the desire to avoid indivision (joint tenancy) in ownership, or the absence of state restrictions on the acquisition, use or disposition of property. Evidence of paternalism was revealed particularly in family law. The Code stipulated that in a community regime the husband assumes control of his wife's

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[16] Hall, Cause or consideration (1945), 23 Can. Bar Rev. 831; Newman, The Doctrine of Cause or Consideration in the Civil Law (1952), 30 Can. Bar Rev. 662.

[17] Goldenberg, The Law of Delicts under the Civil Code of Quebec (1935); Nicholls, The Responsibility for Offences and Quasi-Offences Under the Law of Quebec (1938); Mettarlin, Contractual and Delictual Responsibility in Quebec: The Rediscovery of Contract (1961), 8 McGill L.J. 38.

[18] Dawson, Negotiorum Gestio (1961), 74 Harv. L.Rev. 817, 1073; Wasserman, répétition de l'indu arising from contracts based on illegal consideration (1952), 12 R. du B. 172; Friedman, The Quasi-contract: Aspects of Unjust Enrichment (1956), 34 Can. Bar Rev. 393.

[19] See Crépeau, Civil Code Revision in Quebec (1974), 34 La L. Rev. 921, at p. 931; *cf.* Caron, De la physionomie, de l'évolution et de l'avenir du Code Civil in Livre centenaire du Code civil (1970), p. 10.

property; in all regimes he alone gives direction to the family and his spouse becomes juridically incapable; a wife is deprived of any rights in her husband's succession and may be totally disinherited by will. Moreover, the husband exercises a *patria potestas* over his children: he alone has the power of correction; he alone is guardian to their property; he alone consents to any proposed marriages. The religious orientation of the Code was reflected most clearly in the articles respecting marriage. The non-existence of civil marriage, the recognition of sectarian impediments to marriage and the refusal to permit divorce are but a few examples. But a religious influence was also visible in the treatment of illegitimate children, in the absence of adoption provisions and in certain privileges granted to the church in matters of land-holding, security on property and prescription (limitation periods). To the extent that the Revision Office is engaged in reformulating the Code it is clear that it must also rethink the continued appropriateness of these underlying values.

Because the 1866 codification incorporated without modification most fundamental civilian legal concepts and because it clearly reflected the dominant social and political presuppositions of mid-nineteenth century Quebec, it must be seen primarily as a consolidating enterprise whose main goal was to reformulate an essentially unwritten law into a written law which compiled and embodied existing legal rules.[20] Thus, while some significant reforms were instituted, the original Code rested on those underlying legal policies at the date of codification—policies which had, moreover, undergone little change in the previous three hundred years. But law and society have not stood still since 1866; in particular attitudes towards marriage, ownership, contract, civil responsibility, succession, landlord-tenant relations, and basic human rights—ironically the essential materials of the Civil Code—have evolved rapidly. Nevertheless, because of its unique mythological position in Quebec society, as reflecting catholic and francophone culture, as representing the embodiment of reason and justice, as insulating the civilian tradition from the intrusive influences of the common law, the Code and private law in general have remained largely unchanged.[21] Consequently, the resistance to incremental reform of the Code which has marked the past century has led to a substantial dissociation of legal norm and social reality. In sum, the work of the Revision Office must not only be seen in terms of rethinking basic civilian legal concepts, but also in terms of reducing the gulf between specific legal norm and current social reality.

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[20] Brierley, Quebec's Civil Law Codification (1968), 14 McGill L.J. 521.

[21] Baudouin, Le Code civil québécois: crise de croissance ou crise de vieillesse (1966), 44 Can. Bar Rev. 391.

III. *The objectives, methodology and underlying themes of the 1978 revision.*

Recognition of the legal and historical context of the 1866 Code and its growing irrelevance to Quebec society in the latter half of the twentieth century impelled the Revision Office to isolate and formulate five basic themes which would underlie the development of the draft Code. At the substantive level, the Office first undertook to identify and resolve existing conflicts between Code articles and in codal interpretation, both at the doctrinal and judicial levels. Legislative conflict often resulted from the diversity of sources from which the Code was drawn: where one article was inspired by the Custom of Paris and another by the Napoleonic Code; where one provision was derived from English law and another represented a codifiers' recommendation.[22] Interpretational conflict sometimes arose simply because the law is a living instrument, constantly in flux;[23] on other occasions diversity was produced by the importation of common law concepts into the civil law by the Supreme Court of Canada.[24] Eliminating these cross-currents, at least temporarily, is thus a principal objective of the draft Code.

A second goal pursued by the Revision Office was the creation of a Code which as nearly as possible incorporated all the civil law of Quebec. Although any code can never be totally comprehensive[25] by the late 1960's the erosion of the Code as the basic document of Quebec private law was substantial. Partly as a result of the British North America Act, 1867[26] many truly private law areas were severed from the 1866 Code, and as aspects of federal jurisdiction subsequently developed according to common law principles.[27] While the Revision Office has no mandate to itself revise the Canadian constitution, given the multitude of difficulties in identifying the exact limits of provincial jurisdiction, especially in the family and property law fields, it proceeded on the basis that constitutional difficulties posed by its recommendations could be overcome later. But a more important aspect of the integration

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[22] For example, the incapacity of the married women meshes poorly with a matrimonial regime of separation of property and absolute freedom of willing clashes with the idea of irrevocable wills by marriage contract.

[23] Among the more important of these are disputes over the origins of unjust enrichment, the scope of the theory of abuse of rights and the locus of ownership in the trust *corpus*.

[24] See Baudouin, L'interprétation du Code civil québécois par la Cour suprême du Canada (1975), 53 Can. Bar Rev. 715.

[25] See the remarks of Beetz, J. in *Cie, immobilière Viger Ltée* v. *Giguère*, [1977] 2 S.C.R. 67.

[26] 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

[27] For example, divorce, bills of exchange, patents and copyright.

problem involves the incorporation of various Quebec statutes into the fabric of the Code. Many fundamental civil law concerns such as adoption and consumer protection had been the subject of separate legislation, itself not always entirely compatible with the Code. Hence, although the Revision Office was anxious not to encrust the Code with ephemeral or technical provisions, the recreation of a comprehensive Civil Code incorporating much of this disparate legislation figured prominently in its work.

A final substantive objective of the revision has been the reappraisal of several basic policies of the civil law, which while appropriate in the context of the 1866 Code, no longer represent the aspirations of a franco-civilian society existing in a twentieth century North American environment. As Professor Crépeau states, citing André Tunc:[28]

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

Thus, developing and formulating new legal policies and legal rules and weaving them into the fabric, style and language of the Civil Code is a central concern of the Revision Office.

But the Code was in need of reform also at the purely formal level. The archaic language, convoluted style and artificial organization of the 1866 Code are contrary to many premises of codification. A virtue of a good code is its consistent use of a uniform language with clarity and grace, in order that it can be read and understood by everyone. Achieving this goal has been foremost in the work of the Revision Office. Moreover, the desire to integrate form and substance has led to a rethinking of the basic structure of the 1866 Code. The original codification had adopted the structure of the Code Napoléon (that is, Book I—Persons; Book II—Property; Book III—Modes of acquiring property) and added thereto a fourth book, Commercial law. This classicial arrangement, especially in regards to Book III, was highly artificial and in no way seemed to reflect the substantive divisions and inter-relationships of modern private law. Consequently the Revision Office also undertook to develop an organizational framework for the Civil Code which assured the autonomy of private law institutions and which was more compatible with the goal of universal accessibility.

However, in many jurisdictions the law reform process (even when accompanied by such carefully defined and well-accepted

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[28] Crépeau, Civil Code Revision in Quebec (1974), 34 La L. Rev. 921, at pp. 931-932.

goals) has foundered for lack of an appropriate methodology. Recognizing that successful code revision could not be the work of one person, but must result from a formalized process of consultation and collective reflection, the Revision Office adopted a relatively uniform, decentralized methodology for its review of the Civil Code. The basic working unit of revision has been the Committee, a group of three to seven jurists comprising judges, lawyers, academics and civil servants. Forty-three Committees, each charged with examining a specific area of the civil law, were created. Following research studies, working papers and informal consultation with interested individuals or groups, each Committee prepared an interim report incorporating draft articles and explanatory notes.

These reports were then published and circulated in 1800 copies to various groups such as the Bench and Bar, the law schools, political parties, social organizations, religious groups, trade associations, women's organizations, unions, and so on for detailed comment and criticism. Where appropriate, public consultation by way of forums and meetings was also encouraged. After this consultation procedure each Committee reviewed commentaries received and prepared a final report for submission to the Revision Office. The work of Code revision was completed by the integration of various Committee reports, the standardization of language in draft articles, the redrafting of certain proposals into a uniform style and where necessary, the resolution of conflict between Committee recommendations. The document which resulted from this final stage of co-ordination was the three-volume *Draft Civil Code and Commentaries*.

IV. *The principal reforms of the draft Civil Code.*

The draft Civil Code is a model document. As much by its objectives as by its methodology the Civil Code Revision Office has reflected the civilian approach to law: rational, *a priori*, comprehensive, systematic. Although numerous dramatic structural reforms are proposed it retains the essence of the civil law tradition that is, the particular mode of conception, expression and application of the law adverted to earlier in this comment. Moreover, while it reorients many of the specific rules and concepts in the law of the family, property and obligation, the new Code remains a work whose fundamental object is the human person. Finally, the draft is written so that it is relatively easy to abstract from particular proposals and identify underlying themes embraced in the new law.

At the structural level, the draft abandons the classical distinctions inherited from the Napoleonic Code: the three books format—of Persons, of Property, of the Acquisition of Rights of Property, prefaced by a general definitional Introduction—has been

replaced by a nine-book model which bears a more rational connection to current inter-relations of various legal provisions. Hence, one finds that the draft Code commences with three books centering on the individual. Book I on Persons deals with such matters as the enjoyment and exercise of civil rights, name, physical identity, domicile, majority, persons in need of protection, and legal persons (corporations and government agencies). Book II on the Family outlines rules relating to the requisites of marriage, dissolution of marriage, the effects of marriage, matrimonial property regimes, filiation, adoption, support obligations and parental authority. Book III on Successions contains provisions relating to intestate and testamentary succession, partition and liquidation, executors and substitutions. Thus, these first three books establish the central position of the individual in civil society, place him in his closest personal contact, his family, and provide for the disposition of his patrimony upon death.

A second general theme of the draft relates to economic man: an individual's ability to acquire and dispose *inter vivos* of property. Two books are consecrated to this theme. Book IV on Property sets out general concepts (possession, ownership and dismemberments), the framework of security on property, and the rules relating to trusts. Book V on Obligations is the longest of the new Code. It contains general provisions relating to contracts, delicts, restitutionary concepts, and the modalities, execution and extinction of obligations. Moreover, it treats the principal nominate contracts, sale, gifts, lease of things, employment, mandate, partnerships, insurance and transport, as well as contracts such as suretyship, settlements and arbitration.

The final four books of the draft are devoted to various aspects of adjectival law. Book VI on Evidence outlines rules relating to the modes and admissibility of proof. Book VII on Prescription deals with the nature of acquisitive prescription (adverse possession) and the periods of extinctive prescription (limitation periods). Book VIII on Publication of Rights establishes rules on the manner, effects and cancellation of registration. Finally, Book IX on Private International Law contains a carefully worked out framework for characterization, conflict of laws, recognition of foreign judgments or arbitration awards, conflicts of jurisdictions and immunity from execution.

Although this new arrangement of the Civil Code is not free from criticism, it clearly highlights the central concerns of the civil law, more logically inter-relates various underlying themes, and overcomes most of the lacunae of the 1866 Code. Within this new structure, what then are the principal modifications to Quebec private law incorporated by the draft Civil Code?

In its first book, Persons, the new Code formalizes many unwritten or customary rules relating to juridical personality, one's name and one's physical identity: every person is possessed of civil rights (arts 1-4) and has the right to privacy (arts 12-14); the principle of good faith, non-abusive exercise of rights consistent with public order and good morals is enshrined (arts 8-10); the human person is deemed inviolate, saving freely consented medical experiments or transplants (arts 15-23) and in all matters affecting children, the child's best interest must govern (arts 24-30); attribution and use of name is fixed and protected by law (arts 32-45; 57-59) and change of name and physical identity is formalized (arts 46-56); children take their father's name (art. 33) and married women retain their maiden names (art. 45). The law of domicile is amended by abolishing an intentional element: domicile is the place of habitual residence (art. 60); husband and wife may have separate domiciles. The system of registration of birth, marriage and death is centralized in the Office of a Registrar of Civil Status (arts 66-110). The law respecting persons in need of protection eliminates the cumbersome formalities of the family council and makes tutorship (legal guardianship) subject to supervision by the Public Curator (arts 221-240). Finally, Book I incorporates the legal person in public and private law into the framework of the Code: unincorporated associations and corporations are specially regulated (arts 241-270; 271-292); rules affecting the Crown are extended and simplified (arts 293-298).

Significant revisions have also taken place in Book II, the Family. Most importantly, the Code formally recognizes the equality of spouses (art. 41) and this principle finds application in several new Code provisions (for instance arts 42, 45, 47, 53 and 150). The Code also institutes a special protection for the matrimonial home and its contents (arts 53-66). The revision of matrimonial regimes of 1969 remains essentially unchanged except that either spouse may now be the administrator in a community regime (art. 150). The rules relating to separation and divorce are organized on the governing principle of "marriage breakdown" (art. 240) and certain kinds of separation agreements are now recognized as valid (arts 237-239). Paternal affiliation is established by presumptions based on legal or *de facto* conjugal relationships (arts 266-274); although disavowal of paternity is made less difficult, and is permitted to both father and mother (arts 275-279) except in cases of freely consented artificial insemination (arts 280-281). Most significantly, the Code suppresses any legal distinctions between legitimate and illegitimate children (art. 291). The provisions of the Adoption Act are incorporated into the Code (arts 292-335) with few amendments and no distinction is drawn between natural and adoptive children. The alimentary obligation is now restricted to consorts or relatives in a direct line

only (art. 336) but includes *de facto* consorts while they live together or otherwise if the court orders (art. 338). The concept of parental, not paternal authority, incorporated into the Code since 1977, is continued (art. 350) although such authority may be withdrawn, in whole or in part, if it is abused (arts 359-370).

The provisions of Book III, Successions also show the mark of reform. Although many minor modifications designed to simplify the transmission, administration, partition and liquidation of successions are instituted, the major reform involves the protection of surviving consorts, and to a lesser degree, children. First, the spousal share upon intestacy, if there are no children is 100% (art. 40) and if children, is ownership of fifty per cent or a usufruct of 100% (art. 41). These rules also apply to *de facto* surviving consorts if the deceased were unmarried (art. 42). Secondly, even where there is a will, a hereditary reserve consisting of one-half the estate (where no children survive) or of one quarter of the estate (if children survive) is attributed to a surviving consort (art. 60). This reserve may be replaced by certain legacies (art. 62) but does not operate in favour of *de facto* consorts (art. 59). Successoral rights are independent of the matrimonial regime of the consorts (election is thus abolished) and the deceased's obligation to support continues and constitutes a charge against the succession (arts 79-82). Finally, the fideicommissary substitution as a modality of legacy or gift has been retained although it has been made considerably more flexible (arts 354-400).

In general, Book IV on Property retains most of the provisions found in Book II of the 1866 Code. Some clarifications respecting the right of superficies and construction leases, in their relationship to emphyteusis have been introduced (arts 248-275). Moreoever, provisions relating to possession have been added to this book (arts 20-33) and the nature and limitations on the right of ownership (arts 34-70), including accession (arts 71-93) and indivision (arts 181-201) have been set out more clearly. But in the domain of security on property substantial innovations have resulted: first, all real security is consolidated in one flexible device—the hypothec (arts 281-289); secondly, a regime of non-possessory security on moveable property has been created (arts 317-325); thirdly, the plethora of privileges which encumbered the commercial use of property has been abolished. This Book also contains provisions respecting the administration of another's property (arts 487-599) which formalize the powers and responsibilities of various types of administrators and trustees. Finally, the book continues the Quebec trust, but enlarges its scope by making onerous (for instance business) as well as gratuitous (for instance family) trusts possible (art. 601); the conflict over the locus of ownership of the trust is

resolved by constituting the trust corpus as a separate patrimony (art. 603).

Superficially, Book V on Obligations also seems to have undergone a substantial reform. For example, many special contracts, including those formerly prohibited, for instance arbitration (arts 1206-1239) or located elsewhere in the Code, for instance gifts (arts 446-489) or simply unknown, for instance services (arts 698-706) have been incorporated into this book and other nominate contracts, for instance mandate (arts 707-745) have undergone minor amendment. But the truly significant reforms occur in the general theory of obligations. In the contractual field the new Code envisions an increased control over freedom of contract—rules governing exemption clauses (art. 300) or making certain provisions mandatory (art. 537) have been inserted—and the establishment of lesion—disproportion of prestations coupled with exploitation or imposition leads to a nullity (art. 37), contracts are strictly construed against him who stipulates (arts 68-69) and abusive clauses may be annulled by the court (art. 76). In the extra-contractual area, the basis of civil responsibility is turned inside out; rather than liability for fault, the new Code imposes a positive obligation of prudence in behaviour towards others (art. 94) and concomitantly, a theory of products liability has been introduced (arts 102-103). Moreover, the concept of unjust enrichment is fully integrated into the Code (arts 127-130). Finally, remedies for default are modernized and specific performance is enshrined as the principal recourse (arts 267-271).

The remaining four Books of the new Code contain several provisions of note. The scope of testimonial proof (arts 41-50) is enlarged in Book VI, Evidence. Moreover, the court is authorized to reject illegally obtained evidence (art. 5) and generally is given more discretion in matters of admissibility (arts 6; 73). In Book VII on Prescription the rules respecting acquisitive prescription are simplified and the general limitation period is shortened to twenty-five years (art. 40); good faith reduces this period to ten years in all immoveable matters (art. 41) and to three years in moveable matters (art. 45). With respect to extinctive prescription only two different time periods remain: ten years for principal real rights, save ownership which remains imprescriptible (art. 48) and three years for personal rights (art. 49). Book VIII contains provisions respecting the publication of rights. These proposals, which reflect a modified Torrens system, rest on two fundamental principles: first, state guarantee of registration (arts 49-57) coupled with a theory of universal notice by registration (art. 89); secondly, indemnity to third parties who rely in good faith on faulty registers (art. 92). Finally, the last Book of the new Code, on Private International Law contains for the first time in Quebec a real system of rules relating to

characterization, jurisdiction, conflict of laws and recognition of foreign judgments. This comprehensive book bears close resemblance to many international conventions and reflects modern commercial realities.

These, in a nutshell, are the principal modifications proposed to the domain of private law in the draft Civil Code. Obviously, the many technicalities of the provisions here outlined, and the particular framework of the civil law make it imperative to consult the entire draft text and the commentaries thereon in order to grasp the specifics of this reform. But from the overview just completed two general themes to this recodification seem to be apparent: first, a comprehensive and enthusiastic embrace of the pre-eminence of the human person, and secondly, an integrated approach to modernizing the law (especially as regards the commercial realities in late twentieth century Canada).[29] Examples of the former may be seen in the introductory articles on juridical personality, the protection of children, the adoption of the principle of spousal equality, the imposition of an hereditary reserve, increased judicial supervision to ensure contractual equality, and the imposition of positive standards of behaviour as the basis of civil responsibility. Examples of the latter are the reform of trusts, including the business trust, the creation of a regime of construction leases, the development of the hypothec on moveables, the modernization of many nominate contracts, the simplification of the law of prescription and the centralization of the system of registration of rights.

IV. *General evaluation of the draft Civil Code.*

Faced with a law reform project of the magnitude undertaken by the Civil Code Revision Office the common lawyer is apt to be extremely apprehensive; given the upheaval in Ontario caused by each of the Personal Property Security Act,[30] the Family Law Reform Act[31] and the Succession Law Reform Act[32] it is frightening to think that combined, these would represent about one-tenth of the work of the Revision Office. Yet by dint of the consultative methodology followed, the consensus that the 1866 Code required major reform and the fact that the project is essentially one of recodification rather than a statutory tinkering with the common law, the odds favour integral adoption of the draft Code by Quebec's

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[29] These are summarized from Crépeau, Forward in Report on the Quebec Civil Code (1978).

[30] R.S.O., 1970, c. 344, as am.

[31] S.O., 1978, c. 2.

[32] S.O., 1977, c. 40.

National Assembly.[33] In light of this, what general observations can be made about the proposed Code, recognizing that a detailed critique of specific articles and policies is impossible in a comment such as this?[34]

First, the draft Code reflects a global approach to legislative law reform: there appears to be a presupposition that whatever defects are present in the private law of Quebec not only can be, but also can *only* be corrected by reformulating Code articles. Yet, if a genuine disparity between the provisions of the 1866 Code and current Quebec social reality has developed during the past century fault must not be seen to rest primarily with the language of the Code itself or with the legislature who rarely modified it. Rather it should lie upon the two principal interpreters of the written law: courts and doctrinal commentators. Even though the courts in a civilian jurisdiction do not make law (in the sense that common law courts "declare" the common law) they do have a creative role to play when concretizing the legal rule. Because the Code elaborates norms and not justifications, the absence of theory of *stare decisis* compels courts continually to adapt the written law to new realities. For example, there is no article in the Code which precludes applying the rules of partnership (arts 1830-1900) in matrimonial affairs under a separation of property regime; although article 2022 prohibits hypothecation of moveables and articles 1981-1982 restrict preferences on a debtor's property, there is no Code provision preventing the recognition of an innominate contract similar to the common law chattel mortgage. Even if the language of Code articles remains unchanged, their underlying policies often need not. But the conservatism of the courts, and the failure of scholarly community to develop and articulate new policies for old rules—policies which permit the moulding of these rules to new situations through *a contrario* reasoning or reasoning by analogy—has prevented the law from becoming a living instrument. Given this climate, a new civil law treatise is probably more crucial in the long run than a new Civil Code. The uncompromising positivism of the Quebec legal community has fostered the view that law is only the exercise of legislative will and is something which acts upon, although separate from the society it serves; yet if a gap may develop between law and social reality; obviously the law cannot "control" the affairs of man.

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[33] Some Revision Office proposals have already been adopted: see *supra*, footnote 4. As for other recommendations, it appears as if the National Assembly will proceed with enactment chapter by chapter.

[34] Various proposals have already been the subject of lively debate. For example, compare Brière, La réforme du droit du nom et du domicile (1975), 6 R.G.D. 463, and Slayton, Law Reform in Quebec: a Cautionary Note (1975), 2 Dal. L.J. 473.

Hence, it must be concluded that the "law" is both written norm and social reality; just as norm may mould society, social reality moulds norm in the ever changing context to which the law must apply.[35] It is Professor Crépeau's wish that this new draft Code be treated not as an end, but as a beginning. For this to occur, courts and commentators must reassume their vital function of providing the link between the written law of the Code and the unwritten law of social processes. The legislative law reform process is only one instrument which can be employed in the maintenance of a relevant law.

A second observation induced by the work of the Revision Office relates as much to political philosophy as to law. In conception and execution this new Code follows the civilian tradition of laying down general rules within which the judge shall act. But of course, such a system, and in fact any system of adjudication, ultimately presupposes the omniscient judge; for if judges are to perform effectively they must know the subject matter of the adjudication.[36] In this connection it is worth asking "to whom is the Code addressed?", for the draft seems to rest on two basic beliefs: first, that the law has a role in almost all facets of life, and secondly, that the judicial settlement of disputes is the optimal way of organizing society. As to this first belief, draft articles which formalize the rules respecting one's name, the respective duties of husband and wife or the scope of successions seem to presuppose that the state has a universal function: what is the compelling state interest in one's name? or in whether husband and wife live together? or in whether their love for each other has a financial component? The written law, especially as it is reflected in a fundamental document such as the Civil Code, is a blunt, but fragile social instrument. Not only must one avoid projecting it into situations where it is unsuited and hence ineffective, but care must be taken not to compromise the moral authority of the law through its unwise use. Insofar as the second belief is concerned, instituting a Code where the judge becomes not only the ultimate, but also the only arbiter of social conflict assumes first, that adjudication is the only ordering device in modern society and secondly, that individuals are unable to resolve their own problems. Rather than resting on the view that courts should arrogate to themselves the planning, organization and dispute settling functions in our society, a Code should be structured to facilitate private decision-making. In the commercial law field the new Code at times reflects this goal: arbitration clauses, flexible

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[35] I have addressed this problem at length in Social and Economic Control Through Law (1977), 25 Chitty's L.J. 7.

[36] See Northrop, The Epistemology of Legal Judgments (1964), 58 North W.L.Rev. 758.

security and financing devices, the business trust, the concept of the "mise en demeure" encourage private ordering at both the planning and dispute resolution levels. If the law truly belongs to the people, the Code should envision procedures whereby individual citizens can use it to themselves order their own affairs; an order which involves a range of institutional mechanisms—from mediation, negotiation or voting, to private legislation, deference to authority and chance.

A third general concern which arises from the provisions of the new Code can be stated in terms of the view of society which seems to underlie them: in fact, it is not clear whether a society in the usual sense is envisioned at all. Normally, one sees a society as composed of individuals who are also members of a variety of groups: the family, clubs, a church, a racial, linguistic, religious or cultural group, one's sexual or age group, a social class, unions, co-ops, communities, villages, counties and ultimately the state. Some of these are voluntarily joined, others involuntarily; some result from birth, others from later events in one's life. Yet each contributes to the development of individuals, each plays a significant role in his life, each in some way defines who he is. The 1866 Code recognized and differentiated individuals in their social relation with many of these: one's sexual or age group, one's family, extended family, the church, the state. In addition, several others, such as partnerships, to which one may have freely consented to join were accorded a special place by the law. Unfortunately, given the underlying social assumptions of 1866 these also buttressed an authoritarian, paternalistic law; yet there is no necessary reason that they do so and in view of the objectives of the 1978 recodification, it is doubtful that this would occur. Nevertheless, under the guise of promoting human rights, protecting children and equalizing spouses on the one hand, and promoting "non-sectarian, humanitarian values" and efficient administrative centralization on the other, the legal framework of intermediate social groups seems to have been destroyed. A law which recognized and promoted an individual's self-realization as a unique part of an organic society is now to be replaced by a radically democratic law in which the protean man interacts with others only as an individual atom in the all-powerful state. While the economic view of the individual—a discrete, isolated entity—must not be ignored by the civil law, it should also not be the only conception sustained by the Code; formalizing decision-making and participation in intermediate social holons such as the family council, the parish or a cultural or linguistic group permits the evolution of a more humanistic, diverse society—one of the principal goals of the 1978 recodification.[37]

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[37] See Stone, Existential Humanism and the Law in Existential Humanistic Psychology (1971).

V. *Conclusion.*

At the best of times understanding law reform is both difficult and important; in today's society, where the pace of legislative law reform and social evolution is extraordinary, it is crucial. While common law jurisdictions tinker with statutory plasters on the rents of the common law, in Quebec the Civil Code Revision Office has embarked on a comprehensive reworking of private law. An appreciation of this effort by the common lawyer requires some insight into the nature of a Code and its function in a civilian jurisdiction; some familiarity with basic civilian legal concepts and the underlying policies and values of the 1866 Quebec Code; an awareness of the goals and methodology of the Revision Office; and finally, a mastery of the reforms it proposes. This brief comment has been directed to that end, for both legal traditions in Canada have much to learn from each other at the substantive level: the Family Law Reform Acts of the common law are inspired by civilian matrimonial regime concepts; our security interest on personal property is derived from the civil law hypothec; our law of unjust enrichment benefits from the theoretical framework of quasi-contracts. Yet we can also learn from the process of law reform: the criticisms of Part IV of this comment are equally valid in many common law jurisdictions; in its continuing work the Revision Office might benefit from the experiences of other Law Reform Commissions. In the law, as elsewhere, the lessons learned by our neighbour are as valuable as the lessons we learn ourselves; which is to say that the common lawyer will be greatly repaid should he carefully work through the *Draft Code and Commentaries* of the Civil Code Revision Office.

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