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Supplementary Paper

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An address by the Minister of Justice and Attorney General of Canada, Mr. Stuart S. Garson, Conference of Ministers of Justice, Attorneys General and Supreme Court Judge of the Inter-American Bar Association Conference, Dallas, Texas, April 1956.

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First, may I express my deeply sincere appreciation for the great honour which you have conferred upon my country and myself by asking me to act as the North American Chairman of this Conference of Ministers of Justice, Attorneys General and Supreme Court Judges of North and South America. When the President of the Inter-American Bar Association, Mr. Robert G. Storey, greatly honoured me with an invitation to attend this Conference, I was delighted to accept. The citizens of the United States of America and of Canada get along famously together and it is not surprising that they should; for a good many of them are blood relatives. For example, my wife, who herself is a native of the U.S.A., and I have almost as many relatives in the United States as in Canada. Indeed, in colonial days, my own maternal ancestors were citizens of the United States. They probably would still have been ... if they had not remained Loyalists during the American Revolution. Following its successful conclusion they, animated by a continuing loyalty to their King - not perhaps untinged with prudence - retired to the then northern forest wilderness of the British North America, which since has become today's self-governing Dominion of Canada. If this exodus had not taken place, perhaps an American descendant of theirs, of the eighth or ninth generation, might be here today as a host in place of me as a Canadian guest.

It is not only in relation to the United States that as a lawyer I feel at home here today. To the south of our two countries, are Mexico and all those countries of Central and South America whose legal codes, mostly through Spanish, Portuguese and French media, partake fundamentally of the great Romanesque legal system. Our Quebec Civil Code partakes of the same system through the medium of the laws of 17th Century France. It is only last November that the Honourable Doctor Patrick Kerwin, Chief Justice of the Supreme Court of Canada, had the privilege of attending in Caracas, Venezuela, at the invitation of that country, the Centenary ceremonies of the Bello Code of Chile. We in Canada were glad in this way to have our tribute paid to this outstanding achievement of a jurist born in Venezuela, whose work has had such an important influence upon so many

of the legal systems of the western hemisphere.

Indeed, the civil law is represented in the United States of America itself. The adjoining state of Louisiana, for example, has a code of civil law. Why? Mainly because its territory at one time was, like Canada, a part of New France.

But the immense area, almost twice as large as that of Texas, and the large population of the Province of Quebec, makes Canada, I think, the only country in the world in which no less than thirty per cent of its citizens steadfastly follow the French Civil Law, whereas the other seventy per cent follow just as steadfastly the English Common Law.

It is this unique and harmonious co-existence of these two legal systems in a single state, that I wish to discuss with you this afternoon.

One of the things which makes this co-existence possible is that our Canadian constitution has deliberately provided that it is the provincial legislature which has the exclusive power to make laws in relation to property and civil rights in the province. That is to say, it is the provincial legislature which alone can determine what laws shall prevail in its province in relation for example, to the right of citizens inter se; the character of private property; the limitations imposed by law on owners of property; the law of obligations, including the law of contracts; the law of torts, or, as they are called in Quebec, delicts and quasi-delicts; the personal status of the individual; and the power of individuals to dispose of their property inter vivos or by will.

Thus, in relation to these subject matters, Canada in theory could have as many systems of provincial legislation as there are provinces. Yet, in the Common Law provinces, there is, consistent with special conditions of each province, a great degree of uniformity of laws, especially of commercial laws. This uniformity is the product of the enactment as law the Common Law legislatures, of the recommendations of an interprovincial Committee of Commissioners for Uniformity of Legislation.

Each of our two Canadian legal systems has proven helpful to the other. Yet, over the decades each has preserved its identity. Neither the Common Law nor the Civil Law of Quebec has been, nor does it seem likely to be, seriously infiltrated much less permeated by the other system. The harmonious co-existence of the two systems has left us a set of laws for Canada as a whole which is well-balanced and workable. For these and other reasons, the followers of each do not merely tolerate, they respect the other.

Before I cite actual examples of their favourable effects upon each other, let me sketch in some relevant historical background.

Although at its zenith New France extended much farther west into Manitoba and south through the valley of the Mississippi River into Louisiana, the territory of Quebec and Ontario was the main part of New France throughout most of its history. In this New France of 1663 Louis XIV by a Royal Ordinance created the Conseil Souverain de

Quebec, and also brought definitely into force the whole body of the laws of old France. These were: first, the whole of the Coutume de Paris; second, the Roman Law to the extent that that law was being subsidiarily applied within the jurisdiction of the Parlement of Paris; and third, all of those Great Royal Ordinances which had been promulgated in France.

Following 1663, it seems agreed that only the laws and ordinances of the Kings of France which were formally registered with the Conseil Souverain de Quebec became law in New France.

As time went on, the laws of New France also included all decisions and rules of general application handed down by the Sovereign Council itself, and all orders proclaimed by the Governors and other administrators. This remained the law until the sovereignty of New France passed to the British Crown a century later in 1763.

Upon this happening, the public law of England, by international custom became the law of Canada. By this same international custom, the Civil Law proper as distinguished from public law, should normally have remained as it was before the British conquest. But, as to this, doubt was raised by the proclamation issued by King George the Third of England after the conquest. This proclamation authorized the Governor of the new British colony to constitute therein a Court of Judicature, to hear and determine all causes ... according to law and equity, and as much as would be feasible, according to the laws of England, and every litigent was entitled to appeal to the Privy Council in London.

Thus, for eleven years, French-Canadians had the experience of being governed by alien and unfamiliar laws. Naturally, they vigorously protested; and hearkening to their protests, the Government of England gave its new colony of Canada, effective May 1st, 1774, its first constitutional charter, known as the Quebec Act. This formally restored in Canada the whole body of the French Civil Law as it had been in force before the allegiance of its citizens passed to the King of England.

The French Civil Law thus restored, affected both French-Canadians and Anglo-Canadians in Canada. These Anglo-Canadians later included a considerable group of Loyalists who, following the American Revolution, migrated into Canada. These Anglo-Canadians now had their turn for seventeen years, not only to know how they themselves felt when being governed by the unfamiliar Civil Law, but to understand and sympathize with how their French-Canadian compatriots must have felt during the eleven years that they were governed by the unfamiliar Common Law. They had occasion to discover that the French-Canadians had had a good case when they wanted to be governed by their own laws. The French-Canadians in turn knew how the Anglo-Canadians felt. They both were of one mind. Each group wanted to be governed by its own laws. Each group could see the fairness of conceding to the other what it wanted for itself. So when the Loyalists petitioned to have their own laws, no one objected; and in response the British Parliament enacted the second Great Canadian Constitutional Charter known as the Constitutional Act of 1791. This divided the colony into two parts, one called Upper Canada, now Ontario, and the other Lower Canada, now Quebec. Each of these Provinces was given its own Legislature. The

first act of the Upper Canada Legislature was to bring into force the whole of the Common Law of England. Thereupon, the co-existence of the Civil Law and the Common Law within Canada commenced.

In 1837 there was an insurrection upon which Lord Durham was commissioned to make a report to the British Government. In this Report, Lord Durham concluded that only by the assimilation of the French-Canadians could security and peace be achieved, and that such assimilation could be achieved by bringing Upper and Lower Canada together into one province governed by one single legislature. This was accordingly done. But Lord Durham proved to be wrong in his views concerning assimilation. Instead of their being assimilated, the French-Canadians adhered so strongly to their own French concept of the Civil Law that in 1857, it was the government of the United Canada which ordered that the civil laws which in the meantime had never ceased to rule Quebec, should be codified. This was done and thereupon the single Legislature of the United Canada in 1866 adopted and enacted this French Civil Code. This is the Code which, with amendments of course, is still in force in Quebec as I speak here today.

In 1867, the Provinces of Upper and Lower Canada, New Brunswick and Nova Scotia were confederated as the Dominion of Canada by the British North America Act, an Imperial Statute. This Imperial Statute is our main constitutional document. By it the Provinces, as I have already noted, were granted the exclusive right to legislate in regard to property and civil rights. Thus, the Civil Code continued to be the law of Quebec and Quebec alone through the years following has had the power to amend it.

By this Quebec Code, the order and the logic of the great French legal writer, Robert Joseph Pothier have been even more closely respected than they are by the Code Napoleon. Moreover, the fact that no revolutionary idea or atmosphere surrounded the Quebec Codification may explain the absence of any abrupt departure from the French and especially the Roman law tradition. Whereas the Code Napoleon was intended to be interpreted only in the light of its own provisions and to be considered as an exhaustive body of law, under the Quebec Civil Code ... the old French law, and then the Roman law if necessary, may still be used to supplement incomplete provisions or to interpret imprecise texts. The Quebec legislators were evidently right in so doing because, as Klimrath remarks in his "Histoire du Droit Français":

> "Vraiment, c'est mal comprendre nos lois, que de les isoler, et de ne vouloir les interpréter que par elles-mêmes, lorsque tout le passé est là, pour leur servir de commentaire, et l'avenir de complément."

Notwithstanding this manifest determination of the French-Canadians to adhere to the great principles of their juridical tradition, they have been realistic enough to borrow from the Common Law system certain institutions or solutions which they have succeeded in integrating to their own legal structure, without modifying its basic principles.

One of the most important examples of such developments has been the acceptance by the Civil Law of Quebec of the principle of the absolute freedom of any person to dispose

of his property either inter vivos or by will.

Such variations from the present French law as these are integrated in the first three of the four books into which the Quebec Civil Code is divided.

Book I deals with "Persons"; Book II with "Property"; Ownership and its various modifications; Book III with the "Acquisition and Exercise of Rights of Property" which include all the Civil Law theory of Obligations based essentially on the Roman Law; and Book IV deals with "Commercial Law". In the first three books is to be found the codification of the French law as it was at the cession of 1763. These three books coincide closely in their division and planning with the contents of the three books which constitute the Code Napoleon; although, as I have noted, with some variations in the substance of their subject matter.

Book IV, which concerns Commercial Law, although based in part on the Code du Commerce of France, contains a much greater number of principles directly taken from English Law. This is explained by the fact that trade and commerce in Canada have developed very largely since the beginning of the British control of the Colony. In any case, Book IV is of lesser importance because many of the subject matters of Commercial Law which were dealt with in the original Part IV of the Civil Code, are now subject matters over which the Federal Parliament of Canada alone has power to legislate. For this reason, many of the articles enacted and recorded in this Book IV of the Quebec Civil Code in relation to these subject matters have now been revoked or are without juridical effect over such subject matters of federal jurisdiction as bills of exchange and promissory notes, navigation, and shipping and insolvency.

In this connection certain qualifications should be noted. The Canadian Courts have always been careful to hold that the legislative powers of the Federal Government do not enable it to interfere with the exclusive provincial jurisdiction over property and civil rights. Should a federal statute effect property and civil rights, it will be deemed to be constitutional and intra vires, only if its effect on property and civil rights is necessarily incidental to its logical and meaningful application to a matter which is clearly under federal legislative jurisdiction. For example, a federal statute which, purporting to deal with trade and commerce, provides for certain uniform conditions and warranties to be included in contracts for the sale of goods made anywhere in Canada, would probably be declared ultra vires, even where the seller was domiciled in one Province and the buyer in another. In each such case the locus contractus must be ascertained according to the principles governing conflicts of law; and the law of the particular province where the contract is deemed to have been made or completed would then apply.

Even in the case of bills of exchange and promissory notes, the Federal Act may not be invoked to modify the contractual relationships governed by the provincial law and which have brought about the issuance of a note. For instance, under the Quebec Civil Code, a gift inter vivos is null, unless the contract embodying the disposition has been made under authentic form before a Notary. It appears to be the consensus of legal opinion that, should a gift inter vivos

be made in Quebec, with no preceding notarial deed, but evidenced by an ordinary promissory note delivered by the doner to the beneficiary, the promissory note could not be sued upon before the Court. In this particular case, the promise to pay, in order to be valid, should be embodied in a document containing the essential requirements of a notarial gift inter vivos. It would be different, of course, if the usual authentic deed of gift were first made before the Notary and the promissory note issued afterwards, in execution thereof.

Largely because of his acknowledged sancity of the exclusive jurisdiction of the provinces to legislate concerning property and civil rights, it has now been clearly settled by the Judicial Committee of the Privy Council, that insurance is essentially a civil contract. Therefore, notwithstanding the right of Parliament to regulate trade and commerce, jurisdiction with respect to insurance contracts remains vested exclusively with the provincial legislatures. We should note here that the nine Common Law Provinces have adopted virtually uniform statutes in matters of insurance, but that Quebec has decided, until now, to remain governed by its civil code and other local statutes in relation to insurance. However, in the basic principles, there is great similarity between the Code itself and the legislation of other Provinces on the matter of insurance. For, as the Commissioners charged with codifying the Quebec Law have said, in their seventh report, much of the law of insurance finds its origin in the most famous of the great Ordinances of Louis XIV: Colbert's L'Ordonnance de la Marine of 1681, and has developed subsequently in all trading countries in large part as a result of English initiative so that, at the time of codification, a universal body of rulers relating to insurance existed, from which many of the articles of the Quebec Civil Code have been derived.

Certain Quebec lawyers have tole me that the coexistence of these two systems of law in Canada has actually helped to maintain the traditional principles of French law embodied in the French Civil Code in this respect. The Courts of Quebec have apparently declined to apply within their jurisdiction certain modern principles, evolved by the Courts of France and in fact constituting a small body of Judge-made law. These principles are not necessarily based on the Code Napoleon, nor on enacted French statutes. An example of this is the doctrine of "Risque Crée" by which the French jurisprudence has widened the scope of vicarious responsibility far beyond what would appear to have been the intended bearing of Articles 1382 to 1384 of the Code Naopleon itself. While the French Code states that the master is responsible for damages caused by his employees, "dans les fonctions auxquelles ils les ont employés", Article 1054 of the Quebec Code uses an expression which would appear to be very similar, that is, "dans l'execution des fonctions auxquelles ces derniers sont employés". These two texts would appear to correspond to the Common Law expression: "In the course of his employment in his master's service". The French Judges have therefore interpreted the expression "dans les fonctions auxquelles ils les ont employés" as meaning "à l'occasion de leurs fonctions". As a consequence of an application of this doctrine, the case is often referred to of the French decision where a master was found liable for an accident caused by his chauffeur who, after having received a formal order to bring the car back to the garage, decided to use it for his own purposes, in no way connected with his employment and, upon his return, caused the said accident.

It is evident that under the Common Law, no such responsibility could be found to exist. In a similar case in Quebec, the Supreme Court of Canada declined to find the master liable; and, in so doing, the Judges insisted that they were not applying the Common Law as such, but merely giving Articles 1053 and 1054 of the Quebec Civil Code their true interpretation, as part of the body of the Quebec Law.

In this I have cited an example of the way in which the Civil Code of Quebec has benefited from the co-existence of the two systems of law in Canada. Let me now give an example of the way in which the Common Law has benefited from this co-existence.

The Common Law defence of contributory negligence, available in the other provinces of Canada, has never been accepted by the Courts of Quebec. In any case where a plaintiff was revealed by the evidence to have been to any extent at fault, the Quebec Courts, instead of denying the right of action have persisted in applying the doctrine of common fault which, under the French law, has only the effect of reducing the right of the claimant in the proportion of his own contribution in the cause of the accident or of the damage. This doctrine, having been found to be more equitable than the rather blunt defence of the Common Law, has gradually found its way into the nine other Provinces of Canada, which have now passed statutes embodying the French principles of the defence of common fault.

Although it has sometimes been said that this doctrine of common fault is not to be found in the Code Napoleon, nor yet in the Civil Code of Quebec, but was itself a creation of jurisprudence, it is felt by many - and there appears to be much merit in this contention - that, whenever both parties had contributed to an accident by their respective negligence, the apportionment of responsibility among them in proportion to their respective degrees of fault is nothing else than a logical conclusion drawn from Article 1053 of the Civil Code and 1382 of the Code Napoleon.

Across the Ottawa River from our capital City of Ottawa is the City of Hull. Both cities are made up of large numbers of French-Canadians and Anglo-Canadians. Ottawa, in Ontario, is predominantly Anglo-Canadian. Hull, in Quebec, predominantly French-Canadian. Thousands of people live in one city and work in the other. Each morning and throughout the day, a very considerable exchange of population takes place between the two cities. They pass back and forth from the Civil Law system to the Common Law system.

The two largest and most important business and commercial centres of Canada are Toronto in Ontario and Montreal in Quebec. By mail and otherwise, many thousands of individual transactions are being conducted each day between corporations and individuals of these two cities. These multifarious business activities are being conducted. I am sure, by people, the huge majority of whom are quite unconscious of the fact that they and their transactions are passing back and forth between two quite separate and distinct legal systems.

What makes these phenomena possible? First, I think, arising out of our joint history, there has been a conscious desire on each side to hold to its own; and a conscious certitude of the folly of denying to the other side the correlative right to hold to its own. Arising out of this

admission of the correlative claims of others to assert for themselves the same rights we claim for ourselves, there has been a desire on both sides to make our two systems work harmoniously and beneficially for Canada as a whole; and to this end a tendency for those under each legal system to conform themselves, to adapt their usage and customs to neutralize the effect of any differences in the law of their respective provinces.

Another reason is that insofar as is consistent with any mandatory provincial law, many types of commercial contracts have been made uniform throughout Canada and are accepted by merchants and businessmen, irrespective of the legal system under which they operate. In many cases, parties to contracts elect domicile for all purposes of interpretation and carrying out of contracts.

Another thing which has contributed to this harmonious co-existence is the substantial body of decisions bearing upon the conflict of laws in Canada which has developed in this country as a result of our having these two systems of law.

Another factor consists, as many of you no doubt have encountered, in the surprising similitude of solutions which are arrived at in practice, even through the use of basically different approaches of the Common Law and the Civil Law. It is surprising to realize on how many occasions, whatever the system applied, the results will coincide. In my own Department we transact business in all of the Provinces of Canada, and in this way have to deal with problems under both systems. I am told by the officers that they very often arrive at the same conclusion through the application of the Common Law or the Civil Code. This brings to mind the words of a former Batonnier of the Paris Bar, quoted before the Canadian Bar Association by the former Chief Justice of Canada, the Right Honourable Thibaudeau Rinfret, when he referred to

> "l'unité essentielle du droit, sous l'apparente diversité des législations."

May I, in conclusion, express the hope that this Canadian experience will be of some interest as a practical example of the type of intellectual and practical adjustments that men of good will in all nations will have to make if they are going to get along harmoniously together in a world in which they are being brought into closer and closer contact as the years go by.