ARTICOLE

A VERY BRIEF HISTORY OF A RECODIFICATION AND ITS PROBLEMS[1]

Jean PINEAU*

***Abstract**: Le Québec semble ne pas vouloir oublier l'année-anniversaire de la mise en vigueur de son Code civil, puisqu'il le " fête " tous les cinq ans : en 2009, ce nouveau code a 15 ans. Après avoir rappelé le travail de l'Office de révision, l'auteur résume le processus d'élaboration du projet de réforme entrepris par le ministère de la Justice sous la gouverne de ses ministres successifs, puis fait état de ce qui est nécessaire pour surmonter les embarras d'une recodification : besoin d'une volonté politique, obtention d'un consensus social malgré la diversité des opinions, recherche d'équilibres délicats et de compromis, maintien de la tradition civiliste dans un contexte anglo-américain. L'œuvre ne pouvant être parfaite, la jurisprudence et la doctrine aideront à la compréhension des textes, la création d'un institut de réforme du droit pouvant aussi amener le législateur à suivre avec attention l'évolution du droit et à apporter, de façon ordonnée et cohérente, les modifications qui s'imposent au fil des ans.*

***Keywords**: codification, recodification, civil code*

In 1999, we were already celebrating the fifth anniversary of the coming into force of the Civil Code of Québec; in 2004, concurrently with the bicentennial of the French Civil Code, we were celebrating the Quebec Code's tenth birthday; and here we are today at fifteen years! If the Quebec Code, like the French Civil Code, reaches its 200th birthday, what a celebration that will be! For a long time now, we have understood that the French like celebrations, commemorations, anniversaries. Well, Quebecers have at least one thing in common with the French: on both sides of the Atlantic, *Homo festivus* is alive and well!

In France, however, the Civil Code's first hundred years were marked in a very subdued fashion, notwithstanding the publication of the two- volume "Livre du Centenaire" and notwithstanding the fire set by a militant feminist to a copy of the Code at the foot of the Vendôme Column; as for the 150th anniversary, it was celebrated almost twenty years late in 1973 with the issue of a postage stamp showing Bonaparte and Portalis against the background of the Conseil d'État, which led Doyen Carbonnier to muse, "The postage stamp remembered, but how long is a

postage stamp remembered?" The French made up for it at the bicentennial, which was celebrated with great pomp and circumstance. Here in Quebec, let us not imitate France's reserve on the occasion of the first 150 years of the Napoleonic Code, and let us properly celebrate the first fifteen years of the successor to the Civil Code of Lower Canada which, in turn, had a glorious centennial; and let us begin the celebration with a brief review of the history of a recodification and its problems, although much has already been said and written on the subject.

To refresh our memories, let us mention the names of Thibaudeau Rinfret and André Nadeau, who were tasked in 1955 and 1961 respectively, the former with drafting a Code amendment, the latter with revising the Code. However, it was only in 1965 that any real revision work was begun, with the creation of the "Revision Office" directed by Paul-André Crépeau. The Office completed its draft Civil Code and commentary in 1977 and delivered it to the Hon. Marc-André Bédard, who was Justice Minister at the time. That draft would sit for awhile in some drawer in the department. It is worth pointing out here that the Office's work was done *without* the support of the political powers-that-be, aside from funding, and *without* the least governmental interest. Nevertheless, in 1980, on the eve of a referendum, the *Civil Code of Québec* was born, beginning and ending with Book Two on family law, namely Articles 400 to 659: an embryonic code! It became clear that the new Code would indeed eventually see the light of day, albeit in phases, given, on the one hand, the magnitude of the task, and on the other, that "wait and see" was the preferred policy at the time.

Then, in 1982, three drafts were proposed on the law of persons, property and successions. After a few misadventures, near the end of 1984 they were studied by a Parliamentary Committee and consolidated into Bill 20 (the Hon. P.M. Johnson having become Justice Minister) but were not completed, as the provincial election was to turn the governing party – which had introduced it – into the new opposition party and vice versa. That is when the new Justice Minister, Herbert Marx (the third one the Bill had) struck a "Civil Code Reform Committee," consisting of four individuals, attorney Marie-Josée Longtin and the late André Cossette – both of whom were senior civil servants put in charge of the project – plus the late Judge Chassé and your servant. The committee was tasked in particular with proposing legislative policies, overseeing the preparation of the draft bills and coordinating them. It was also incoming Minister Marx who declared, after consulting the interested communities, that the Civil Code would be adopted and brought into force in one stroke. With Mr. Marx, there would be no more "wait and see"! Of course this did not fail to get the legal community in an uproar, notwithstanding that it was getting what it had asked for! Truly, people are hard to please….

So the committee got to work with the team from the Justice Department and in eighteen months prepared three sets of draft bills which, together with the family law reform and Bill 20, covered the entire subject matter of the Civil Code. Maleville, a native of Périgord, did not state the truth when he wrote in 1804, "And, through hard work, we managed to create a Civil Code in four months." Like him, we could say – also untruthfully – that through hard work, we managed to create a Civil Code in eighteen months. But we would say nothing of the kind; in reality, it took nearly thirty years! The French Code had Cambacérès, and Quebec's Code had the Office.

After reviews and analyses of those draft bills by the Parliamentary Committee, after receiving a plethora of comments and observations, and after more studies and analyses, the Reform Committee gave its latest minister (the fourth one) – the Hon. Gil Rémillard, who had succeeded the Honorable Herbert Marx in the meantime – documents which, consolidated into Civil Code Bill 125, would be introduced in the National Assembly on December 18, 1990.

It is not insignificant to recall that before the draft Code was introduced in the Assembly, the Assembly had in 1987 already enacted Bill 20 – the set of articles dealing with persons, property and successions – for ressons of parliamentary procedure and to establish the terms. As a result the Justice Department had experienced *a few distractions* due to the desire expressed by some communities for the immediate enactment of specific provisions on certain topics; these included, for instance, consent to care, the protective supervision of persons of full age, the astonishing family patrimony – virtuoso pieces all, which would become part of the *Civil Code of Lower Canada*. Thus, within a short period of time Quebec was blessed with two codes, putting a crimp in inclusiveness – or the "wait and see" of inclusiveness.

Finally, from the 27th of August to the 12th of December, 1991, the Commission des Institutions, meeting in subcommittee, reviewed every section of Bill 125, one by one, and those sections were to become the 3,168 articles of the new *Civil Code of Québec*, passed on April 18, 1991, 125 years after the *Civil Code of Lower Canada*. It came into force on January 1, 1994, fifteen years ago.

What is worth, or what is not worth, remembering now about the problems of recodification?

Quebec's experience demonstrates that no real, complete and *quick* reform of the Code saw the light of day as long as that reform was not a government priority; and such *overriding* priority was not admitted until 1985, following a change of government, with the appointment of Mr. Marx as Justice Minister. At last, the political will to *quickly* reform the Code was asserted, a will that was absolutely necessary, codification being first and foremost an act of political will, otherwise one only legislates in bits and

pieces to meet the most pressing needs. Minister Marx who, before his appointment, was responsible for the Bill 20 file (persons, property, successions) in the Parliamentary Committee on behalf of the official opposition, had understood that the time had finally come to either see things through *quickly*, or never arrive at the destination. Similarly, after his departure from the government, his successor in the Justice portfolio, Gil Rémillard, had that same concern, that same political will to see the project through, which has led me to observe in the past that Mr. Marx put the train on the tracks and Mr. Rémillard brought it into the station.

This experience in Quebec, which occurred at a quiet time in politics, following a fiercely-discussed referendum question, only confirms something Portalis said, namely, that to pass good laws requires not only the existence of a political will, but also the absence of revolution or even of a political crisis: "Every revolution is a conquest…. In and of themselves, such laws are necessarily hostile, partial…." Without wanting to imagine a Quebec in revolution, no doubt one may evoke a politically appeased Quebec whose determination was the indispensable fuel for the proper functioning of the operation.

Aside from this political will to see the project through, it was also necessary to have the will to institute legislative policies to meet what is known as a "social consensus." But how can one "meet a social consensus" without trying to please everyone, to please the society of the day. How can one know what is accepted, what is rejected, what is acceptable, how far is too far to go? "The legislative art is similar to the art of war," says Doyen Carbonnier, "a defensive and just war," which encourages the legislator to become a tactician, if not a strategist. Also, by introducing draft bills, the Quebec legislature took the pulse of society, and was thus able to make a few strategic fallbacks on positions more or less preplanned!

However, what is this society whose pulse is being taken? Is it the one that responds to public hearings, the camouflaged investigation or survey – elements the results of which are not always easily exploited, considering that they are rarely harmonious, the nation now being a human group which is less and less homogeneous. Who will be the arbiter of the differences? The answer has to be, at least theoretically, the legislator. And who is the legislator? Quite obviously, it is the MNAs, *but* can one overlook the weight of pressure groups of every ilk, weak or powerful, which rarely leave the politicos unaffected? It is sometimes almost a case of holding the democratic system for ransom with political representatives feeling, "Unable to please everyone, let us try not to displease those groups that can hurt us politically."

It is therefore important to navigate the shoals, the opinions, the differing views and objectives, and arrive at what Philippe Rémy called "*a prudent compromise between what is desirable and what is possible,"* a work of deal-making, a work of

reconciling the new provisions with the old or using some to amend the others, "without dislocating the system," as Portalis observed about the relationship between customary law and civil law, and without offending the general mentality. As Portalis also wrote, "It is advisable to preserve everything which it is not necessary to destroy: the laws must accommodate habits if those habits are not vices." Actually, it is not a matter of dislocating everything, but rather reviewing everything. Accordingly, it might be possible that the new Code would be, as Paul-André Crépeau hoped, "the reflection of a collective will" or rather, I would say, the reflection of the will of the vocal collectivity. Is it really so astonishing that such accommodations are sometimes unreasonably shaky? A bit of moralizing, but not too much; a bit of socialization, but not too much; the quest for a fair balance between diverging interests, which inevitably means a fragile balance, a compromise that satisfies no one in the end.

As for the key features of the reform, one will be content with repeating that this new Code is characterized by the continuity of yesterday's law and more appropriateness for today, by attempting to respond to the social and economic realities of the late twentieth and early twenty-first centuries, while maintaining the civil law tradition in an Anglo-American context.

Its reception, before (and also shortly after) the bill was passed, was rather chilly: too conservative for some, too progressive for others, a lack of ambition for some, a big zero for others who, moreover, predicted legal chaos for 1994. It was the creation of a so-called "advisory" committee, chaired by Judge Jean-Louis Baudouin and responsible for advising the Justice Minister on certain legislative policy options, that would help quell the extreme and destructive zeal of certain interest groups.

As for the style, what wasn't said! Some people even claimed that the code had been drafted by "common lawyers"! Of course it is not the style of Portalis, who is no longer with us, but going straight to the point and being concise are perhaps no longer such easy rules to follow as they used to be; the problems the law has to address today are more complex and diverse, the solutions are less straightforward and more subtle than before, the basic essentials are many-faceted, and thus conciseness sometimes oversimplifies a complicated reality. This explains the need for the legislature to be more wordy and more flexible than it used to be. On this topic, I cannot help thinking of the five articles of the French Code dealing with civil liability (1382 to 1386), which have always been praised for their beauty, clarity, precision, conciseness; but no one ever counted how many volumes and pages of doctrine it took to explain them, how much deliberation and drafting it took judges to apply them – how many trees it cost our forests – to say and write what those beautiful words said or make them say what they did not! And I cannot

help noticing that in 1998, after the fifth article (1386), eighteen articles (1386-1 to 1386-18) were needed to deal with product liability; had the civil law experts and the French legislature become "common lawyers"?

If the wording raises doubts, the power of reason will dispel those doubts, the judge will interpret, perhaps aided by the doctrine, and will bring coherence to what seems incoherent (to each his own coherence), this being what the preliminary provision of the Code invites. Moreover, did not Judge Albert Mayrand admit at a conference similar to this one that it is "delightful to doubt"?

And then, what about the Minister's comments? What wasn't said or written about them! One minute they were bad doctrine, the next they said nothing! No one here thought of repeating Napoleon's cry when the first commentary on the French code came out: "A commentary, my Code is lost!" No! Not only was the Quebec Code not lost due to the Minister's comments, but better yet, the judges cited them rather often; so it might be possible to believe that those comments contained a few points of note, unless the judges were only citing them… to say nothing! And if those comments do not say anything, at least they have one virtue: they do not err.

So how has the Code turned out, fifteen years after coming into force? We will find out during this conference. However, we already know that after this Code was passed unanimously by the National Assembly, the legislature – on a motion by a new government – hurried, especially in the area of family law, to reform the reform, forgetting Portalis's advice: the law must be "prepared with prudent slowness … with wisdom, and not decreed hastily and in a frenzy…"

As soon as the Parliamentary Committee began its detailed study of Bill 125, the opposition at the time announced that it would not vote in favour of it unless a law reform agency was created to ensure that any possible oversights would be dealt with or that amendments would be brought for certain new situations that might arise – in short, to do what is known as "follow-up" for purposes of correcting a "real-life experience" that was a "real-life problem." A law was immediately passed in 1992 creating that agency, which is still on hold today: conceived seventeen years ago but still unborn!

This fifteenth anniversary of the Code could, or should, be an excellent opportunity to think about nurturing such an agency, which would effectively be tasked with monitoring the problems stemming from the application of the rules of the adolescent Code, seeing to the possible revision of any provisions that need some cosmetic changes or amendments, or reflecting on desirable additions, "without dislocating the system and without offending the general mentality," bearing in mind that the Code contains the *jus commune*.

If the legislature is not tired of legislating, may it legislate with forethought, maturity and level-headedness, but without forgetting the words of Montesquieu:

> There should be no change made to a law without sufficient reason. Justinian decreed that a husband could be repudiated without the wife losing her dowry if for 2 years he had been unable to consummate the marriage. He changed his law, and gave the poor fellow 3 years. But in such a case, 2 years are worth 3 and 3 are not worth more than 2.

Perhaps Voltaire was not wrong when he claimed that Montesquieu was making fun of the spirit of the law!

Finally, if it is true, as Portalis once again said, that laws are "acts of wisdom, justice and reason," it is now up to our audience to tell us if the *Civil Code of Québec* is living up to the lessons of the past and if it has achieved its objectives. What we do already know, and of this we are certain, since we are gathered here today, is that there was no period of chaos. What a relief!

[1] Material a fost publicat pentru prima oară în "Canadian Bar Review", vol. 88 nr. 2 sept. 2010, toate drepturile de proprietate intelectuală fiind deținute de autor şi de revista menționată (disponibilă online la adresa : www.cba.org).

[*] Jean PINEAU, Professor Emeritus at the Law Faculty of the University of Montreal. He has written several books and articles, in particular an important work on the general theory of obligations within the context of the *Civil Code of Quebec*. He was also one of the four members of the ministerial committee tasked with reforming Quebec's Civil Code.