COMMON LAW — CIVIL LAW

Different societies have different laws, and one is tempted to say what makes them different is the kind of law they have. The French Canadians compiled the Code Civil (1858-1866), and more than any institution, other than the French language itself, the Code marks off Quebec from the rest of Canada. To start with, it is not only the laws in the Code, but the very fact of a Code, that is a major difference. As anyone knows who has tried, the English Common Law on property, wills, trusts, torts — civil law — is embedded in hundreds of cases, some of which go back to the 17th century, or to statutes earlier than that. One famous criminal trial in Canada in 1885 was compelled to rely on a statute of Edward III, the Statute of Treasons (1352), once aimed at the Scots. The common law has amazing range and flexibility; but what the law is on any subject is an arcane science, its principles induced from two or three hundred leading cases. English law is like the great tradition of English philosophy: inductive, based upon a rooted aversion to getting too far away from particular realities. The great philosophical traditions of England have been empirical to the core, beginning with William of Ockham in the 14th century, and going on to the trinity of empiricism in the 18th, with Locke, Berkeley and Hume. They could even include James Mill and John Stuart Mill in the 19th.

French law, even when France had 366 codes, was based substantially upon Roman law, a law that owed much to Justinian. When Napoleon framed his great law code of 1804 New France had been parted from old France by the exigencies of conquest. Nevertheless, the Code Napoléon was a strong influence in Canada. When French Canadian and English Canadian jurists came together (1858-1866) to create the Code Civil, they used all three forms of law: the Code Napoléon, some elements of English commercial law, and of course, seigneurial law, which had come from France as the *coûtome de Paris*, but which in the 1860's was overlaid with some 200 years of Canadian experience.

The Code Civil is the civil law of Quebec. It was in some ways more modern for its time than contemporary British law, at least prior to the passing of the British Married Women's Property Act in 1882. The family law embedded in the civil code is reflective of Aristotelian conceptions of society from the Roman Catholic Church. Its spirit is the sense of mutual interdependence, with as much emphasis on responsibilities as upon rights. For example, the law of marriage had as its basic principle the formal and legal establishment of what the French call *communauté des biens*. There is no convenient English Canadian equivalent in law or in language: the idea of a community of material interests, based upon what each person could materially bring to the marriage. It was, and still can be, enumerated officially by a notary, as the civil prerequisite to a religious sacrament.

Prior to Quebec reforms in the 1950s and 1960s some of the elements of the Code Civil were rather authoritarian insofar as marriage was concerned.

Sec. 174. A husband owed protection to the wife; the wife obedience to her husband.

Sec. 176. A wife could not appear in judicial proceedings without her husband or his authorization.

Sec. 1292. The husband alone administered the joint property of the marriage.

There were also some other differences:

Sec. 187. A husband could demand the separation of the marriage on the ground of his wife's adultery.

Sec. 188. A wife could demand the separation of the marriage on the ground of her husband's adultery if he keeps his concubine in their common habitation.

This was certainly old-fashioned enough, and this invidious distinction (from the Code Napoléon) and which ended in France in 1884, lasted in Quebec until 1955. There is another element in the civil code: as parents are bound to maintain their children, and look after them, so are the children, in due course, bound to maintain their mother and father, "and other ascendants", if their parents, or the grandparents, are in want.

One would need to know more about the application and the functioning of such laws before drawing too many hard conclusions from them, but it is obvious that this kind of law reflects a society with different values from English Canadian society.

Place Victoria, Montreal's tallest building, 190 metres high, with 47 storeys, houses the city's stock exchange and is connected to the Régence Hyatt Hotel.
Photo: Mia and Klaus.