
January 1995

Book Review: Quebec Civil Law: An Introduction to Quebec Private Law, by John E. C. Brierley and Roderick A. Macdonald (eds)

Nathelie Des Rosiers

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

Book Review

Citation Information

Des Rosiers, Nathelie. "Book Review: Quebec Civil Law: An Introduction to Quebec Private Law, by John E. C. Brierley and Roderick A. Macdonald (eds)." *Osgoode Hall Law Journal* 33.1 (1995) : 203-208.

DOI: <https://doi.org/10.60082/2817-5069.1659>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss1/6>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Book Review: Quebec Civil Law: An Introduction to Quebec Private Law, by John E. C. Brierley and Roderick A. Macdonald (eds)

BOOK REVIEW

QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW

By JOHN E.C. BRIERLEY & RODERICK A. MACDONALD, EDs.
(Toronto: Emond Montgomery, 1993)

Drafting a Civil Code is an ambitious project. The French comparatist André Tunc wrote that “[a] Code, for a Frenchman, should be complete in its field; it should lay down general rules, ... it should arrange them logically ... and [be] grounded on experience.”¹ This is the way one should consider *Quebec Civil Law: An Introduction to Quebec Private Law*—ambitious, comprehensive, fundamental, well-organized, and grounded in extensive academic experience. Furthermore, it is also for English-speaking persons.

The work “seeks to set out the genius of the Civil law” tradition in Canada (p. 1), its historical origins, its complexity, and its rationale. Part One describes the essence of the civil law tradition. Part Two aims at providing an overview of the “institutions” of the Civil Code and is more or less a description of the subject-matter covered by the *Civil Code of Lower Canada* (C.C.L.C.), from the law relating to persons and property, to obligations, nominate contracts, security devices, and commercial law.

It is an impressive project whose major contribution is to present in one tome a general introductory treatise about Quebec private law that is accessible to English-speaking common lawyers and anglophone civil law students. The two parts of the book are quite distinct. Each could have been a book in its own right and I will discuss them separately. I have also included excerpts from the book in text boxes in order to give a flavour of the language and ideas developed in the book.

... a Code aspires to provide meaningful generalities that can accommodate a range of future facts ... [t]he vocation of the legal text is to assemble and characterize clusters of ideas in formulae of relative permanence ... (p. 107, para. 91)

¹“The Grand Outlines of the Code Napoleon” (1954-55) 29 Tulane L. Rev. 431 at 435, para. 8.

I. PART ONE—NATURE, SCOPE, AND TECHNIQUES OF THE CIVIL LAW

Part One details the historical development of civil law in Quebec as well as the nature, scope, and technique of a civil law regime. It is a very original contribution to civil law legal thinking. While the subjects it covers have been developed in articles or conferences, it is difficult to find such a comprehensive treatment of the historical and political underpinnings of the Quebec civil law tradition.

In fact, there is little Quebec literature on the process of codification itself, on its assumptions and rationales. The authors mention that little has been written on the theory of the "sources" of law² (p. 151). It is true that most comparative law materials in common law schools refer to French authors to present this fundamental aspect of the difference between civil law systems and common law regimes. The chapter on the Theory of "Sources" in Quebec Civil Law will no doubt remedy this problem. It is well-organized and presents a very pragmatic look at the problem of "sources."

Generally, Part One is very engaging: the thinking is original and the expression often ingenious. Professors Brierley and Macdonald have written extensively on the theory and history of the Quebec Civil Codes and Part One is probably a distillation or a summation of their thinking. It is a testimony to their respect for the civil law tradition and a contribution to its "resplendissement."

Several expressions are real discoveries: the Civil Code as a "social constitution,"³ the Civil Code as an "icon" (p. 46, para. 42), civil law as "the mediation of Legal Right and Lived experience" (p. 180ff.),

The practical success of many Civil law fictions is reflected in the fact that they have so entered the general body of the law that they have lost their obvious character as a fiction, and are simply seen as ordinary legal rules ... the presumption that ignorance of the law is not an excuse [is a clear example]. (p. 181, para. 144)

the analysis of the "conscious fictions" present in the Civil Code or the

² By "sources of law," one generally refers to a hierarchy of normative prescriptions. Typically, and simplistically, it is under this heading that comparatists explain the differences between the common law system, which relies on binding precedents as a source of law, and a civilian regime which presupposes the pre-eminence of written law.

³ The expression was first coined by the French Professor Jean Carbonnier, as the authors mention at 34, footnote 5. They should be credited for disseminating the expression which is particularly telling to a twentieth-century audience.

reference to "codal patriotism" (p. 71, para. 63), the legal discourse which identified the Civil Code as a defining symbol of French-Canadian civilization along with Roman Catholic faith and the French language.

What is most interesting about this first part of the book is the variety of angles under which the basic theme of the underpinnings of the Quebec civil law

tradition is being explored; the influence of legal professionals and their governing corporations on the fate of civil law is canvassed, as are the corresponding

[T]he general impoverishment of doctrinal scholarship, and its traditional preoccupation with defending at all costs some pristine conception of the Code and the preservation of its values, had long set an intellectual climate in which creative judicial interpretation was castigated as being untrue to the genius of the Civil law. (p. 83, para. 70)

importance of legal education and the role of public administration. The comprehensiveness of the treatment is accompanied by a wealth of bibliographical details. References to Quebec and French thinkers abound, making Part One a very useful bibliographical tool for further research on the civil law tradition.

Also noteworthy is the section on the Historiography of the Civil Code (p. 67ff.). Professors Macdonald and Brierley join several Quebec

authors who have begun to explore the rich field of academic and legal writing as an historical source.⁴

[M]emory was more important than imagination in 1866 (p. 35, para. 33)

Generally, the historical approach is well-cultivated and provides an

accessible and lively introduction to the subject.

The language of this first Part is at times cumbersome; Latin is used frequently and some of the examples chosen to illustrate a point require more knowledge of civil law than a common lawyer or a civil law neophyte would typically have.⁵ Another difficulty, which I will address in the context of the discussion of the Second Part, is the reference to the provisions in the C.C.L.C., which has now been repealed. In the Preface, the authors explain that they limited themselves to presenting a statement of the Civil law "as it exists on the eve of the coming into force

⁴ See, among others, S. Normand, "L'histoire de l'imprimé juridique: un champ de recherche inexploré" (1993) 38 McGill L.J. 130; J.-G. Belley, "Une croisade intégriste chez les avocats du Québec: *La Revue du Droit* (1922-1939)" (1993) 34 C. de D. 183.

⁵ See the reference to usufruct and emphyteusis to demonstrate the "consolidation of legal rights" (at 184, para. 146) without much explanation as to the difference between the two concepts.

of the *Civil Code of Québec* enacted in 1991," (p. iii) not in force at the time of publication of the book.⁶ Although their decision not to refer to the new Code is understandable, the reference to provisions, now repealed, in the text of the book, dates it. This is unfortunate because the interest of Part One transcends the adoption of the new Code. If references to the provisions of the C.C.L.C. had been in footnotes, or if the references had indicated the number of the new provisions, when applicable, the reader would have been less puzzled. Unless the reader has easy access to a copy of the C.C.L.C. as it stood in 1991, the numerous references to the C.C.L.C. could be meaningless.

Nevertheless, there is a large and grateful audience for the book, particularly for the first Part: teachers of comparative law across Canada will want to refer frequently to the powerful picture of Canadian civil law

[T]he fiction often reflects the power of social fact to reorient legal definition in pursuit of [policy] finalities. (p. 182, para. 144).

which is being presented in these first 200 pages. One would hope that

introductory materials for law students in all Canadian common law schools would also make extensive use of this book. Finally, Quebec legal scholars and students will find useful and stimulating materials in this book as well.

II. PART TWO—INSTITUTIONS OF THE CIVIL LAW

Part Two is probably what anglophone first-year civil law students will read most. To my knowledge, it is a unique attempt to include in one book the basic notions of a law school private law curriculum. Several of Professors Brierley and Macdonald's colleagues at the Faculty of Law of McGill University contributed to this Part, each writing a Title in his or her area of expertise. The result is a valuable introductory guide to Quebec law as it was on the eve of the adoption of the *Civil Code of Québec*.

The problem of not referring to the New Code provisions is particularly difficult in this Part since the content is, at times, more descriptive than analytic. Nevertheless, each Title explores the underlying principles of the civil law institution, its historical origins, and its relationship to the other institutions described in the book. This knowledge continues to be valuable.

⁶ The *Civil Code of Québec* has been in force since 1 January 1994 and has replaced the *Civil Code of Lower Canada*.

One should also not minimize the fact that this contribution is in English. Although there is a civilian legal tradition in English in Quebec, historically more developed than the common law in the French tradition, the difficulties arising from the need to translate ideas which were developed in another language must be recognized. It is always a labourious exercise to assimilate materials in one language and then attempt to formulate one's own contribution in another language. The effort pursued here is very successful. Civil law in English now has an important linguistic tool to continue its development.

The treatment is comprehensive: Title One deals with persons, physical and moral. Title Two covers family relations, marriage, cohabitation, and parental obligations. Title Three on property explains the basic notions which permeate the conception of property law in a civil law regime. At times, it is repetitious of some of the examples found in Part One. Title Four considers matrimonial property, inheritance, and liberalities. Title Five tackles the major subject of obligations,⁷ while Title Six details the characteristics of nominate contracts, sale, mandate, lease, and others. The rights of creditors and security devices are reviewed in Title Seven, while Title Eight outlines the scope of commercial law as it is defined in the Quebec legal regime. Finally, Title Nine examines "Proof," usually known as evidence in civil matters, and Title Ten concludes with an evaluation of the private international law regime.

At times, the treatment might be unequal between the different titles and further readings may be required for a good understanding of the subject covered. Fortunately, a bibliography is always included, which makes the book particularly useful. The purpose is to provide an overview. Therefore, an extensive coverage of the case law is not included and little criticism is offered as to the impact of the different provisions reviewed. One example is the treatment of the thorny question of the foetus' legal rights discussed in Title One: Persons, in the context of an analysis of personality rights of physical persons. It reviews

⁷ The treatment of causation is particularly well-done in the chapter on delictual obligations in Title Five: Obligations. However, I found the treatment of damages somewhat confusing. The author states that, "with two notable exceptions, there are no limits upon the compensation of non-pecuniary losses" (p. 436, para. 472). The two exceptions mentioned are the controversial limitation on an award for grief for dependants in cases of death pursuant to the old article 1056 C.C.L.C., and the refusal by the courts to recognize compensation for the shortening of life in itself. This statement may appear incorrect without a discussion of the issue of the ceiling on non-pecuniary damages which was imposed by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. The ceiling is generally adopted by the Quebec Courts: see, among others, *Carra v. Lake* [1992] R.R.A. 928 (C.A.). The reference to the ceiling is only made much later in para. 519. Obviously, this is a small organizational difficulty.

the decision in *Tremblay v. Daigle*⁸ without providing much detail on the legal battle involved. The authors shy away from taking a position and simply criticize the decision of the Supreme Court of Canada in a detached and abstract way that does not do complete justice to the complexity of the issues involved.

Nevertheless, there is no question that *Quebec Civil Law: An Introduction to Quebec Private Law* is a remarkable achievement. The formidable challenge of setting forth a "conspectus of the Civil law tradition in Quebec" (p. iii) has been met. The book should be well-received by civilists and common lawyers alike, as it fulfills a great need. Civil law is largely ignored in English Canada. The language barrier which maintained this ignorance has now been removed. There is no longer any excuse to ignore the wealth of the Canadian civilian legal tradition.

Hugh MacLennan wrote in *Two Solitudes* that it seemed that the English "did not understand the peculiar value of the French and did not want to understand it."⁹ Let us hope that, with this original and comprehensive addition to Canadian legal libraries, that will no longer be the case with civil law.

Nathalie Des Rosiers

Associate Professor, Faculty of Law, University of Western Ontario

⁸ [1989] 2 S.C.R. 530. The case involves an attempt by Mr. Tremblay to obtain an injunction to prevent his ex-girlfriend from obtaining an abortion. The Supreme Court of Canada rejected Mr. Tremblay's application.

⁹ (Toronto: Macmillan, 1945) at 46.