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Lower Canada (Quebec): Transformation of Civil Law, from Higher Morality to Autonomous Will, 1774-1866

MURRAY GREENWOOD

FIFTEEN YEARS AFTER THE BRITISH CONQUEST of New France the imperial parliament restored the *canadien* civil laws, an unwieldy mass which would continually grow more confusing until codified in 1865–66. These laws could be characterised in many meaningful ways. One was their subordination of individual desire to higher morality, variously defined or implied. This pre-industrial, indeed feudal, Quebecois motif confronted merchants from the highly commercialised civilisation of Great Britain, whose laws from at least the mid-eighteenth century placed overriding emphasis on individual autonomy in fostering entrepreneurship. This essay tells the story of these conflicting European values in Quebec's political and legal arenas.

The end result by 1866 was a significant commercialisation of the laws, with *laissez-faire* theories of Adam Smith and Jeremy Bentham triumphant over moral assumptions found in the writings of pre-Revolutionary French jurists. By codification in 1866, representative French Canadian lawyers and politicians looked upon the modern world with ambivalence, almost schizophrenically. They wanted a future of economic progress in which their compatriots would fully participate, but not at the price of losing pre-Revolutionary values in family life. This Janus-like vision perfectly imprinted itself on the *Civil Code of Lower Canada, 1866*.¹

¹ My great debt to John Brierley's magisterial essay (1968), *infra* note 7, on codification, to Evelyn Kolish's excellent, often pioneering, work particularly for the period 1812–1836, and Brian Young's stimulating scholarship will become obvious in text and notes, as will the considerable debt I owe to the more specific but important writings of André Morel, Blaine Baker, John W. Cairns and others. I should add that Dr. Kolish has helped my understanding through many conversations on Quebec's legal history and by letting me read the revised version of her doctoral thesis (University of Montreal, 1980) on the civil law, 1760-1840, now published: *Nationalismes et conflits de droit: Le débat du droit privé au Québec* (La Salle, Québec: Éditions Hurtubise HMH Ltée, 1994). This essay was substantially written before Brian Young's *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: The Osgoode Society/McGill-Queen's Press, 1994) was published. I have tried to incorporate into the text and notes many of his more important points. Similar comments apply to the meticulously researched essay of Michel Morin, "La perception de l'ancien droit et du nouveau droit français au Bas-Canada, 1774-1866" in H.P. Glenn, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville, Qué: Les Éditions Yvon Blais Inc., 1993) 1, and the thought-provoking article by Sylvio Normand, "La codification de 1866: context et impact" in *ibid.*, 43. My own recently published book, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: The Osgoode Society/University of Toronto Press,

I. The Period of the *Quebec Act*, 1775–91

A. Jurisprudence

The British conquest of New France, made permanent by the *Treaty of Paris* (10 February 1763), produced a military régime lasting from 1759 to 1764. For a decade afterward confusion reigned among legal men on both sides of the Atlantic as to how much, if any, English civil law had been forced upon the new colony of Quebec by the *Royal Proclamation* of 1763. And if any had been, was that not a gross flaunting of the law of nations? For a variety of reasons, including a policy of conciliating the newly conquered *canadiens*—in view of possible continued war with France, growing American colonial unrest, or both—Britain's imperial government and parliament cut the Gordian knot in the *Quebec Act* of 1774. This restored the French civil system: "... in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same."² Restoration included all regulations applying to the feudal or seigneurial system of land tenure (e.g., the seigneur's *banalité* or monopoly of gristmill, whereby habitant farmers were obliged to grind grain needed for domestic consumption at the banal mill, paying 1/14th for the service).

What then were the laws of Canada (or New France)? No one in 1774 could have said with any precision. Sources were multiple, often overlapping, sometimes contradictory. The main source was the *Coutume de Paris*, the century-old basis for the New France civil law confirmed by Louis XIV in 1664. These were the laws governing Paris and adjacent regions, dating back at least to the early middle ages. The *Coutume* had been codified into articles during the sixteenth century and published in 1580; but it apparently required several tomes of scholarship thereafter to approach clear meaning.³ In addition to the skeletal and sometimes obscure *Coutume de Paris*, the *canadien* laws included significant portions of Roman law (e.g., on contracts) and canon law (e.g., on marriage); a few rules drawn from other *coutumes*; judgments of the courts in France and in Canada, particularly those of the highest colonial court, the Sovereign/Superior Council; and, legislation of the governors and intendants and royal edicts applying to the colony.

1993) deals in great detail with the constitutional, political and legal history of Quebec and Lower Canada in the period 1784–1811, and to some extent later; but this essay is more comprehensive and more thoroughly researched on the evolution of the civil law. I thank those who acted as my research assistants: Christopher Greenwood, Beverley Boissery, and Julie Boudreault of Montreal for good natured help and useful discoveries. Bev, as usual, gave me invaluable editorial assistance.

² 14 George III, c. 83. I have used the text in Adam Shortt & Arthur G. Doughty, *Documents relating to the Constitutional History of Canada (1759–1791)*, 2nd ed. (Ottawa: King's Printer, 1918) at 570–76. I shall refer to this and succeeding volumes of the "Constitutional Documents" series (1791–1818 and 1819–1828) as follows: CD(I), CD(II) and CD(III).

³ See the Dickinson essay, *supra* at p. 34. For a concise study of the *Coutume* as it applied in Canada, then Quebec/Lower Canada, see Yves Zoltvany, "Esquisse de la *Coutume de Paris*" (1971–72) 25 *Revue d'histoire de l'Amérique française* 365 [hereinafter RHAF].

Two of these were the well-known *Edicts of Marly*, 1711, which forced seigneurs to grant waste lands on the rent and conditions prevailing in the seigneurie: a form of rent control.⁴ Arguably part of the colony's legal system were the ordinances enacted by the Bourbon kings for France. In the mother country, ordinances did not come into force in any region unless registered by its highest court (*parlement*). None of the ordinances, e.g., dealing with donations, civil procedure and commercial transactions, was registered by the Sovereign/Superior Council, although the colonial courts enforced most if not all. After the Conquest of 1760 the question arose as to validity of the unregistered *Code Marchand*, 1673, a set of rules facilitating commerce (e.g., regulating negotiable paper, protecting creditors of a bankrupt), on which the courts and lawyers divided.⁵ Added to these sources of law would be provisions contained in local and imperial legislation and the writings of a few local lawyers,⁶ concerning "la doctrine" and the works of pre-Revolutionary French scholars.

Among jurists of influence in Quebec were Claude de Ferrière, a specialist on the *Coutume de Paris* and Robert-Joseph Pothier (1699–1772) of Orléans, a profound student of Roman law and customary law in general. Probably because of his superb clarity, intelligence and the greater availability of his works after 1800, Pothier was cited far more in the courts than de Ferrière or any other scholar.⁷ The Swiss born *patriote* Amury Girod complained in 1835 that "if de Ferrière is a thousand times more reasonable than Pothier, as he is sometimes, Pothier is *à la mode* and takes the victory."⁸ Some years later the law clerk to the upper house or legislative council remarked that Pothier was "in fact, the oracle par excellence of the civil ... law in Lower Canada."⁹

⁴ These two laws (6 July 1711) are printed in William B. Munro, *Documents Relating to Seigniorial Tenure in Canada 1598–1854* (Toronto: Champlain Society, 1908) at 91–94.

⁵ See Hilda Neatby, *The Administration of Justice under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937) at 15–17, 155–160. The better reasoned opinion, I think, is that unregistered ordinances, if enforced as the *Code Marchand* was, were valid. For discussion, see Jean-Gabriel Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962) at 15–20 and especially Jean-Maurice Brisson, *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867* (Montréal: Éditions Thémis, 1986) at 34–39, 58 note 112. The Judicial Committee of the Privy Council ultimately decided in the opposite sense: *Hutchinson v. Gillespie* (1844), 4 Moo. P.C. 378; *Symes v. Cuvillier* (1880), 5 App. Cas. 138. It should be noted that the argument that non-registration meant invalidity was raised only after the Conquest.

⁶ See, e.g., Joseph-François Perrault, *Questions et réponses sur le droit civil du Bas Canada* (Québec: C. Le François, 1810); N.-B. Doucet, *Fundamental Principles of the Laws of Canada* (Montréal: John Lovell, 1841). Other names will appear in the text and notes.

⁷ Claude de Ferrière, *Corps et compilation de tous les commentateurs anciens et modernes sur la Coutume de Paris*, 2nd. ed., 4 vols. (Paris: Nicolas Gosselin, 1714). The edition of Pothier I have used is M. Bugnet, ed., *Oeuvres de Pothier*, 11 vols. (Paris: Cosse & Marchal, 1861). Several editions of Pothier were published in the early nineteenth century. De Ferrière's last edition appears to date from 1788. See John E.C. Brierley, "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14 McGill Law Journal 521 at 539. For a brief but interesting treatment of Pothier's work in relation to the law of French Canada see Robert Taschereau, "Pothier" (1943) 3 *Revue du Barreau* 165.

⁸ *Notes diverses sur le Bas-Canada* (Village DeBartsch: J.-P. Boucher-Belleville, 1835) at 36, in my translation.

B. Values

For ease of communication the higher values, as perceived by the majority of French men of law in the eighteenth century, can be divided into three categories: equity in contracts, the link of the family to its often traditional lands, and fair protection for vulnerable members of the family. Notions of equity in the contractual realm included usury laws against excessive interest on loans¹⁰ and provisions for protection of debtors: for example, the requirement of formal written proof of debts exceeding 100 *livres* (about £5 sterling) and the short prescriptions to collect for wholesale and retail sales, of twelve and six months respectively.¹¹ By far the most distinctive concept, compared to contemporary English and later Quebec law, was that of *lesion*. In theory (i.e., it seems to have been of little practical importance),¹² an injured party in certain real estate contracts, such as sale, purchase, exchange and physical partition between co-proprietors (e.g., co-heirs) could nullify the agreement if he or she had made an extremely bad bargain.¹³ Pothier explained the rationale thus: when rough equality was not achieved “and one of the contracting parties gives [much] more than he receives, the contract is void, because it sins against equity, which must govern.”

A second important realm of higher morality facilitated retention of family real estate within a family, an absolutely crucial motive de Ferrière claimed in French law. Thought to foster an ordered society, it reflected the aristocratic and gentry desire to exhibit ancient lineage. The *Coutume* was full of rules helping to preserve a family’s link to its lands. Spouses, for example, could not inherit from or make contracts with each other after marriage.¹⁴ Sale of a seignury required payment of a fine of one-fifth the price to the crown.¹⁵ A second rule aimed at discouraging land speculation established mutation fines of one-twelfth the price (*lods et ventes*), payable by the buyer to the seigneur, when *roture* (granted) land was sold to non-family members.¹⁶ The *retrait lignager*, treated below, went to the extreme of

⁹ Edward Lewis Montizambert, *A Lecture on the Mercantile Law of Lower Canada* (Montreal: Lovell & Gibson, 1848) at 12. Pothier had by far the greatest influence among the local law officers as well. See, e.g., Attorney-General Jonathan Sewell to Milnes, 4 April 1801, Q series, MG 11, vol. 86, National Archives of Canada [hereinafter NAC].

¹⁰ See *infra* at notes 161–71.

¹¹ Articles 126 and 127 of the *Coutume*. The English limitation of action delay was six years.

¹² For example, it was not even mentioned by two *canadien* legal scholars; see Henry [sic] Des Rivières Beaubien, *Traité sur les lois civiles du Bas-Canada* (Montréal: Ludger Duvernay, 1833); Jacques Cremazie, *Manuel des notions utiles sur les droits politiques, le droit civil, la loi criminelle, et municipale, les lois rurales etc.* (Québec: J. & O. Cremazie, 1852).

¹³ Pothier, *supra* note 7, vol. II at 20–23. The victim in partitions had to have been done out of more than a quarter of his or her entitlement, by value. The standard for the other contracts was more than one-half.

¹⁴ Property deriving from the maternal line went on death to maternal collaterals, even when paternal collaterals in a closer degree existed (and vice-versa). Lands inherited by a spouse did not fall into the community.

¹⁵ One third of the fine was remitted upon prompt payment.

¹⁶ The seigneur, within forty days, was entitled to repossess sold habitant (“roture”) lands by paying the stipulated price to the buyer. This *retrait roturier* was designed to afford the seigneur protec-

allowing potential heirs to buy back any real estate, within a year and a day, by paying the price to the purchaser and compensating him or her for some, but only some, expenses.

Lesion and the *retrait lignager* are central symbols in this study. Of like importance was the notion of *legitim* which laid down that a child was entitled to one half of what he or she would have received on a succession, regardless of any will or any gifts made by the deceased. To make up his or her *legitim*, the heir could recapture property or money from legatees or donees.¹⁷ For obscure reasons the *Quebec Act* contained a proviso, unasked for and seemingly unjustified in Britain's parliament, to the "Property and Civil Rights" clause: that it shall be lawful for every person, owning lands or goods, to "bequeath the same at his or her death, by his or her last Will and Testament." It might be thought that the English principle of testamentary freedom, entirely against the moral notions of *canadien* and French succession laws, had been introduced. The *legitim*, however, had not been expressly eliminated and serious doubts soon arose. A local statute of 1801 abolished *legitim* in the case of wills but doubts whether this applied to gifts remained until codification.¹⁸

A third area of higher morality involved numerous rules attempting to insure equity among members of the family, including protection of the vulnerable. With a partial exception in the case of seigneurial real estate,¹⁹ the law of abintestate succession, that is, without a will, divided the property of the deceased among the children in equal proportions, regardless of age or gender. This of course contrasted strikingly with the English rule of male primogeniture, whereby only the eldest son inherited the landed estate. Of considerable importance was customary dower, which prevailed where there was no marriage contract.²⁰ It gave the widow a life estate, with the children having ultimate ownership, in one half of her husband's real estate, whether seigneurial or *rouure*.²¹ These rights had preference over the claims of ordinary creditors and could not be renounced by the wife after marriage (e.g., in a contract of loan), a rule which discouraged the extension of credit by merchants to married men.²²

tion against low, simulated prices, which affected the amount of the *lods et ventes*.

¹⁷ Pothier, *supra* note 7, vol. I at 370–73; Thomas McCord, *Synopsis of the Changes in the Law Effected by the Civil Code of Lower Canada* (Ottawa: G.E. Desbarats, 1866) at 6.

¹⁸ Statutes of Lower Canada, 1801, c. 4; Attorney-General Jonathan Sewell to Milnes, 2 April 1801, CO 42, MG 11, vol. 116, NAC; T.K. Ramsay, *Notes sur la Coutume de Paris* (Montréal: La Minerve, 1863) at 74–77; McCord, *ibid.* at 6. For a sophisticated treatment of freedom of willing in Quebec, see André Morel, *Limites de la liberté testamentaire dans le droit civil de la Province de Québec* (Paris: Librairie générale de droit et de jurisprudence, 1960).

¹⁹ The oldest son of the seigneur inherited the manor house and half the remainder of the seigneurie. The other half was shared among the other children, with moveable property divided equally among all children.

²⁰ Or was not eliminated or modified in a marriage contract. Where such an agreement existed it often included a clause of "conventional dower" (ousting customary dower) in which a sum of money, secured by *hypotheque*, was promised to the wife, exigible upon the husband's death.

²¹ On customary dower see Mireille D. Castelli, "Le douaire en droit coutumier ou la déviation d'une institution" (1979) 20 *Cahiers de Droit* 315. Castelli points out that the customary dower was in part an illogical exception to the protection of lineage property.

Under *canadien* and French laws in 1774, married women's property interests were far better protected against spousal exploitation than in England, where only an atrophied form of dower prevailed and the husband became effective owner of his wife's property.²³ The Quebec standard marital régime, unless varied by pre-nuptial marriage contract, was community of property. Although administered by the husband, the community assets, specifically chattels and most real estate acquired after marriage, were commonly owned.

The married woman had her material interests protected by the civil law, but this was an exceedingly authoritarian, paternalistic régime. The husband alone could decide the common residence. His wife in general could not make contracts or sue in court without his consent. The father exercised parental authority over children of minor age, whether in administering punishment, assenting or not to marriage, or in permitting the child to leave home. He even had custody pending his wife's separation suit. The supposed feudal simplicity of the marital relationship was well captured later by the codifiers, in Article 174: "A husband owes protection to his wife; a wife obedience to her husband." This contract of "vassalage" would not be radically altered until the 1960s.

II. The Administration of Civil Justice, 1775–91²⁴

In the Quebec of the 1780s, hiring a horse could be a risky undertaking, as a man named Mackenzie found. While dining *en route* he discovered that another traveller had appropriated his transport, later learning that the "borrower" had driven the animal so hard it died. The owner of the horse sued the innkeeper. Out of curiosity Mackenzie, who was not a party to the suit, wandered into the Montreal courtroom of seigneur René-Ovide Hertel de Rouville, a judge renowned for authoritarian tendencies, not to mention choleric temperament and chronic intoxication on the bench. After the evidence was complete, de Rouville spotted the ill-fated Mackenzie, announced that he who had hired the horse obviously bore legal liability for the loss and immediately entered judgment against him.²⁵

This vignette captured the essence of civil justice in Quebec during the years 1775–91, and to a degree afterward, namely its grossly uncertain nature which owed much to the absence of professional training for those appointed to the colony's two main civil courts, the Common Pleas for the districts of Quebec and Montreal.²⁶ It

²² E.g., *Le canadien*, 26 December 1807.

²³ Lee Holcombe, *Wives and Property* (Toronto: University of Toronto Press, 1983), ch. 1–3.

²⁴ Unless otherwise specified the principal sources for the following are letters published in the *Quebec Herald* (especially by the articulate "Junius," 23 February 1789 - 3 March 1791); the several complaints of merchants, or descriptions of such, reproduced in CD(1); [James Monk], *State of the Present Form of Government of the Province of Quebec* [1789], 2nd ed. (London: n.p., 1790), Appendices 14–16 (evidence from the 1787 inquiry into the administration of justice); *The Paper Read at the Bar of the House of Commons by Mr. Lymburner* (Quebec: William Moore, 1791); Neatby, *supra* note 5, *passim*. Quebec merchant Adam Lymburner was the agent-lobbyist for the *canadien* and English reform committees.

²⁵ Neatby, *supra* note 5 at 144–45; H. Neatby, *Quebec: The Revolutionary Age 1760–1791* (Toronto: McClelland & Stewart, 1966) at 217.

²⁶ In 1787 the judges with their occupational background were (Quebec District) Dr. Adam

owed a great deal also, as Evelyn Kolish has convincingly demonstrated, to the change in legal metropolis after the Conquest. This resulted in two legal systems vying for supremacy in the political arena and the courtroom, as well as in most judges of a British cultural background attempting to administer the unfamiliar civilian system.²⁷ Other profound determinants of uncertainty, besides the nature of the civil law's sources, were the usual class frictions between gentry and bourgeoisie and the thorough politicisation of the judiciary.

The so-called French party dominated the courts of common pleas and the appointed Legislative Council up to 1792.²⁸ This political group, consisting mainly of *canadien* seigneurs, and certain highly placed English governmental officials with pretensions to aristocratic status, stood for authoritarian government, that is "le système des généraux" implemented by governors Sir Guy Carleton (1775–1778) and Sir Frederick Haldimand (1778–1784) during the American Revolutionary War. The system of the generals included hostility to the very notion of *habeas corpus* and to political dissent; secrecy in government, including the legislature;²⁹ and determined opposition to an elected assembly which reformers pressed for in these years. The French party also looked upon the *Quebec Act* as a "sacred Charter" granting *canadiens* cultural autonomy and as a brilliant political stroke guaranteeing the security of the colony, as had been proved early in the colonial American war.³⁰ The *Act* had to be protected in the courts and the legislature from any significant changes, particularly to feudal land tenure and traditional civil laws.

Mabane, army surgeon; Thomas Dunn, merchant; Pierre-Meru Panet, government official and (Montreal District) Edward Southouse, government official; John Fraser, army officer; René-Ovide Hertel de Rouville, government official. As in the case of all judges until 1843, these men and the chief justices held their offices at pleasure.

²⁷ Evelyn Kolish, "The Impact of the Change in Legal Metropolis on the Development of Lower Canada's Legal System" (1988) 3 *Canadian Journal of Law and Society* 1. See also her "Nationalismes et conflits de droits" *supra* note 1 *passim*, but particularly chapter 3.

²⁸ While this essay deals primarily with the substantive law, some readers may need to know the basic facts about court structure. From 1777 to 1794 the Montreal and Quebec courts of common pleas, consisting of three judges each, exercised civil law jurisdiction. The chief justice sat on neither. Appeals could be taken to the Court of Appeals, which was the governor and legislative council acting in a judicial role (after 1791 the Executive Council), where the amount in issue exceeded £10 or future rights (e.g., fees of office) were in dispute regardless of the amount. Appeals could be taken to the Plantations Committee of the [British] Privy Council (then to its Judicial Committee in and after 1833) when the amount exceeded £500 or future rights were in question. In 1794 the two courts of common pleas were replaced by two independent courts of king's bench, each with four judges headed by a chief justice of the province, sitting in Quebec and Montreal. The courts each held four superior terms a year for cases exceeding £10. "Provincial Judges" were appointed for the inferior districts (e.g., Gaspé, Trois Rivières, St. Francis, created in 1823) with limited jurisdictions. The appeals structure remained essentially the same. In 1849 the system was again radically changed. A superior court of first instance consisting of eighteen judges sitting in seven judicial districts (e.g., the newly created Outaouais) replaced the queen's bench courts. A Court of Queen's Bench, sitting in Quebec and Montreal, and consisting of the chief justice of Lower Canada and four other judges, was to function as the new Court of Appeals. Appeals to the Judicial Committee remained the same. See Statutes of the Old Province of Quebec (hereafter S.O.Q.) 1777, c. 1; S.L.C. 1794, c. 6; S. Prov. C. 1849, cc. 37 and 38.

²⁹ Except on occasion the legislative debates were closed to the public from 1775–1791.

³⁰ See particularly Haldimand to Germain, 25 October 1780, CD(I) at 720.

Despite its name the French party was led, in council and on the bench, by a Scot, Dr. Adam Mabane, a former army surgeon and judge since 1764, Carleton's most trusted councillor in the 1770s and Haldimand's virtual "prime minister." Not surprisingly, this protector of *canadien* feudalism pursued an aristocratic lifestyle, entertaining "quality" at his landed estate of Woodfield in Sillery. As Mrs. John Graves Simcoe of Upper Canada remarked, Mabane was living "what is called most hospitably, far beyond his fortune."³¹ He exercised power behind the scenes, in council and from the bench, where he gave dozens of conservative decisions and which he used from time to time to attack legal and political reformers. The Montreal bench included two French party activists: John Fraser, Mabane's lieutenant on the council and de Rouville, a leader in the political campaign against introduction of an elected assembly and of English commercial law. On the Quebec court sat merchant-councillor Thomas Dunn, a party supporter except on certain matters to do with commerce.

The English merchants, with varying degrees of support from their *canadien* reformer allies, depending on the issue, fought in council, newspapers, pamphlets, petitions and otherwise to eradicate the many seemingly anti-commercial features of the *Coutume*. They were irked by its restrictions on the oral proof of debt, its absence of, to them, adequate bankruptcy provisions, its short prescriptions and the rules of estate administration which allegedly favoured heirs over business partners and creditors. Most poured vitriol on the system of 'secret' *hypothecs*, which were like English common law mortgages but allowed preferential payment rather than transfer of title upon default. *Hypothecs* were general, applying to all real estate owned by the person obliged at the time of obligation and all "immoveables" he or she thereafter acquired. They arose from monetary judgments of the courts, by operation of law alone (e.g., customary dower) and from notarial deeds specifying debt, as in a loan agreement. Merchants had no sure way of knowing what were the actual charges on lands and buildings owned by prospective borrowers, because there were no land registry offices, despite the merchants' continual campaign for them.³² Spokesmen for the "Commercial Interest" writing to and in the *Quebec Herald* complained bitterly of purposeful frauds: multiple deeds of *hypothec* entered into on the same day or days, inflated sums of conventional dower in marriage contracts, fictitious deeds to provide candidates for the priesthood with a real property interest as supposed *hypothec* creditors, akin to mortgagees, to meet the entry requirements. Much of this probably had some justification.³³ But the English merchants' response

³¹ J. Ross Robertson, ed., *The Diary of Mrs. John Graves Simcoe* (Toronto: William Briggs, 1911), Coles Publishing reprint (1973) at 56 (30 November 1791).

³² See CD(I) at 916–17, 920 (including the letter of 23 January 1787). Many *canadiens* active in politics, e.g., the French party seigneurs, opposed registry offices as costly, unworkable and exposing to public view the financial "secrets and situations of Families" [CD(I) at 905], an interesting example of the often noticed "family individualism" in pre-Quiet Revolution francophone Quebec. Registry offices existed in Scotland and several American states. A representative group of Quebec City merchants (1787) were willing to have the law require a searcher to swear an oath of interest and to limit viewing to relevant extracts: *ibid.* A detailed study of secret *hypothecs* is S. Normand & A. Hudon, "Le contrôle des hypothèques secrètes au XIXe siècle," (1990) *Recueil de droit immobilier* 169.

³³ Kolish makes the good point that we really do not yet know how anti-commercial, if at all,

revealed insensitivity to the high value *canadiens* tended to place on protecting vulnerable members of the family. Additionally there was pure prejudice directed against an unfamiliar régime, which helped explain their particular insistence that the *Code Marchand* was out of date, and not in force compared to the highly pro-commerce judgments in England of Lord Mansfield. But here another factor was at play: acceptance of the *Code Marchand* would undermine the main goal of having parliament introduce the commercial laws from England *in toto*.

The merchants had managed to gain a few concessions from the council. In 1777 an ordinance enacted the English law of evidence in commercial matters and introduced imprisonment for debt. A law of 1785 provided for optional jury trials in cases of civil wrong or delict, akin to tort, and for contracts "of a Mercantile Nature only, between Merchant and Merchant."³⁴ These changes hardly satisfied the merchants. Jury trials were not available, even in commercial matters, where one party was not a merchant. French party judges severely restricted the scope of the evidence rule and, unlike England, imprisonment was not generally available for defaulting debtors. Instead it depended on the plaintiff swearing an affidavit that his or her debtor was about to abscond.³⁵

English merchants and their *canadien* allies were incensed by the uncertainty of the laws governing business transactions and their perception of grossly, unprofessional, partisan conduct by the judges. Both were revealed in great detail during the inquiry into the administration of justice conducted by Chief Justice William Smith in 1787, assisted by a bellicose Attorney-General James Monk, acting as the merchants' counsel. London did nothing with the thirteen thick volumes of damning evidence, except to fire Monk in 1789 and then return him to office in 1792. These volumes, as summarised by Monk, and dozens of letters to the newspapers in this period, provide the basis for judging the merchants' complaints about the courts of common pleas.

Instances of judicial misconduct were legion. Until 1787 when compelled to do so by ordinance, judges seldom gave reasons for decisions. Delays were inordinate, parties arbitrarily denied hearings, French party lawyers favoured *ex parte* proceedings, etc. And as the last mentioned complaint suggested, the judges at times exhibited personal, political and pro-gentry class bias. A telling incident involved Fraser, who refused to accept merchant James McGill's use of an account book as proof that he owed no money to retired Colonel John Campbell. In Hilda Neatby's words, Fraser "taking from his pocket a letter from the plaintiff, a personal friend, assured the court that Colonel Campbell was incapable of a dishonourable action."³⁶

were, for example, the absence of registry offices and the operation of the seigneurial régime: "Le Conseil législatif et les bureaux d'enregistrement (1836)" (1981-82) 35 RHAF 217. Dealing with the merchants' complaints did not mean agreement with their value system or that they were always correct in their assessments of consequences. The role of notaries in all of this remains to be studied.

³⁴ S.O.Q. 1777, c. 2, ss. 1, 7, 22; S.O.Q. 1785, s. 9.

³⁵ On this last subject see Evelyn Kolish, "Imprisonment for Debt in Lower Canada, 1791-1840" (1987) 32 McGill Law Journal 602 at 604-09.

³⁶ Neatby, *supra* note 25 at 217. For a slightly different example (or a slightly different version of the same one) see, *Quebec Herald*, 20 April 1789 (letter of "Junius").

Inconsistency in decision making was almost a daily experience in litigation. The courts regularly contradicted each other or themselves on procedure, bills of exchange, evidence, seizures before judgment, insolvency and much more. The judges in any given case might accept arguments based on the *Coutume*, even where not appropriate, on Roman law, English law or, above all, personal notions of equity. Incoherence often characterised the Quebec court, but the situation was utterly chaotic in the District of Montreal. Fraser angered the merchants by insisting that virtually all cases, even those involving proof of business transactions, were to be decided by the *Coutume*. Edward Southouse proclaimed in court that “he had no occasion for a knowledge of French law ... as his conscience ... guided his judgments.” In one case Southouse, unable to understand the arguments, had the defendant’s lawyer draw up his written decision.³⁷ Mr. Justice de Rouville’s legal learning was sufficiently illustrated in the Mackenzie case!

The Court of Appeals afforded no relief. Until Loyalist William Smith, Chief Justice of Quebec and formerly Chief Justice of New York, took control late in 1786, it applied *canadien* or English law depending on whether it was composed of a French party majority or a majority of English legal reformers, such as merchant William Grant and Deputy Postmaster-General Hugh Finlay. Smith only exacerbated matters in his first major judgment, *Gray v. Grant* (1786), when he interpreted the *Quebec Act* to mean that in any litigation between “old subjects” (i.e., residents of British origin) English law was to prevail.³⁸ The decision enjoyed popularity among many anglophones, although a short-lived one.³⁹ This judgment, part of Smith’s anglicisation scheme,⁴⁰ implied that parliament in 1774 had resurrected the archaic, complex system called “personality of laws,”⁴¹ which had prevailed on the continent from early medieval times and that parliament had abandoned the territorial principle

³⁷ Evidence of William Dummer Powell, corroborated by several witnesses to the Inquiry of 1787; Neatby, *supra* note 5 at 121.

³⁸ The notes of plaintiff Alexander Gray on the judgment are preserved in the “*Gray v. Grant*” folder, MG 23, G II 15, NAC and printed in Leslie F.S. Upton, ed., *The Diary and Selected Papers of Chief Justice William Smith 1784–1793*, 2 vols. (Toronto: Champlain Society, 1963/1965), II at 208–11 (hereinafter *Gray’s Notes*). See also Neatby, *supra* note 5 at 223–28; Leslie F.S. Upton, *The Loyal Whig: William Smith of New York and Quebec* (Toronto: University of Toronto Press, 1969) at 173–77.

³⁹ Secondary references in preceding note; Finlay to Nepean, 15 January 1787, Q series, vol. 28; same to same, 15 March 1787, CD(I) at 846; Monk, *supra* note 24; Lymburner’s Paper. Smith’s doctrine, although newly applied in court, seems to have long been assumed by at least some of the English community.

⁴⁰ This was aimed at making British North America a magnet for American immigration by, e.g., abolishing feudal tenure, opening the townships for settlement and establishing a non-sectarian university. In a letter to Under Secretary of State, Evan Nepean, Smith frankly admitted his political aims: “I gave some scope to the Argument *ab inconvenienti*, in stating the consequences of the contrary opinion, as injurious to ... general commerce ... by preventing British Accessions to the Country, and driving out of it the Thousands of Loyalists that have already taken refuge here, it would be reduced to a state of Debility, exposing it to the first Power, that might think it worth the trouble of an Invasion:” 2 January 1787, Upton, *supra* note 38, vol. II at 213.

⁴¹ The concept derived from the practice of the early medieval Frankish empire whereby a person’s rights and duties were those of his or her tribe, rather than those of the territory of residence.

without express words.⁴² Furthermore, the *Act* itself specified that in property and civil rights cases “all Matters of Controversy” and “all Causes that shall hereafter be instituted in any of the Courts of Justice” were to be determined by the “Laws of Canada.”⁴³ The courts of common pleas, led by a politically outspoken Dr. Mabane, adamantly refused to follow *Gray v. Grant*. As a result reversals on appeal became commonplace, even after the British law officers cast great doubt on the doctrine.⁴⁴ Ironically, these included several instances where verdicts of English juries, applying the *Coutume* in a manner satisfactory to the English merchants, were overturned.⁴⁵

From 1784 to 1791 the most intense political issue in Quebec revolved around the English merchants’ 1784 petition to the crown for an elected assembly and introduction of English commercial law.⁴⁶ They were bitterly opposed by the French party. Most English officials evidently favoured legal reform but not representative government. The main allies of the petitioners came from the *canadien* bourgeoisie of the cities: merchants, professionals and shopkeepers. Two of the most active later became even more prominent in politics: Quebec lawyer Jean-Antoine Panet and Montreal notary-surveyor, Joseph Papineau.⁴⁷ *Canadien* and English lobbying committees established in Quebec and Montreal, translated the petition, published a French language pamphlet of justification in 1785,⁴⁸ obtained signatures and sent a common agent to lobby parliament (1787–1791), Quebec merchant Adam Lymburner. The reform committees worked harmoniously during the local newspaper “war” of 1788–89. This bourgeois alliance suffered strains, particularly in 1787–88 when the English merchants at first applauded *Gray v. Grant* and upped their demands for legal reform to the point where some *canadien* committee members feared that such cherished notions as customary dower might be under challenge.⁴⁹

⁴² Smith had his own interpretative presumption that “It is as necessary to have express words to take away the English laws from Englishmen as to Grant the old Canadian Law to Canadians,” Gray’s Notes, *supra* note 38.

⁴³ It appears from Gray’s Notes that Smith cited only two positive textual reasons: the second preamble in the Act which referred to the interest of *canadiens* enjoying *canadien* law and the beginning of the Property and Civil Rights clause, which guaranteed “His Majesties Canadian Subjects” in quiet possession and title to their property. For a usually persuasive and detailed critique of the judgment, see Alexander Gray to Melville, June 1787, “*Gray v. Grant*” file.

⁴⁴ The Law Officers’ grounds for doubt were i) the apparently clear wording of the Property and Civil Rights clause and ii) the early and uniform practice of the courts, 1775 to late 1786, in assuming the territorial principle applied, suggesting this was the legislator’s intention. See opinion of 3 August 1787, quoted in Neatby, *supra* note 5 at 226–27.

⁴⁵ Upton, *supra* note 38 at 191–92. While its demise has not yet been tracked, the Smith doctrine seems to have exercised little, if any, influence in the courts after his death in 1793. This was a good thing, considering the grave difficulties, being compounded every year by intermarriage, in determining who was a ‘new’ and who an ‘old’ subject.

⁴⁶ 24 November 1784, CD(I) at 742–52. The names of *canadien* subscribers were published by *Le canadien*, 19 August 1809.

⁴⁷ See Pierre Tousignant, *La Genèse et l’avènement de la Constitution de 1791* (Ph.D thesis, University of Montreal, 1971); Neatby, *supra* note 5, ch. 13–15.

⁴⁸ *Aux Citoyens et Habitants des Villes et des Campagnes de la Province de Québec* (Quebec: Brown, 1785, as reprinted by the Société bibliographique du Canada, Toronto, 1951).

⁴⁹ CD(I) at 902–09, 917–920; Quebec merchant Robert Woolsey to Morrison, 17 January 1787,

But it survived as a reasonably united force through the first general election, June 1792, under the *Constitutional Act* of 1791.⁵⁰

This became a crucial point in view of later conflicts over commercialising the civil law between the English party and the *parti canadien*, known as *patriotes* after 1826, during the successive leadership of Papineau/Panet (1792–1800), Quebec lawyer Pierre-Stanislas Bédard/Panet (1801–1812) and Louis-Joseph Papineau (1815–1837), Joseph's son. But the direct political ancestors of the *parti canadien* or *patriotes*, the *canadien* reformers of 1784–92, were anything but anti-commercial in their approach to law. Article 5 of the petition, as much their petition as the English merchants', requested that the "Commercial Laws of England, be declared to be the Laws of this Province," while the Quebec *canadien* committee (1788) instructed Lymburner to press this issue as absolutely imperative in the interests of trade.⁵¹ The French language pamphlet of 1785 lauded the laws of England as those of "the greatest commercial kingdom in the world" and characterised the *Coutume de Paris* as made for a feudal society. *Canadien* reformers obviously did not idolise the *Coutume*, as the *parti canadien* would come to do. They willingly considered a heavy dose of commercialisation of the laws, provided certain traditional values with regard to the family (e.g., customary and conventional dower) were protected. Had the bourgeois alliance survived the early years of Lower Canada after 1791, one might have expected a host of commercialising changes; to make bills of exchange or promissory notes more negotiable; to increase the ambit of jury trials and English rules of evidence; to lengthen prescriptions in cases of sale; to enact pro-creditor bankruptcy legislation;⁵² to eliminate or restrict some extreme elements of seigniorial tenure (e.g., the *retrait lignager*) and even, perhaps, to establish land registration.⁵³ But almost as Lower Canada's legislature began its life the bourgeois alliance began to die.

IV. From the *Constitutional Act* (1791) to the Rebellions (1837–38)

A. Demise of the Bourgeois Alliance

The *Constitutional Act* of 1791⁵⁴ did not amend the civil law provisions contained in the *Quebec Act*, 1774. The constitution then established in each Canada, Quebec

Lindsay-Morrison Papers, MG 23, G III 5, NAC; French party seigneur Joseph-François Cugnet to de Lavaltrie, 1 February 1787, Collection Baby, MG 24, L.3, vol. 10, NAC; Joseph-François Perrault to Perrault l'ainé, 18 October 1787, quoted in Kolish, "Le débat sur le droit privé", ch. 2 at 7; same to same, 2 August 1790, Collection Baby, vol. 11; Montreal *Canadien* Committee to Lymburner, 26 November 1787, *ibid.*, vol. 48; Quebec English Committee to same, 8 November 1787, Chatham Papers, MG 23, A.2, vol. 10, NAC; Attorney-General James Monk to Maseres, 3 November 1788, Monk Family Papers, MG 23, G II 19, vol. 2, NAC.

⁵⁰ 31 George III, c. 31. See e.g., *Quebec Gazette*, 29 December 1791, 17 May 1792; *Montreal Gazette*, 24 May, and 14 July 1792.

⁵¹ 29 October 1788, Q series, vol. 43.

⁵² See CD(I) at 917.

⁵³ See *supra* notes 32–33.

⁵⁴ 31 George III, c. 31.

being divided along the Ottawa River, consisted of a governor, appointed legislative and executive councils, and an elected assembly. The latter had no positive power, to implement French tenure in the Eastern Townships, for example, because any controversial initiatives from the lower house were almost always blocked in the upper, dominated by English and very conservative *canadien* councillors (e.g., old family seigneurs). It did, though, possess a veto power, for example, against anglicizing bills such as one for schools in 1801 and another looking to the abolition of seigneurial tenure in 1805.⁵⁵ More important in the evolution of *canadien* civil law was the impact of the French Revolution, begun in 1789, particularly as it threatened to be exported beyond France's borders, and especially after war was declared in early 1793 between Great Britain and France.

Between late 1792 and 1797, the bourgeois alliance in Quebec of anglophone and francophone reformers died. Many forces were at work: the lesser need for allies now felt by *canadien* politicians, the ultra-conservative attitudes of pre-industrial farmer-electors and the gradual demise of *canadiens* engaged in import-export commerce. One development of prime importance was the shattering impact of the French Revolution on the psyche of the English minority, outnumbered by about 15–1, which I call their "garrison mentality." Joseph Papineau had been the active friend of English party leaders, merchants John Richardson and James McGill, in the first general election, held in the spring/summer of 1792.⁵⁶ But by early 1793 the English leaders were referring to Papineau and his followers as "being infected with the detestable principles now prevalent in France."⁵⁷ By the second general election of 1796 the alliance had broken down completely⁵⁸ and shortly after, Richardson, then the Montreal magistrate in charge of counter-intelligence for the area, began regularly in private to accuse Papineau of treason, for working hand in glove with French authorities posted to the United States.⁵⁹ The breakdown of the coalition meant that politics would henceforth split largely along ethnic lines. There could no longer be a bi-ethnic force to liberalise the constitution, for example, by establishing an independent judiciary.

The breakdown of the bourgeois alliance also resulted in the *parti canadien* becoming far less interested in commercialising the law and much more prone to protect traditional *canadien* laws and customs.⁶⁰ The divorce in mentality between

⁵⁵ *Journals of the House of Assembly of Lower Canada* [hereinafter *JHALC*] for 1801, *passim*.; *Quebec Mercury*, 23 February 1805.

⁵⁶ *Montreal Gazette*, 24 May, 14 June 1792; Pierre Tousignant, "La Première campagne électorale des *canadiens* en 1792" (1975) 8 *Histoire sociale/Social History* 120 at 133–44.

⁵⁷ Richardson to Alexander Ellice, 16 February 1793, ed. F.H. Soward, (1923) 4 *Canadian Historical Review* [hereinafter *CHR*] at 260–63. See also McGill to John Askin, 20 January 1793, in Milo M. Quaife, ed., *The John Askin Papers*, 2 vols. (Detroit: Detroit Library Commission, 1928/1931), vol. I at 459–60.

⁵⁸ Tousignant, *supra* note 56 at 136.

⁵⁹ See e.g., Richardson to Sewell, 13 February, 6 April 1797, Sewell Papers, MG 23, G II 10, vol. 3, NAC. The English élite was of course in error here. While erstwhile *canadien* reformers like Papineau continued for some years to admire the ideals of the French Revolution, they had only revulsion for the atrocities it spawned and most certainly did not want Lower Canada conquered by France.

⁶⁰ It may be, too, that the profoundly hostile reaction to the French Revolution, which involved

erstwhile political allies was brought out by lawyer-M.P.P. Ross Cuthbert's attempt in 1805 to abolish the *retrait lignager*. This had entitled a blood relative of the vendor to repossess sold real estate within a year and a day, by paying the price to the buyer and compensating him or her for certain expenses, which however did not include money or labour expended to improve the property.⁶¹ The *retrait* did not protect vulnerable family members, did not operate to benefit farmers who bought or sold land, and introduced untold complexity into the law. It was clear, too, that the *retrait* was not generally thought to uphold vital *canadien* values, comparable, say, to customary or conventional dower.⁶² It was patently unfair, potentially at least to purchasers.

To support his Assembly motion Cuthbert argued that if a person bought a lot, then "expended on it £5000 in building a wharf or manufactory," he could be dispossessed, perhaps by "a cousin of the fiftieth degree, on condition of reimbursing the few pounds paid for the lot." Lawyer Berthelot d'Artigny and notary Louis Bourdages of the *parti canadien* maintained in opposition that "what had been long practised should be touched with caution; that the *retrait lignager* was a part of the law of the land, and that it had the good tendency of preserving in families the property they had long possessed." Cuthbert's motion that the bill be engrossed was defeated 31–6, the *parti canadien* clearly opting to uphold an extreme feudal privilege potentially damaging to commerce.⁶³ By the early months of 1805, then, the *parti canadien* had become defensive, indeed rigid in protecting the traditional laws, which were referred to by Bédard and his followers as a well-constructed "édifice," articulating the wisdom of the forefathers and to be kept almost entirely intact.⁶⁴ "Legislative paralysis" had begun, dooming for a generation any significant amendments to the civil law.⁶⁵

much radical legal change (abolition of feudalism, divorce, adoption, civil marriage, elimination of priestly tithes, etc.) among almost all educated *canadiens* by early 1793 made traditional values more precious to the political élite than they had been in the 1780s. The *patriotes* of the late 1820s and 1830s drew inspiration from the French Revolution of 1789 but after their defeat, 1837–38, the older hostile attitudes, which the seigneurs and clergy had never abandoned, rapidly re-asserted themselves among much of the middle class.

⁶¹ Pothier, *supra* note 7, vol. III at 260, 305, 356–59. Reimbursable expenses included those incurred to make the purchase (e.g., notary's fee) and to effect necessary repairs. The refusal to compensate for merely useful expenses was based on the idea that otherwise wealthy buyers could easily frustrate the family's desire to regain its lands, by making expensive improvements.

⁶² The drawbacks of the *retrait* had been obvious even to French party Judge John Fraser, who often refused to enforce it in the 1780s and to country merchants Bonaventure Panet and Pierre-Guil-laume Guerout, who had moved for its abolition in the first session of the legislature. See Neatby, *supra* note 5 at 118; JHALC for 1792–93 (7 March 1793). During the last decades of New France, its potency had been reduced: see R.C. Harris, *The Seigniorial System in Early Canada* (Milwaukee: University of Wisconsin Press, 1966) at 75. As for complexity, de Ferrière devoted 437 columns to explaining the *retrait*, with most exceeding 550 words: *supra* note 5, vol. II at 558–995.

⁶³ *Quebec Mercury*, 9 February 1805.

⁶⁴ *Ibid.*, 23 February 1805. For a striking example of conservative rigidity (1807) see Kolish, *supra* note 1 at 93.

⁶⁵ The phrase is taken from Kolish, *supra* note 27 at 6.

This prevented change but encouraged dispute. Time and again similar proposals were made and defeated in the provincial parliament. Recurrently, from 1805 to the 1837–38 Rebellions there were bitter conflicts in the legislature, newspapers and pamphlets, political speeches on or off the hustings and private conversations, between supporters of the *parti canadien* and the English party. The issues engaging most attention were abolition or retention of seigneurial tenure in general or its various incidents, such as the *lods et ventes*,⁶⁶ land registry offices (often involving general *hypothecs*),⁶⁷ and procedures for bankruptcy and debt collection.⁶⁸ There were also a host of less prominent conflicts, such as those involving customary dower.⁶⁹

As to general attitudes, there were the contradictory claims (1809) of lawyer-M.P.P. Denis-Benjamin Viger, *parti canadien* intellectual and Ross Cuthbert, one of the English party's assembly leaders. According to Viger the *canadien* civil law was characterised by its "beauty, wisdom and majestic simplicity."⁷⁰ Cuthbert savagely lampooned this Bédard-Viger "édifice" of clarity as being of medieval construction and therefore

most majestically, accommodated with ingeniously contrived trap doors, that play upon invisible springs ... and with numberless latent back stairs, and subterranean alleys, up and down, and round about, which, rights and wrongs may occasionally indulge in the very fascinating ... game of hide and seek.

And although not as yet documented, tensions between anglophones and franco-phones must have been recurrently increased whenever governmental officials and supporters began, as they often did, to think of replacing *canadien* with English law, as part of a general anglicisation program to foster internal security.⁷² Again, as a

⁶⁶ See, e.g., *Quebec Mercury*, 9, 23 February 1805, 23 March 1807; *Le canadien*, 26 December 1807; [Ross Cuthbert], *An Apology for Great Britain* (Quebec: J. Neilson, 1809) at 7–8; references in note 131 *infra*; Jean-Pierre Wallot, "Le régime seigneurial et son abolition au Canada" (1969) 50 *Canadian Historical Review* 367.

⁶⁷ See e.g., the 1805 petition from the Eastern Townships in CD (II) at 310; *Quebec Mercury*, 24 February 1806; "Petition from Quebec, for Union" (December 1822) in CD (III) at 137; "Address to Dalhousie from Montreal, 1824" in *ibid.* at 221; *Quebec Gazette*, 19 April 1827; references in note 131 below; Kolish, *supra* note 33.

⁶⁸ See, e.g., Hugh Gray, *Letters from Canada* (London: Longman, Hurst, Rees et al., 1809 — Coles Canadiana reprint, Toronto, 1971) at 120–23; *Quebec Mercury*, 24 February 1806; "Petition from Quebec, for Union" (*supra* note 67); Evelyn Kolish, "L'introduction de la faillite au Bas-Canada: conflit social ou national?" (1986–87) 40 *RHAF* 215; Kolish, *supra* note 35.

⁶⁹ See, e.g., the letter from an English resident printed in *Le canadien*, 26 December 1807 and Kolish, *supra* note 33 at 222.

⁷⁰ *Considérations sur les effets qu'ont produit en Canada, la conservation des établissements du pays, les moeurs, l'éducation, etc. de ses habitants* (Montreal: James Brown, 1809) at 27. *Le canadien* (11 March 1809) praised Viger's defence of "survivance" as a masterful work of scholarship and essential reading for *canadiens*.

⁷¹ Cuthbert, *supra* note 66 at 8. In a note referring to the *retrait lignager*, Cuthbert wrote that "a few cases have appeared within a short time, and the effect of one, was to extort an additional sum of money from the purchaser ... a very snug, if not a very majestic sort of trap."

⁷² This idea, for example, was firm government policy in 1810–11: Governor Sir James Craig to

manifestation of the “survance” ideology, the *parti canadien* or *patriotes*, emphasised at election time that the civil laws were sacrosanct.⁷³

These conflicts were of course part of the political confrontation (1805–1837) of agriculture, represented by the *parti canadien* or *patriotes* against commerce, a thesis first effectively enunciated by Donald Creighton in the 1930s and still a powerful interpretative tool.⁷⁴ The confrontation involved explosive disputes over taxation, notably land rates vs. import duties, and immigration which in the 1830s threatened French Canada demographically and brought the cholera; the reluctance of the Assembly majority to subsidise canal building after 1824; and the opposition that the majority showed to the initial stages of the railway era.⁷⁵

The tenor of the debate came through clearly from the dispute over immigration, mainly British, in 1832, when the Assembly succeeded in imposing a poll tax on immigrants to pay for their health care. Despite having just witnessed the first savage epidemic of cholera, English merchants and their spokesmen urged the *laissez-faire* case over this gross interference with the “influx of Emigrants ... a valuable import trade of the nerves and sinews of prosperity.” *Patriote*-M.P.P. Edouard-Étienne Rodier had a different point of view, which he expressed in a September 1832 speech:

It was not enough to send among us avaricious egotists, without any other spirit of liberty than that which could be bestowed by a simple education at the *counter*, to enrich themselves at the expense of the Canadians, and then endeavour to enslave them;—they must also rid themselves of their beggars and cast them by thousands on our shores ... [and] they must do still more, they must send us in their train pestilence and death.⁷⁶

Papineau set much of the political tone in the fifteen years before the Rebellions. He saw the merchants as a vile money-grubbing aristocracy out to reduce *canadiens* to proletarian servitude and as very dangerous anglicising opponents, capable of manipulating the imperial government into attempting to effect Canadian union in 1822 and able to have parliament pass the *Canada Tenures Act*, 1825, which provided, ineffectually, for voluntary commutation of seigneurial into English tenure.⁷⁷ Himself a “grand seigneur,” the Assembly Speaker and unchallenged *patri-*

Liverpool, 1 May 1810, CD (II) at 393; same to Ryland, 10 June 1810, Ryland Papers, Department of Rare Books and Special Collections, McGill University, Montreal; Chief Justice Jonathan Sewell’s “Observations” CD(II) at 401; Civil Secretary Herman Ryland to Peel, 11 July 1811, Robert Christie, *A History of the Late Province of Lower Canada*, 6 vols. (Quebec/Montreal: T. Cary/J. Lovell, 1848–55), VI at 251.

⁷³ In the general election of 1808, for example, *Le canadien* urged its readers to vote for *compatriotes* on the grounds that Parliament had intended the *Constitutional Act* to enable *canadiens* “to conserve their laws and their jurisprudence ...” (28 May 1808).

⁷⁴ See particularly D. Creighton, *The Empire of the St. Lawrence [1937]* (Toronto: Macmillan, 1956), ch. 6, 10. See also Fernand Ouellet, *Economic and Social History of Quebec 1760–1850* [1966, in French], trans. Institute of Canadian Studies, Carleton University (n.p.p.: Carleton Library, 1980), ch. 12, 13.

⁷⁵ E.g., “Camillus” [Adam Thom], *Anti-Gallic Letters* (Montreal: Herald Office, 1836) at 194. According to Thom the *patriotes* had “rejected every bill for opening railroads through the English Townships.”

⁷⁶ Both quoted in Creighton, *supra* note 74 at 274–76.

ote leader was something of a Jeffersonian democrat, dreaming of a rural arcadia of free and equal *canadien* farmers, guided by an enlightened élite, living under a benign seigneurial régime serviced by cottage industry. In this conception, highly capitalised commercial ventures were anathema. Papineau railed against banks, the British American Land Company (chartered 1833, with huge holdings in the Eastern Townships), the timber trade and more. In the mid-1830s he even went so far as to press the *patriotes*' agent in London to lobby for elimination of tariff preferences for colonial grain and timber! So long as Papineau held sway the civil law would not be commercialised.

B. Chaos in the Courts and Anglification

Despite professionalisation of the bench after 1791, with all appointees legally trained, complaints about uncertainty in the administration of civil justice continued to pour forth. Critical comments emanated not only from lawyers, politicians, newspapers of both language groups and English merchants but as well from travellers, English law officers and judges. Critics pointed to innumerable causes: the multiple, often contradictory sources of law; the archaic nature of the *Coutume*; near-absence of published case reports;⁷⁸ chicanery of lawyers; the functioning of the Court of Appeals, where one district's judgments were regularly overturned by the chief and his colleagues from the other;⁷⁹ and ignorance of the civil law under which laboured English judges, always a large majority until 1836⁸⁰ and a significant presence on the Lower Canadian Bench thereafter.⁸¹ For many *canadien* commen-

⁷⁷ 26 George IV, c.59. For a revisionist article claiming, in face of the proof, that before 1840 the English merchants in general did not desire the abolition of seigneurial tenure, see Gérald Bernier & Daniel Salée, "Appropriation foncière et bougeoisie marchande: éléments pour une analyse de l'économie marchande du Bas-Canada avant 1846" (1982-83) 36 RHAF 163, *passim* but particularly at 170.

⁷⁸ In the periods of the *Quebec* and *Constitutional Acts* there were only two one volume publications: *Pyke's Reports*, 1811 and *Stuart's Reports*, 1834.

⁷⁹ Such reversals were commonplace and probably owed a great deal to personal animosities, e.g., between Chief Justices Osgoode (1794–1801) and Sewell (1808–1838) on the one hand and Montreal Chief Justice Monk (1794–1824) on the other. See e.g., Attorney-General Sewell to Milnes, 28 October 1805, S series, RG 4, A. 1, vol. 88, NAC; *Quebec Mercury*, 28 December 1807. The problem was not entirely solved until the two co-equal king's bench courts were eliminated in the judicial reform of 1849.

⁸⁰ The districts of Montreal and Quebec each had three English judges, including the chief justice, and one *canadien* judge.

⁸¹ This criticism, levied mainly by *canadiens*, was never or almost never directed at Chief Justice Jonathan Sewell (see e.g., *Le canadien*, 27 August 1808) who had spent his first years in the colony (1789–1791) devoting much of his working time to a study of the *canadien* civil law (to Stephen Sewell, 1 January 1792, Sewell Papers, vol. 15). His crystalline thinking on non-politicised legal matters comes out perfectly in his 1810 analysis of the rules of pleading. The case (*Forbes v. Atkinson*, *Pyke's Reports* 40) would even now, I think, be profitable reading for procedure students in the Quebec law schools. Sewell's high reputation among *canadiens* as a civilian judge lasted for at least a generation after his death. See e.g., the statement of François Eventurel MPP during the codification debate in 1865: "... Hon. Jonathan Sewell, one of our greatest judges" (source referred to note 237 *infra* at 13).

tators,⁸² a large share of the blame lay with the English judges' purposeful attempts at anglicification.⁸³

The paucity of case reports and the inaccessibility of many manuscript court records may well work to conceal a much greater degree of judicial anglicification than scholars have yet detected. In many spheres, even of substantive law, anglicizing judgments abounded, only to be eventually dismissed as authorities when codification took place. Pierre-Stanislas Bédard, provincial judge at Trois-Rivières in 1820, believed that soon his compatriots would "have only English civil laws ... whether on form or substance, except those dealing solely with tenure and landed estates."⁸⁴ And the legally knowledgeable John Richardson in 1814 could describe the courts' crowning achievement since 1792 as "the judicious, temperate amalgamation of the French general jurisprudence, with English legal principles."⁸⁵ We certainly know that some who sat on the Bench were insensitive chauvinists. Justice James Kerr of the Quebec court reportedly declared on one occasion (1829) that *canadien* law was "unworthy of an English judge" and unrepentantly from the bench on another (1831) that "he did not know what the law of Lower Canada might be, as applicable" to the case before him.⁸⁶

Scholars are now sure that the English judges made inroads on the peripheries of the civil law. In an extra-judicial opinion on land law in the Townships, five of the six anglophone justices of the King's Bench concluded that descent and dower, and by implication such other areas as *hypothecs*, and servitudes, akin to easements on real estate (for example, rights of way), and conveyancing, were governed by English common law.⁸⁷ This ruling received imperial sanction in the *Canada Tenures Act*, 1825,⁸⁸ and again by the Court of Appeals in the 1830 case of *Paterson v. McCallum*, where Montreal Chief Justice James Reid, reversing provincial Chief Justice Jonathan Sewell, held that even pre-1825 land transactions in the Townships had been and still would be governed by common law, a judgment contrary to past practice and creating serious uncertainty among settlers.⁸⁹ English land law in the

⁸² Jurist François-Maximilien Bibaud in 1853, added anglophone courtroom lawyers as well. Kolish judged Bibaud's charge to have merit; *supra* note 27 at 25, note 70.

⁸³ See, e.g., references in note 79 above and the following: Osgoode to Milnes, 12 August 1799, Q series, NAC, vol. 83; Henry Allcock (C.J.L.C.) to Shee, 5 December 1806, *ibid.* vol. 101; *Quebec Mercury*, 23 March 1807; *Le canadien*, 19 December 1807, 28 August 1808; Gray, *supra* note 68 at 120-23; Cuthbert, *supra* note 66 at 7-9; Girod, *supra* note 8 at 28-30, 36; Anon., "De la codification des lois du Canada" (1846) 1 *Revue de législation et de jurisprudence* 337 at 338; Montizambert, *supra* note 9 (1848) at 25; *La Minerve*, 26 November 1835, 4 April 1857. See also Wallot, *supra* note 66 and Kolish, *supra* note 27 at 10-17.

⁸⁴ Bédard to Neilson, 1 July 1820 as quoted *ibid.* (in French) at 16.

⁸⁵ Richardson to Sewell, 21 February 1814, Sewell Papers, vol. III. Richardson, evidently, was not one who saw chaos in the administration of the civil law.

⁸⁶ Kolish, *supra* note 27 at 23, note 46. Kerr, a Scot, had practised in London prior to emigrating to Lower Canada in 1793 or 1794.

⁸⁷ Opinions enclosed in Milnes to Hobart, 1 July 1803, Q series, vol. 92, NAC.

⁸⁸ An editorial comment to the case cited in the next note (at 436), referring to the 1803 advice, claimed "There is every reason to believe that the declaratory act of 6th Geo. IV is not only in accordance with, but absolutely framed upon these opinions."

Townships was partially, then wholly repealed by local statutes enacted in 1829 and 1857.⁹⁰

C. Rules of Evidence, Practice and the Language of Writs

Two changes at least were made in the law of proof. Chief Justices Henry Allcock (1805–08) and Sewell decided in 1807 and 1811 that holograph wills, hand written by the signer but not witnessed, must be probated, despite the absence of any such requirement in the *canadien* legal tradition or in the *Quebec Act* provisions on wills.⁹¹ These controversial decisions permanently amended the law, as did Sewell's holding in an 1809 case, *Pozzer v. Meiklejohn*. The chief justice settled longstanding doubts on the ambit of the English laws of evidence in commercial matters, deciding that they applied to the business transactions of shopkeepers and artisans as well as merchants.⁹² But the area of civil procedure saw the most far-reaching attempts at anglicification.

During the first fifteen years or so of the nineteenth century there emerged an explosive political issue over the making and content of procedural rules to be followed by litigants.⁹³ The *parti canadien* claimed the governing law was that of Lower Canada. It followed that local statutes authorising judges to promulgate rules of practice⁹⁴ confined them to minor additions consistent with the letter and spirit of *canadien* law.⁹⁵ By contrast, the English judges, and particularly Chief Justices John Elmsley (1802–05), Sewell and Monk, assumed that replacement of the French by English courts after the Conquest had *ipso facto* eliminated *canadien* procedure. To them the *Quebec Act* of 1774 had restored only the substantive civil law and the delegating statutes empowered the judges to enact veritable codes of procedure, if that were thought necessary.

⁸⁹ Stuart's Reports 429; Manning, *The Revolt* (London: MacMillan & Co., 1962) at 318. Reid dismissed respondent's claim for a general *hypothec* flowing from a notarial obligation signed in 1816. In Reid's defence, section 8 of the *Quebec Act* exempting Township lands from *canadien* law as restored by the Property and Civil Rights clause was ambiguous.

⁹⁰ S.L.C. 1829, c. 72; S. Prov. C, 1857, c. 45.

⁹¹ Wallot, *supra* note 66 *passim*; Kolish, *supra* note 27 at 24, note 55. The *Quebec Act* stated that wills could be executed "either according to the Laws of Canada, or ... the Laws of England." Allcock's decision was roundly condemned by the *parti canadien*.

⁹² *Pyke's Reports* 11 and *Stuart's Reports* 122.

⁹³ For this issue see *Le canadien*, 1 August 1807 (reproduced in Wallot, *supra* note 66 at 375); JHALC for 1814, Appendix E (impeachment proceedings against Monk and Sewell); Brisson, *supra* note 5 at 58–65; Kolish, *supra* note 27 at 14–16 [particularly illuminating on Pierre Bédard's anger (1814–1820) at the introduction of English procedure]; 7 *Dictionary of Canadian Biography* (Toronto: University of Toronto Press) 782 at 786–87 (Sewell) [hereinafter *DCB*].

⁹⁴ The most recent was S.L.C. 1801, c. 7, s. 16.

⁹⁵ The *canadien* law of procedure, had the courts accepted it as being in force—would likely have included not only judicial precedents from the French régime but also the royal *ordonnance civile* (or *Code Louis*) of 1667. Even though it was not registered in the Sovereign/Superior Council, as Brisson proves, judges *circa* 1809 thought it had been: *supra* note 5 at 34–39, 58, note 112. The *parti canadien* claimed the ordinance was in force.

Acting upon this last assumption Chief Justice Sewell issued comprehensive rules of practice for the Court of Appeals and another set for the Quebec King's Bench in 1809. His example was followed two years later by James Monk in Montreal. The rules of practice of 1809 and 1811, heavily influenced by the Westminster common law model, contained a number of relatively uncontroversial provisions, such as those dealing with prerogative writs like *mandamus* and *habeas corpus*. But several others roused the fury of the *parti canadien*.

In 1814 the Assembly impeached the two chief justices. In various resolutions and in articles of impeachment, the majority complained that the new rules amended *canadien* law to the detriment of everyone but the judges. Specifics included the multiple requirements to deposit funds to cover future costs, e.g., for appeal, the introduction of the law of contempt and shortening several delays. The articles and supporting documents alleged that such provisions were not only oppressive but unconstitutional, in that the chief justices in pursuance of "traitorous and wicked purposes" had "usurped powers ... which belong to the Legislature alone."⁹⁶ The impeachments, not surprisingly, were dismissed by the Privy Council in 1815, following the report of a committee on which sat the chief justices of the Common Pleas and the King's Bench, a judge of the Court of Admiralty, the Chief Baron of the Exchequer and the Master of the Rolls.⁹⁷

Sometime in the late 1810s the King's Bench for the District of Quebec altered the traditional usage, no longer required by explicit statutory provision, of issuing writs in the language of the defendant, insisting on English only.⁹⁸ This change, confined to cases heard in the superior law terms, largely escaped public notice until 1825 when Judge Edward Bowen, on circuit in Kamouraska, extended the new rule to inferior sessions, by dismissing several suits where the writs had been drafted in French, the ground being that the defendants, although francophone, had been born British subjects.⁹⁹ This brought an angry *nationaliste* rebuttal from young law student, Augustin-Norbert Morin, at the beginning of his highly successful legal-political career, which culminated as co-premier of United Canada and as one of the codifiers.¹⁰⁰ Morin argued that Bowen's illegal move was part of a plot to entirely anglify court proceedings, a notion probably closer to truth than to paranoia.¹⁰¹ An

⁹⁶ Article 2 of the impeachment of Monk: JHALC for 1814, Appendix E at 54. The equivalent article (2 at 46) against Sewell was more bland. In addition to the legal charges Sewell was impeached on a number of political accusations as adviser to Governor Sir James Craig during the "reign of terror," 1808–1811. These were dismissed without enquiry by the colonial secretary.

⁹⁷ Christie, *supra* note 72, vol. II at 255–59.

⁹⁸ Writs in the defendants' language had been required from 1777 under S.O.Q. 1777, c. 2, s. 1 and S.O.Q. 1785, c. 2, s. 1. For reasons I cannot yet explain the Legislature repealed the requirement in 1801: S.L.C. 1801, c. 7.

⁹⁹ Kolish, *supra* note 27 at 16–17; *supra* note 1 at 152–55, 158 note 39. It is not clear how long the Bowen position prevailed in the Quebec district.

¹⁰⁰ See "un étudiant en droit" [A.-N. Morin], *Lettre à l'honorable Edward Bowen* (Montreal: James Lane, 1825—NAC pamphlet no. I-1185).

¹⁰¹ See, e.g., Kolish, *supra* note 27 at 16 where she quotes James Stuart (soon to be appointed attorney-general): "... the sole use of the English language in all writs, records, and written proceedings in His Majesty's Courts of Justice ... would be productive of the best effects, in contributing to anglify

initiative similar to that of Bowen had earlier been attempted in Montreal (1813) by a litigant. He failed when Justice James Reid ruled that it was perfectly proper for the king to communicate officially with his Lower Canadian French-speaking subjects in their native tongue.¹⁰² A like preliminary exception was dismissed in 1828, again by Reid as chief justice, on the ground that beneficial law must be given a liberal interpretation.¹⁰³ In the end neither Bowen's nor Reid's viewpoint prevailed, with the plaintiff having the option after 1867 to choose the language of the writ.¹⁰⁴

D. Illegal Seigneurial Exactions

Louis XIV's *Edicts of Marly*, 1711, enacted for New France alone, required that the seigneur grant land to capable farming applicants; on rents and conditions prevailing in the seigneurie.¹⁰⁵ While the legal status of the *Edicts* in Canada was unclear and abuses far from unknown, they at least established i) a form of rent control for new grantees and ii) the concept of seigneurial lands held in trust for future generations of farmers. In practice the intendant often gave complaining habitants swift and free justice to enforce what they saw as their rights.

There was no analogous office to intendant after the Conquest. Enforcement of the *Edicts* lay in the hands of the courts, if anywhere. From the farmers' point of view enforcement was certainly needed, because landlords regularly raised rents and imposed new conditions, e.g., one or two days' labour on the seigneur's private farm, or the obligation to grind grain at his banal mill. While not universal, rent-raising was general, with lay and ecclesiastical *canadien* seigneurs indulging in the practice. The main exploiters, of course, were English seigneurs who looked upon their feudal property not only as a route to social status but as a profitable commodity in which to invest. Attorney-General James Monk wrote in 1794 of the post-Conquest English seigneurs' firm assumption that they enjoyed "a legal right to concede how and on what Terms they thought proper."¹⁰⁶ But in the 1790s, and indeed until the 1820s–1830s, the provincial law officers and judges were just as firmly of the opinion that the *Edicts* had introduced rent control.¹⁰⁷ Not that this helped very much!

the country" (1824).

¹⁰² Maréchal Nantel, "La langue française au palais" (1945) 5 *Revue du Barreau* 201; Claude-Armand Sheppard, *The Law of Languages in Canada* (Ottawa: Information Canada, 1971) at 36–37.

¹⁰³ "An Advocate," *An Inquiry into the Meaning and Extent of Operation of the 10th Sec. of the 2d Cap. of the Ordinance of 1785* (Montreal: *Montreal Herald and New Montreal Gazette*, 1829) at 12.

¹⁰⁴ *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c. 3, s. 133. The same article of course entrenched the right of the defendant as well as the plaintiff to opt for either official language in his/her/its written (or oral) proceedings.

¹⁰⁵ These two royal laws, dated 6 July 1711, are printed in Munro, *supra* note 4 at 91–94.

¹⁰⁶ Monk to Dundas, 6 June 1794, CO 42, vol. 100, NAC.

¹⁰⁷ See references in notes 109–10 *infra*; Osgoode to Burland, 27 October 1795, CO 42, vol. 22, NAC; Kolish, *supra* note 27 at 6–7, 21, note 21; *Reports of the Commissioners Appointed to Inquire into the Grievances Complained of in Lower-Canada [1836]* (London: House of Commons, 1837) [hereinafter Gosford Reports], General Report, evidence, at 50 (re: case of 1818).

The problems for habitants attempting or contemplating enforcement of their rights were the cost and delays of the courts of king's bench and for a time doubts whether the intendant's policing powers had passed to the post-Conquest judiciary. Solicitor-General Jonathan Sewell got to the root of the problem for new grantees, old ones without contracts and even old ones with deeds clearly specifying their obligations. Sewell informed the governor that everything came down to the cost of litigation, particularly because future rights were always in issue. Hence these cases, however small the actual amount in question,¹⁰⁸ were invariably appealable to the Plantations Committee of the Privy Council in London: "the enormous Expence attending an Appeal to His Majesty in Council ... deprives them of the possibility of obtaining Justice[,] compels them to abandon their cause and throw themselves upon the mercy of their antagonist who ... grants a new deed of Concession upon his own Terms."¹⁰⁹ Attorney-General James Monk thoroughly agreed, noting that the "peasants" had taken a few cases, only to be told there was doubt whether the courts enjoyed the intendant's power to enforce rent control, doubts generally considered totally unfair by the habitants because the courts had often been used by seigneurs to enforce those portions of the *Edicts* dealing with eviction and forfeiture for insufficient cultivation.¹¹⁰ Plans by Monk and the colonial secretary to rectify the situation were stillborn.¹¹¹

In prime farming areas adjacent to the cities and towns, rents had doubled or probably more often tripled by 1800 from the French régime¹¹² and several new, onerous conditions had begun to appear in concession deeds. Endless disputes occurred over ownership of streams, wood-cutting on unconceded lands and doubtless more topics, such as the fishing monopoly.¹¹³ Given a worst case scenario, a typical farmer, producing about 200 *minots*, might have lost six French bushels (*minots*) of wheat to illegal exactions, the amount needed for a small child's annual bread ration. Illegal exactions, even in good crop years, annoyed farmers. In poor

¹⁰⁸ Normally appeals could be taken from the Court of Appeals (Executive Council) to the Plantations Committee only where the amount in issue exceeded £500. Exceptionally, future rights cases could be appealed to London (e.g., fees of office, seigneurial rents etc.).

¹⁰⁹ Sewell to Dorchester, ca. 24 February 1794, Q series, vol. 67, NAC.

¹¹⁰ Monk to Dundas, 6 June 1794, CO 42, vol. 100, NAC. See also Evelyn Kolish, "Some Aspects of Civil Litigation in Lower Canada, 1783-1825: Towards the Use of Court Records for Canadian Social History" (1989) 70 *Canadian Historical Review* 337 at 364. In 1785 seigneur Simon Sanguinet took fifty-four of his farmer-*censitaires* to court (Montreal) for non-settlement.

¹¹¹ Monk inserted into his *Judicature Act*, 1794 a provision explicitly granting the intendant's regulatory powers to each of the two newly created courts of king's bench and urged the secretary of state to direct that the attorney-general represent the interests of the *censitaires* in all future litigation: to Dundas, 6 June 1794, CO 42, vol. 100 NAC. The Secretary of State suggested a collective test case by the farmers be pursued to the Privy Council: Dundas to Dorchester, 5 July 1794, Prescott Papers, MG 23, G II 17, vol. 7, NAC. None of these initiatives bore fruit: Bishop Jacob Mountain to Lord Spenser, 26 October 1804, Mountain Papers, C series, vol. 5, Quebec Diocesan Archives, Lennoxville, Quebec; Kolish, *supra* note 27 at 6-7.

¹¹² Monk to Dundas, 6 June 1794, CO 42, vol. 100 NAC, and abundant corroborating evidence.

¹¹³ Most seigneurs enjoyed a fishing monopoly which they usually delegated to their *censitaires* for a consideration (e.g., one tenth of the fish caught).

harvest years, like 1795–96, every bushel gone in *rentes* or tithes to the priest (i.e., 1/26th of grain crops) could mean a difference between avoiding charity and suffering, if not starvation or malnutrition from eating boiled hay. In such hard times the illegal exactions issue became explosive. In 1795 the *parti canadien* attempted ostensibly to legislate so as to prevent seigneurial abuses. In the 1796 general election, Chief Justice William Osgoode noticed that “seven unlettered Gentry” elected to the assembly had promised “to abolish all Rents and all Tithes.”¹¹⁴

During the very threatening riots against compulsory road duty and amid rumours of military invasion by revolutionary France (1796), Osgoode remarked that ignorance among the common people and their hatred of the seigneurs were so profound that “they firmly believe that ... under French or American Government they should be exempted from the Payment of both Tythes & Rent.”¹¹⁵ The *parti canadien*, led by Joseph Papineau and Jean-Antoine Panet, won the election of 1796, but there was not a word about reforming or abolishing the system of land tenure in the 1797 legislative session. As would prove to be the case in the 1830s, it was fine rhetoric to attack the “bloodsucking” seigneur for electoral purposes but quite stupid to attempt to carry these attacks into legislation. After all, the top notaries, including Papineau, and lawyers including Panet, drew more business from the seigneurs than from the habitants.

Abuses continued relentlessly after 1800.¹¹⁶ By the 1830s rents in the crowded district of Montreal, soon the heart of rebellion, were often five, eight or more times those of the French régime. Seigneurs demanded as many new conditions as imagination could supply: a part of the hay from natural meadows, a disguised sale price, a tenth of the maple sugar and so on. As always the English seigneurs, particularly Edward “Bear” Ellice, M.P., owner of the vast seigneurie of Beauharnois, led the way. Other practices included keeping land off the market for speculative purposes and allowing squatters to improve it, briefly, before eviction. By the 1820s and 1830s, the English-dominated courts began to characterise concession deeds as contracts free from restrictions like any others¹¹⁷ and at least some habitants were deterred from litigation by a seigneur’s threat to appeal to the Privy Council in London.¹¹⁸ Frustration grew into anger and then violence as the farmer faced a series of poor harvests due to soil exhaustion and pests. Not only did illegal exactions bring starvation closer in most of the 1830s but, as the habitants strove to fulfil their main secular duty by purchasing lands for their sons, who were otherwise becoming a rural proletariat, they met the *lods et ventes*, rapidly seen as a totally unfair tax.

¹¹⁴ Osgoode to Burland, 27 October 1795, CO 42, vol. 22 NAC; same to Simcoe, 7 July 1796, William Colgate, ed., “Letters from the Honourable Chief Justice William Osgoode” (1954) 46 Ontario History, 77, 149 at 151.

¹¹⁵ See same to _____, 13 October 1796, CO 42, vol. 22 NAC. See also Alexander to Malcolm Fraser, 12 January 1797, Papiers Fraser, b. 1, Archives nationales du Québec [hereinafter ANQ].

¹¹⁶ See, e.g., Ouellet, *supra* note 74 at 353–65.

¹¹⁷ Tom Johnson, “In a Manner of Speaking: Towards a Reconstitution of Property in Mid-Nineteenth Century Quebec” (1987) 32 McGill Law Journal 636 at 662–65.

¹¹⁸ *Journals of the Legislative Assembly of the Province of Canada* [hereinafter *JLAPC*], 1843, Appendix F, A. 25 & 30.

IV. The Rebellions of 1837–38

With some exceptions that stressed grievances arising from the evolution of seigneurial tenure, historians have ignored or glossed over direct links between the administration of civil justice and the Rebellions of 1837–38. But these links were multiple, various and of considerable force.

A. Seigneurial Tenure

Passage of the *Canada Tenures Act*, 1825, authorising voluntary conversion and introducing English land law to the Townships, was one of three issues in the 1820s which turned Louis-Joseph Papineau into a republican or American constitutionalist, thus putting the *patriotes* on a collision course with imperial governments of whatever political stripe.¹¹⁹ The Assembly responded in 1826 by condemning parliament's introduction, actual and potential, of English law as entirely alien to the customs of *canadiens* and as a gross violation of the independence of the Lower Canadian legislature in domestic matters, the implicit question being: have you learned nothing from the American Revolution?¹²⁰ Eight sections of the famous Ninety-Two Resolutions of 1834, the Legislative Assembly's main statement of grievances, drafted by Papineau, A.-N. Morin and Elzéar Bédard, son of Pierre, were devoted to the *Canada Tenures Act* and its repeal.¹²¹ The *Act* was cited also as a major infringement on *canadien* liberty at some mass protest assemblies in 1837.¹²²

As for seigneurial abuses, there were two Rebellions each in 1837 and 1838, with middle class *patriotes*, especially in 1837, looking mainly to constitutional reforms such as a republic, an elected upper house and separation of church and state; but the habitants and villagers, especially in 1838, focussed on the opportunity to abolish all seigneurial dues and tithes without compensation.¹²³ Witnesses before the court martial in 1838–39, following the 1838 Rebellion, testified that the rebel habitants at Beauharnois, 3–11 November 1838, had shouted such sentiments as i) “... they

¹¹⁹ The other two were the imperial government's attempt to enact an anglicizing union of the Canadas in 1822 and the long drawn-out struggle to control the appropriation of public funds.

¹²⁰ See, e.g., Thomas Chapais, *Cours d'histoire du Canada [1919–1934]*, vol. 3 (Beauceville, Qué.: Boréal Express, 1972) at 200–01.

¹²¹ Sections 56–63. The “92” are printed in W.P.M. Kennedy, ed., *Documents of the Canadian Constitution 1759–1915* (Toronto: Oxford University Press, 1918) at 366–88.

¹²² See, e.g., Resolution 6 of the St. Ours meeting, 7 May 1837: *Vindicator*, 12 May 1837. The *Vindicator* claimed that upwards of 1,200 attended.

¹²³ See, e.g., S.D. Clark, *Movements of Political Protest in Canada 1640–1840* (Toronto: University of Toronto Press, 1959) at 288–322; W.H. Parker, “A New Look at Unrest in Lower Canada in the 1830's” (1959) 40 *Canadian Historical Review* 209; Georges Baillargeon, “À propos de l'abolition du régime seigneurial” (1968–69) 22 *RHAF* 365 at 382–390; F. Murray Greenwood, “L'insurrection appréhendée et l'administration de la justice au Canada: le point de vue d'un historien” (1980–81) 34 *RHAF* 57 at 63–64; Beverley Dawn Boissery, *The Patriote Convicts: A Study of the 1838 Rebellion in Lower Canada and the Transportation of some Participants to New South Wales* (Ph.D. thesis, Australian National University, 1977), ch. 1–3; Boissery, *A Deep Sense of Wrong: The Treason, Trials and Transportation to New South Wales after the 1838 Rebellion in Lower Canada* (Toronto: The Osgoode Society/Dundurn, 1995), ch. 1–2 forthcoming. For the contrary position see Ouellet, *supra* note 74 at 359, 470–75.

wished to abolish the 'lods et ventes', and ... were resolved to succeed or die" and ii) "... they intended to abolish the lods et ventes, make the country free, do away with the rents and clip the gowns of the clergy."¹²⁴ Habitant Jacques-David Hébert was one of some 3,000–4,000 who heard rebel leader Robert Nelson read Lower Canada's "Declaration of Independence" at Napierville on November 4th, 1838. Hébert paid little attention to promised constitutional changes. All he could remember, a few weeks later, it seems, was "the exemption from all seigneurial rights and the abolition of tithes."¹²⁵

B. Commerce v. Agriculture

No one doubts that this divisive and continuing legal and political battle was a major precipitating cause of the Rebellions. Quite properly, historians have emphasised the dramatic constitutional or regulatory issues, such as Canadian union, immigration, financing canals and tariffs, where the two forces clashed in what could only be described as hatred. But there was also important conflict, manifest almost every legislative session in the 1820s and 1830s, over what might be called traditional civil law matters including procedure. Papineau, for example, expressed utter outrage in 1831 over the *Paterson* judgment and repeated this public attack on ignorant, anglicising judges in 1833.¹²⁶ The seventy-sixth of the Ninety-Two Resolutions, after complaining that ethnic bias in patronage was most obvious in the judiciary, condemned the ignorant and politically biased English judges for virtually destroying *canadien* jurisprudence. It went on to claim that the judges continued to usurp the functions of the legislature by enacting rules of practice, even extending "to fundamental law." Resolution 77 asserted that some on the bench had attempted to abolish the French language in court proceedings, which was a violation of *canadien* rights "by the law of nations and by statutes of the British Parliament."¹²⁷ On the eve of the rebellions (1836) the Papineau dominated Assembly investigated accusations against several judges. One of them, the provincial judge for the Eastern Townships, John Fletcher, reportedly despised *canadien* law generally and rejected French rules of proof even in non-commercial cases.¹²⁸

There was no doubt that the English minority, particularly the Montreal mercantile community and its spokesmen, contributed to the outbreak of violence in late November 1837. Their aggressive behaviour included formation of a "British Rifle Corps" in 1835;¹²⁹ outspokenly francophobe and sabre-rattling articles published by Adam Thom, editor of the pro-merchant *Montreal Herald*; the bloodying of the

¹²⁴ Greenwood, *ibid.* at 63.

¹²⁵ Voluntary Examination of Hébert, 7 December 1838, "Événements de 1837–38," no. 2437, ANQ. Hébert was convicted of treason by the court martial and transported to New South Wales. See Boissery, *supra* note 123, ch. 4 for his story.

¹²⁶ Fernand Ouellet, ed., *Papineau: textes choisis et présentés*, 2nd ed. (Quebec: Laval University Press, 1970) at 38–42; Creighton, *supra* note 74 at 273.

¹²⁷ Kennedy, *supra* note 121 at 383. The *patriotes* of course also complained of the administration of justice in criminal law and constitutional law matters (e.g., rendering extra-judicial opinions).

¹²⁸ Kolish, *supra* note 27 at 23, note 46.

¹²⁹ This was soon suppressed by Governor Gosford.

quarrel on November 6th when the younger generation's Doric Club attacked the "fils de la liberté" and vandalised *patriote* buildings; provocative issuance of arrest warrants in Montreal, and the delay in serving them.¹³⁰ The English minority had, as its principal political demand since about 1810, the union of the Canadas, designed to bring to reality the dream of the "Commercial Empire of the St. Lawrence" through numerous avenues. One was to change the perceived anti-commercial laws of the *Coutume*. Extant evidence left no doubt that two such changes, the abolition of seigneurial tenure and the introduction of compulsory land registration, were as important as any others in the minds of English merchants in the years 1836–38.¹³¹

C. Lord Durham

It took Lord Durham, as Governor and Royal Commissioner in 1838–39, about two months to conclude that the English community had precipitated the first Rebellion. Justifiably so, he distinctly implied, because this had forestalled *canadien* preparations. Racial hatred had made violence inevitable and the merchants had suffered dreadfully "by the ancient and barbarous civil law of the country."¹³² Durham returned to the latter point in his famous Report:

The law of the Province and the administration of justice are, in fact, a patch-work of the results of the interference ... of different legislative powers, each proceeding ... utterly regardless of the other. The law ... is a mass of incoherent and conflicting laws, part French, part English, and with the line between each very confusedly drawn The French law of evidence prevails in all civil matters, with a special exception of "commercial" cases ... but no two lawyers agree in their definition of "commercial."¹³³

As with other aspects of culture, Durham's solution was to anglify the *canadiens* and thereby "establish an English population, with English laws and language, in this Province."¹³⁴ Durham hoped to bring about general anglicification by political union of the Canadas, with electoral representation based on population, which would in time give Upper Canada many more seats because it would receive the bulk of emigrants from the United Kingdom. The imperial government agreed on union

¹³⁰ For the facts see Gérard Filteau, *Histoire des patriotes*, 3 vols. (Montreal: Éditions de l'A.C.-F., 1938-39), II, Book 5, ch. 3, 4. The delay in arresting allowed Papineau and several of his followers to escape to the Richelieu, where the congregation of armed *patriotes* provided a pretext for the regular army to attack.

¹³¹ In a document entitled "Address to the Inhabitants of British America" (1836), issued by the Montreal Constitutional Association (Tory), the first two of six listed essential English Lower Canadian demands (including, e.g., public money for public improvements) were "To relieve landed estate[s] from the servitudes and exactions of feudal law" and "To introduce Registry Offices and [so] put an end to the iniquitous frauds that grow out of the present system," Kennedy, *supra* note 121 at 427–31. See also, Gosford Reports [1836], General Report at 33–43; George Moffatt & William Badgley to Lord Durham, 5 April 1838, NAC, *Annual Report 1923* at 169 (summary); Charles Buller, "Sketch of Lord Durham's Mission to Canada in 1838"[1840], *ibid.*, 341 at 355; Kolish, *supra* note 1 at 291–96. A mass assembly of "loyalists" in Montreal on the eve of the '37 rising met amidst flags marked "Our two grand objects—Registry Offices and the Abolition of Feudal Tenures," Young, *supra* note 1 at 41.

¹³² Durham to Glenelg, 9 August 1838, NAC, *Annual Report*, 1923 at 318.

¹³³ Gerald M. Craig, ed., *Lord Durham's Report* (Toronto: McClelland & Stewart, 1963) at 69.

¹³⁴ *Ibid.* at 146.

and anglicisation; but, to guarantee a significant English majority in the Union Assembly from the outset, decreed equal representation between the sections.¹³⁵

V. Commercialisation Before Confederation, 1838–66

A. The Special Council

Commercialisation of the laws began in the Special Council, an appointed body dominated by English officials and merchants that replaced the legislature of Lower Canada after the rebellions.¹³⁶ In 1839 a tough *Bankruptcy Act* satisfactory to most English merchants was enacted.¹³⁷ More controversial was the land ordinance of 1841, brain-child of Chief Justice James Stuart, long an active proponent of legal anglicisation along with two “*patriote*-baiters”: Montreal business lawyer William Badgley and Solicitor-General Charles Dewey Day, later one of Lower Canada’s codifiers.¹³⁸ This ordinance effected radical changes by i) making registration of titles and most encumbrances mandatory across the lower section of the new province,¹³⁹ ii) requiring *hypothecs* be land specific,¹⁴⁰ and iii) enabling married women to contractually renounce customary dower and thereby that of their children.¹⁴¹ By making property loans more secure, the ordinance benefited companies like the Montreal Building Society (1845) and untold other lenders.¹⁴²

B. United Canada

The union period (1841–1867) marked Canada’s industrial revolution, its initial railway and manufacturing age. Constantly projected in the 1840s, railways were built in the 1850s. Track went from sixty-six miles for all of British North America in 1850 to more than 1,800 for Canada alone by 1860. Manufacturing boomed everywhere in the province, including Lower Canada, particularly in or near Montreal. The railway spin-off included producing rails, rolling stock and locomotives. Steam power and machine intensification, with thoroughgoing division of labour,

¹³⁵ *The Union Act, 1840* (3 & 4 Victoria, c. 35) came into force on 10 February 1841.

¹³⁶ From November 1838 to the end of 1839 the Council consisted of about twenty-five members made up of equal numbers (or nearly) of English and ‘tame’ *canadiens* utterly opposed to Papineau. The English became a significant majority in 1840–41. See Antoine Perrault, “Le conseil spécial, 1838–1841” (1943) 3 *Revue de Barreau* 130, 213, 265, 299 at 138–39.

¹³⁷ S.L.C. 1839, c. 36; Kolish, *supra* note 68 *passim*.

¹³⁸ Perrault, *supra* note 136 at 270–72. See also Louis Lafontaine’s critical work entitled *Analyse de l’ordonnance du Conseil spécial sur les bureaux d’hypothèques* (Montréal: Louis Perrault, 1842). I owe the expressive term “*patriote*-baiter” to Blaine Baker: “Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1848 to 1868” *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930*, Carol Wilton, ed., (Toronto: The Osgoode Society, 1990) 45 at 51.

¹³⁹ S.L.C. 1841, c. 30. Registration had existed for the Townships since 1830.

¹⁴⁰ S. 28.

¹⁴¹ Ss. 35, 37.

¹⁴² Young, *supra* note 1 at 148

lay behind visible manufacturing growth in making flour, lumber products, nails and iron implements, sugar, ships and much, much more.¹⁴³

In stark contrast to Bédard's or Papineau's time, a deluge of commercial legislation flowed into law. Regulation of business for the purpose of increasing it, especially of factors, insurance, banking and telegraphs; general incorporation laws; pro-creditor bankruptcy rules (1843/1864);¹⁴⁴ promotion of decimal currency; encouragement of turnpike roads. These became everyday preoccupations for legislators. Vast amounts of money were spent on canals in the 1840s; a tariff protecting Canadian industry from foreign, including British, competition was introduced in 1858–59; and in 1849 the lynchpin *Guarantee Act* put the state's credit behind the bonds issued by the larger railways.¹⁴⁵ The loosely enforced land registry laws were tightened and improved, particularly with introduction of public survey plans ("*cadastres*"), showing precise configuration of lots and numbering them.¹⁴⁶ A host of humble changes appeared on the statute books. Lower Canada's English merchants' grievance, of over sixty years and a much controverted question, was settled in 1847 when the short prescriptions which the *Coutume* dictated for wholesale and retail sales were replaced by the English rule of six years.¹⁴⁷ The rule deriving from Roman law that a lessor could terminate a lease in order to occupy the premises personally, was repealed in 1853. Henceforth, early occupation had to be specifically agreed to by the parties to the contract.¹⁴⁸ Blaine Baker has shown that much of this legislation was influenced by a coterie of Canada East élite anglophone lawyers, associated with the fledgling McGill Law School. Like so many others of the time, they wholeheartedly accepted the Adam Smith approach as definitive and sympathised with Jeremy Bentham's ultra conservative defence of private property. This emphasised the negative utility of disturbing vested interests, if redistribution were decided upon, because of increasing pain more than pleasure, thereby denying John Locke's potentially socialistic labour theory of value.¹⁴⁹

Most of these changes, although not the last two specified, can be described as "administrative" in nature, additional and not contrary to the old laws. Impinging more directly on traditional values esteemed in French Canada were two fundamental

¹⁴³ See Maurice Careless, *The Union of the Canadas* (Toronto: McClelland & Stewart, 1967) at 139–149; Stanley B. Ryerson, *Unequal Union* (Toronto: Progress Books, 1968), ch. 12–14; Gerald Tulchinsky, "The Montreal Business Community, 1837–1853" in *Canadian Business History*, D.S. Macmillan, ed., (Toronto: McClelland & Stewart, 1972) 125.

¹⁴⁴ See, e.g., S. Prov. C. 1859, c. 63 (re: manufacturing, mining and other industrial companies). United Canada was without bankruptcy legislation from 1849 to 1864: see Morin, *supra* note 1 at 7.

¹⁴⁵ It was clear from these examples that Lower Canadian businessmen and mercantile spokesmen did not like their *laissez-faire* neat.

¹⁴⁶ S. Prov. C. 1860, c. 59, s. 29.

¹⁴⁷ S. Prov. C. 1847, c. 11, s. 1. For the complexity of the question, see Morin, *supra* note 1 at 8, 14–15. The longer prescriptions and the *Factors Act* of the same year drew qualified praise on behalf of the "mercantile community" of Lower Canada from lawyer Edward Lewis Montizambert, *supra* note 9 at 24.

¹⁴⁸ S. Prov. C. 1853, c. 204; Normand, *supra* note 1 at 51. This new rule became Art. 1662 c.c.

¹⁴⁹ Baker, *supra* note 138 *passim*.

restructurings: the turning of both (i) real estate and (ii) money into commodities, almost like nails, wheat bushels and other things produced by manual labour.

After many false starts the seigneurial system of land tenure was abolished, with compensation in 1854.¹⁵⁰ Supporters of abolition were motivated by many considerations: to appease *censitaires* (tenant farmers) who were fast becoming a political force organised to protest “illegal” abuses; to create capital investment funds in the hands of the seigneurs; and to encourage farmers to make improvements. Most of all they condemned this ‘medieval’ concept of real property as a shackle on commerce. Manufacturers purchasing land for plants, and railways acquiring rights of way, obviously desired elimination of the *lods et ventes*, which a prominent Montreal law firm, Torrance & Morris, characterised as a wrong-headed sales tax on land and hence on industry, urging their clients not to pay it.¹⁵¹ The monopoly or *banalité* rights claimed by many seigneurs over all rivers and streams, i.e., on all milling sites, foreclosed the benefits of competition. In the words of the rising star of Lower Canadian politics, George-Étienne Cartier in 1853: “Although there are more than 200 flour mills in Upper Canada, we only have two in Lower Canada producing flour fit for export.”¹⁵²

Influenced by Locke’s theory that ownership of property was legitimated by labour,¹⁵³ and perhaps by P.-J. Proudhon’s aphorism that “property is theft,” a significant current of pro-*censitaire* opinion, 1841–54, argued for reform or abolition of seigneurial rights without compensation or at the very least with compensation calculated on the basis of rights acknowledged under the laws of New France. In other words, a rate based from before abuses of rent-raising and claimed *banalités*, far beyond the grist mill monopoly, was confined before 1759 to wheat required for the habitant family’s consumption. The latter complainants also advocated that the compensation value of the *lods et ventes* take into account numerous families who never transferred land outside the line of succession. While a number of leading proponents, such as the Attorney-General East, Lewis Drummond (framer of the 1854 bill), sympathised with the *censitaires’* plight, the dominant idea written into the Act was that vested rights, even those given by faulty judicial reasoning,¹⁵⁴ must not be tampered with in the slightest. Man as owner had a right to undiminished future expectations and one must not alarm foreign investors! In the end seigneurs

¹⁵⁰ S. Prov. C. 1854, c. 3.

¹⁵¹ Baker, *supra* note 138 at 61–63.

¹⁵² Speech to the Legislative Assembly, 29 March 1853 in Joseph Tassé, ed., *Discours de Sir Georges [sic] Cartier* (Montréal: Eusèbe Senécal, 1893) at 35–37. See also, e.g., Elizabeth Abbott Gibbs, ed., *Debates of the Legislative Assembly of United Canada 1841–1867*, [hereinafter *Debates*] vol. 12, part 2, 1854–55 at 855–60; A. Kierzkowski, *La question de la tenure seigneuriale du Bas-Canada, ramenée à une question de crédit foncier* (Montréal: John Lovell, 1852); Joseph-Charles Taché, *De la tenure seigneuriale en Canada* (Québec: Lovell & Lamoureux, 1854) at 5–6.

¹⁵³ Young, *supra* note 1 at 58, quoted future Quebec premier, P.-J.-O. Chauveau, telling the Assembly in 1850 that seigneurialism was immoral, because the right of property was not “sacred except in so far as it was ... sanctified by labour.”

¹⁵⁴ After the Rébellions the courts continued to disregard the *Edicts of Marly*, 1711. See e.g., *Roland v. Molleur* (1840), JLAPC for 1843, Appendix F, no. 115.

became outright owners of unconceded lands. They also received full compensation for *lods et ventes* and *banalités* from the province, and their *rentes* were turned into redeemable annual rents, the amounts being based on what their deeds specified, not the rates prevalent in the French régime. Bentham's worshipful approach to private property was clearly in the ascendant.¹⁵⁵

In 1859–60 the seigneurial lands in and around Montreal held by the Sulpician order of Roman Catholic priests, including the entire island, ended with their rights abolished with compensation.¹⁵⁶ Some four to five years earlier the obsolescent *retrait lignager* had been eliminated in a two-clause act which created no apparent controversy.¹⁵⁷ Indeed, even the ultra-conservative law professor and much published jurist, François-Maximilien Bibaud, accepted the *retrait's* passing, although with some nostalgic regret for yet another severance of the link between a family and its property attributable, as ever, to the commercial disposition of "our anglo-saxon compatriots."¹⁵⁸ But this particular rule, he wrote in 1859, was so exceptional as to make difficult any justification for its revival. And it was simply unsuitable to the modern age, having been founded on aristocratic notions of "blood" and preserving the estates of the upper classes, which "formed one of the marks of their antiquity."¹⁵⁹ Bibaud also pointed out that in recent years actions before the courts to enforce the *retrait* had been rare and had there run into barriers of a highly formalistic nature.¹⁶⁰

By 1860, then, land had become a commodity. So had money. Christian hostility to extracting 'excessive' interest on loans or 'usury,' dating back to the middle ages, was still reflected in the laws of late-eighteenth century England and France. The rule applicable in Quebec had been established by an ordinance of 1777 which voided contracts where interest exceeded 6% and made the lender forfeit triple the money lent.¹⁶¹ This law was occasionally applied by the courts in the late eighteenth century and the Roman Catholic Church in Lower Canada certainly tried to enforce its own prohibition against usury. Chief Justice Osgoode remarked with regret in 1795 that the *canadiens* were effectively "taught by the Discipline of the Church that it is sinful

¹⁵⁵ The most useful secondary sources, of many, on the abolition are Baillargeon, *supra* note 123; Maurice Séguin, *La "nation canadienne" et l'agriculture (1760-1850)* (Trois-Rivières: Boréal Express, 1970) at 161-67; Brian Young, *George-Étienne Cartier: Montreal Bourgeois* (Kingston & Montreal: McGill-Queen's Press, 1981) at 97-100; Johnson, *supra* note 117; Baker, *supra* note 138 *passim*. I have also relied on the lengthy Assembly debates in Gibbs, *supra* note 152, vol. 12.

¹⁵⁶ Young, *ibid.* at 100-06. The legislature also foreclosed the contractual restoration of seigneurial-like tenure by prohibiting real estate rents for a term exceeding ninety-nine years: S. Prov. C. 1859, c. 49; Art. 389 c.c.

¹⁵⁷ S. Prov. C. 1855, c. 53.

¹⁵⁸ Bibaud lamented the introduction of testamentary freedom and of the wife's capacity to renounce customary dower.

¹⁵⁹ *Commentaires sur les lois du Bas-Canada* (Montreal: Cerat & Bourguignon, 1859) at 371-73, 456-57; text below. Bibaud—perhaps French Canada's first law professor—taught at the Jesuit Collège Saint-Marie, 1851-1867. My interpretation of his reaction differs from that of Young, *supra* note 1 at 82-84 and Normand, *supra* note 1 at 50.

¹⁶⁰ See also Morin, *supra* note 1 at 9, citing *Dansereau v. Collette* (1847) 5 L.C.J. 71 on formalism.

¹⁶¹ S.O.Q. 1777, c. 3. The ordinance essentially reproduced English statute law.

to put their money to Interest."¹⁶² But Osgoode might have missed the growing opposition, particularly among lawyers and notaries. By the years 1808–11 the church in Lower Canada had decided that occasional, covert enforcement against individuals was the way of prudence.¹⁶³ By the Union period, among all cultural groups evasion was commonplace,¹⁶⁴ and when cases did get into court, according to George Brown, the "judges always lean against the suitor [borrower] ... [and] juries turn a deaf ear to him ... [as] a characterless man," trying to escape his bargain through trickery.¹⁶⁵

The usury laws, a subject of almost constant debate 1841–60, were dispensed with in two stages. An 1853 statute dealing with interest rates higher than 6% decreed that, while rates would be reduced to that percent, the contracts were not void and no forfeitures were exigible.¹⁶⁶ In 1858 the legislature, with a few exceptions, abolished usury laws entirely, the new dispensation being enunciated by section 2 of the *Act*: "It shall be lawful for any person ... to stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest ... agreed upon."¹⁶⁷ Both acts applied to both Canadas.

Leading proponents of restricting or abolishing usury laws in the 1840s and 1850s included such well-known politicians as John A. Macdonald, George Brown, financial expert Francis Hincks (Premier, 1851–1854), Henry Sherwood (Solicitor-General and Attorney-General West in the 1840s) and Montreal business lawyer and Solicitor-General East, John Rose, who successfully piloted the final bill through the House in 1858.¹⁶⁸ These men and less well known political supporters advanced a variety of reasons for reform: to attract foreign capital, to follow the lead of the mother country, to provide money for speculative business loans, to lower the actual rate of interest for said loans by eliminating risks to lenders, and many more. They also stressed the self-evident truth of modern political economy as revealed by such writers as Adam Smith, John Ramsay McCulloch, David Ricardo, and above all Jeremy Bentham, whose 1787 defence of usury applied Smith's theory to money.

Smith had been opposed until at least the last months of his life to this view,¹⁶⁹ that money was a commodity like any other and that persons should be free to treat

¹⁶² *Quebec Herald*, 20 April 1789 (re: enforcement); Burland, 27 October 1795, CO 42, vol. 22 (at 32), NAC.

¹⁶³ Jean-Pierre Wallot, "Religion and French-Canadian Mores in the early Nineteenth Century" (1971) 52 *Canadian Historical Review* 51 at 73.

¹⁶⁴ See references in note 168 below.

¹⁶⁵ Gibbs, *supra* note 152, vol. 11 (1853) at 1919.

¹⁶⁶ S. Prov. C. 1853, c. 80.

¹⁶⁷ S. Prov. C. 1858, c. 85. One exception prohibited banks from charging more than 7%.

¹⁶⁸ Principal sources for the arguments advanced in the political arena against the usury laws were the speeches of hostile politicians in the Assembly. See in Gibbs, *supra* note 152 those of the following: Sherwood (1846), vol. 5 at 957–58; Edward Ermatinger, *ibid.* at 958–59; John A. Macdonald, *ibid.* at 960–61; Sherwood (1849), vol. 8 at 1313–19; Hincks, *ibid.* at 1319–22; Hincks (1853), vol. 11 at 1895–97; Brown, *ibid.* at 1918–20. See also Rose's speech on the second reading of his bill in 1858: *La Minerve*, 24 April 1858.

¹⁶⁹ That Bentham's reasoning converted Smith shortly before he died (1790) has often been sug-

it as such. Nor should usury, Bentham argued, be a penal offence. There could be no victim when voluntary consent had been given.¹⁷⁰ Echoes of *laissez-faire* theory, without additional justification, were commonplace. Hincks for example in 1849 “could not see ... why a man should not be allowed to manage his business in money matters as well as any thing else.” Edward Ermatinger, a prominent Upper Canadian banker in 1846 did not understand “why the laws which govern money should be different from those which govern any other commodity.”¹⁷¹ In 1846 John A. Macdonald claimed that England accepted Bentham on usury as “unanswered and unanswerable,” and the great man had “laid it down ... that every adult of a sane mind has a right to borrow money on any terms he pleases; and any restriction upon this liberty is an infringement of natural right.”

With one major exception, commercialisation of the civil law reached the statute books with the support, often enthusiastic, of francophone members of the provincial parliament (MPPs). Their votes, reflecting francophone opinion generally, were part of the large Lower Canadian majority cast for abolishing the seigneurial régime in 1854.¹⁷² Protective tariff legislation of the late 1850s, which favoured the St. Lawrence importation route over the Erie Canal, passed against a majority of Upper Canadian votes, and the *Guarantee Act* of 1849 went through the House unanimously.¹⁷³ Many of these politicians and others were thoroughly imbued by modern, capitalistic notions of political economy. A leading abolitionist, Montreal lawyer Joseph Papin (1854), for example, attacked the seigneurs’ claimed right to *banalités* as “one of the greatest obstacles to progress, in that it prevents competition which is the source of progress.”¹⁷⁴ In a widely publicised pamphlet of 1854, MPP Dr. Joseph-Charles Taché argued against the *lods et ventes* as being a tax of 1/12th on economic development, imposed every time a railway acquired a bit of right of way and every time a manufacturer bought land.¹⁷⁵ Such was the ideological force of *laissez-faire* that even such an anti-commercial defender of seigneurialism, Louis-Joseph Papineau, claimed in 1847 that he had been “a disciple, from my early years, of Adam Smith’s school.”¹⁷⁶

One explanation for commercialisation was the simple and new need, under union, for *canadien* leaders to forge alliances with mainstream English politicians,

gested but the evidence is ambiguous. See W. Stark, ed., *Jeremy Bentham's Economic Writings*, 3 vols. (London: Royal Economic Society, 1952/1954), I at 26–27.

¹⁷⁰ “Defence of Usury” [1787] reprinted in *ibid.*, vol. I at 120–187.

¹⁷¹ Another example was Premier Hincks (1853): “Money was just the same as flour or any other article of trade: if it was scarce, it was dear and vice versa.”

¹⁷² See, e.g., *Montreal Gazette*, 20 December 1854; Careless, *supra* note 143 at 155–56. The former Premier, Louis Lafontaine, had been an influential, early abolitionist.

¹⁷³ Young, *supra* note 155 at 62.

¹⁷⁴ Gibbs, *supra* note 152, vol. 12 at 863 (trans.).

¹⁷⁵ See *supra* note 152.

¹⁷⁶ Quoted in French in John W. Cairns, “Employment in the Civil Code of Lower Canada: Tradition and Political Economy in Legal Classification and Reform” (1987) 32 McGill Law Journal 673 at 680. Papineau, though, had been a selective convert to classical economics, using it, for example, to urge British Radical MPs to repeal tariff preferences on colonial timber.

if the former wished to exercise power.¹⁷⁷ Thus, Louis Lafontaine and Augustin-Norbert Morin allied themselves with the capitalistic Hincks, as well as with Robert Baldwin.¹⁷⁸ The most powerful politician in Canada East (or Lower Canada) from 1858 to Confederation, Montreal lawyer George-Étienne Cartier, helped fashion a formidable party uniting the francophone *bleu* or usual conservative majority of Lower Canadian MPPs with Upper Canadian supporters of Liberal-Conservative John A. Macdonald, usually a minority, and the leaders of Canada East's business community such as Alexander T. Galt and John Rose.¹⁷⁹

A second explanation was a shift in ideology. Papineau's anti-commercial streak had certainly been mainstream *patriote* politics in the 1820s and 1830s, but not all rebellious followers had agreed with his stand. The 1838 rebels, led by 'radicals' Robert Nelson and Cyrille Côté, for example, did not. After breaking with Papineau following the 1837 Rebellion, Nelson and Côté drafted a Lower Canadian Declaration of Independence which among other things promised to abolish seigneurial dues and church tithes, eliminate customary dower as well as general *hypothecs*, and establish land registry offices.¹⁸⁰ Papineau's stance must have been tainted by the absolute failure of his politics. In any case a former supporter, influential journalist Étienne Parent, among others, lectured and wrote on the need for French Canadians, if they wanted to preserve their nationality, to take up business careers.¹⁸¹ Elements in the Roman Catholic Church deprecated this kind of materialistic attitude,¹⁸² but clerical criticism muted as the clergy came to terms, investing heavily in the railways, with the new age.¹⁸³

¹⁷⁷ For a similar conclusion by one of the leading political historians of the period see Careless, *supra* note 143 at 193.

¹⁷⁸ Lafontaine, the "father of responsible government," was Premier, 1842–43, 1848–51. Hincks, an unrestrained booster of railways, was Lafontaine's Inspector-General, 1848–1851 and Premier 1851–54, with Morin acting as his unofficial co-premier for Canada East.

¹⁷⁹ Aside from a few days in 1858 and two years as opposition leader for Lower Canada, Cartier was attorney-general from May 1856 to Confederation. He was co-premier in the Macdonald-Cartier administration, 1857–58, premier, 1858–1862 and the leading Lower Canadian politician in the great coalition of 1864. Galt was Cartier's Minister of Finance and Rose his Minister of Public Works. Cartier and Macdonald were usually stronger in the house than the alliance of Liberal George Brown and the leader of the anti-clerical, democratic *rouges* (the *patriote* rump and very much a minor force compared to the *bleus*), Montreal lawyer Antoine-Aimé Dorion.

¹⁸⁰ The Declaration, read by Nelson at Napierville at the outset (4 November) of the 1838 rising, is printed in Christie, *supra* note 72, vol. V at 242–44. Côté had held such ideas before the first Rebellion: Clark, *supra* note 123 at 320–21. See also Normand, *supra* note 1 at 45.

¹⁸¹ 10 DCB 579 at 584. Parent was particularly active on this subject in the late 1840s and early 1850s.

¹⁸² On 20 August 1845, *Les Mélanges Religieux* (Montreal clerical newspaper) expressed dismay at the "general preoccupation [among *canadiens*] ... with industry, railways, canals, steamboats, electric telegraphs etc." as revealing a priority for fortune-seeking over communal values: quoted in the French original by Careless, *supra* note 143 at 156.

¹⁸³ Acceptance of commercial endeavour was neatly symbolised in 1846 when Montreal Bishop, Ignace Bourget, a thorough ultramontane supporter of papal authoritarianism, became patron of a newly established savings bank: *ibid.* The Sulpicians used the thousands of pounds in commutation money to invest in, e.g., Grand Trunk stocks and the bonds of the Port of Montreal in the 1860s:

Probably the most important explanation was simply the economic self-interest of the *canadien* bourgeoisie. The railway and industrial age provided opportunities to make money by investment, securing corporate directorships or executive offices, speculating in real estate and, in a few cases, becoming entrepreneurs. *Canadiens* like journalist-MPP Joseph Cauchon promoted railways and others launched a new steamboat line on the Richelieu.¹⁸⁴ *La Minerve* remarked in 1846 that a few years before “there were only two or three *canadien* merchants involved in importing; now there are several who do excellent business.”¹⁸⁵ Work for notaries vastly increased in conveyancing as urban land was sold for new or relocated plants and railways acquired rights of way. Lawyers benefited from growing demands for contracts, incorporations, lobbying, litigating and, if an MPP, legislating.

Not surprisingly, proponents of legislative change to foster business abounded in the legal profession. The lawyer Papin stood as an example, as did André Jobin, first President of the Montreal Board of Notaries (1847–49), who became a director of the Montreal City and District Savings Bank in 1846. He authored or supported numerous commercial statutes and was one of the earliest francophone MPPs to support relaxation of the usury laws.¹⁸⁶ Outside the legislature there was, among others, the anonymous author of an article published in the first volume of the *Revue de législation et de jurisprudence* (1846),¹⁸⁷ advocating codification and with it modernisation of the law: sweeping away all vestiges of feudalism, “that iniquitous shackle on liberty, industry, agriculture and commerce,” to ensure that the “laws regulating business ... harmonize as much as possible with the laws of the new mother country.”

The convergence of commercial interests and government assistance to business, whether financial or legislative, was well represented by Montreal lawyer George-Étienne Cartier, as his biographer Brian Young has shown.¹⁸⁸ Cartier had been an armed follower of Papineau at the battle of St. Denis, November 1837, and as did his leader sought exile in the United States. In the Confederation debates of 1865, he explicitly dissociated himself from Papineau and the hostility to commerce which francophone politicians had shown in the 1820s and 1830s:

The [political] difficulties were great and Mr. Papineau, who was not versed in business affairs, didn't really understand the importance of such [commercial] laws. I also think that Mr. Papineau was right to fight against the [feudal] oligarchy which was then in power, but I have never approved of the attitude that he took towards business affairs nor his opposition to measures designed to foster the country's progress.¹⁸⁹

Young, *supra* note 155 at 106.

¹⁸⁴ 11 DCB 159; Careless, *supra* note 143 at 157. Cauchon's promotion (1852–57) of the North Shore Railway designed to link Montreal and Quebec failed. Lower Canadian entrepreneurial initiatives in this period, of course, remained predominantly in English hands.

¹⁸⁵ Quoted in French in Careless, *supra* note 143 at 157. See also Tulchinsky, *supra* note 143 at 132–34.

¹⁸⁶ 8 DCB 433; Gibbs, *supra* note 152, vol. 11 (1853) at 1924.

¹⁸⁷ *Ibid.* at 337–41: “De la codification des lois du Canada.”

¹⁸⁸ Young, *supra* note 155 *passim*, particularly chapters 3 and 4.

¹⁸⁹ Tassé, *supra* note 152 at 423 (speech of 7 Feb. 1865). See also, for example, his expressed re-

Whether or not this and similar statements reflected his attitude before 1838, they certainly presented an accurate portrayal of his position from the time he entered the Legislative Assembly in 1848–49. He was, among other things, a powerful political spokesman for the mostly anglophone Montreal business community, having a hand in dozens upon dozens of reforming statutes; and as a determined advocate of abolishing seigneurial rights, he framed the Sulpicians' legislation and, by 1858–60, became an outspoken opponent of the usury laws.¹⁹⁰ Throughout his parliamentary career he enthusiastically supported state assistance, regulatory and financial, to the railways, becoming chairman of the influential railway committee in 1852, a post he held until Confederation.¹⁹¹ His interest in transportation matters no doubt began by his being solicitor and lobbyist from 1852 for the Grand Trunk Railway, the largest and longest in British North America by 1867.¹⁹² Only in his stand on usury was Cartier out of step with mainstream *canadien* politics.

That French Canadian politicians, and politically active francophones in general, mainly and strongly opposed loosening the usury laws was accepted by all sides in the debates of the 1840s and 1850s. The *Montreal Gazette* lamented the *canadiens*' "unreasoning and prejudiced" but widespread aversion to the "sound views of monetary science."¹⁹³ During the 1858 legislative session both the repealing bill's sponsor, John Rose, and an MPP named Cimon accepted that francophone opposition was profound. Cimon claimed that "the whole of [French] Lower Canada—farmers, merchants and professional men—oppose this bill."¹⁹⁴ Assembly votes found overwhelming majorities of *canadiens* resisting change to the interest laws: 17-0 in 1846, 20 or 21 to 0 in 1849, 20-4 on third reading, 1853 and so on.¹⁹⁵ French Canadian traditionalists often took the high road, taught by the Roman Catholic Church, that usury was unethical because the lender profited by producing nothing.¹⁹⁶ But it was also obvious that political self-interest was at play, considering that the largest occupational group of voters consisted of farmers, as always a debtor class. Rhetorical protection of the habitants was often expressed in the parliamentary debates, never more clearly than by Commissioner of Public Works Jean Chabot in 1849:

gret that land registry offices had not been generally established in the 1830s (to promote credit) in *ibid.* at 489 (speech of 26 June 1866).

¹⁹⁰ *Ibid.* at 221–24 (speech of 12 March 1860); *La Minerve*, 8 May 1858.

¹⁹¹ While a provisional director of the embryonic company, Cartier successfully piloted the controversial Grand Trunk Bill through the Assembly in 1855. This legislation of the Hincks administration authorised the Grand Trunk to build between Toronto and Montreal. See Young, *supra* note 155 at 112–13.

¹⁹² By late 1860 the Grand Trunk linked Rivière du Loup, Quebec City and Portland, Maine to Montreal and the latter to Toronto/Sarnia. Track measured 1,096 miles. See Jean Hamelin & Yves Roby, *Histoire économique du Québec 1851-1896* (Montréal: Fides, 1971) at 124.

¹⁹³ 8 May 1858.

¹⁹⁴ *La Minerve*, 24 April 1858.

¹⁹⁵ Gibbs, *supra* note 152, vol. 5 (1846) at 966–67; vol. 8 (1849) at 1333; vol. 11 (1853) at 1924.

¹⁹⁶ See, for example, *ibid.* vol. 5 at 958, vol. 11 at 1914; *La Minerve*, 6 May 1858.

This bill was designed to benefit the bankers, capitalists and a small class of others at the expense of the great majority of the people to enable them to raise the rate of interest, interest which would be paid by the Agriculturalists, whom he believed it to be the best policy in the state to protect.¹⁹⁷

Strong as it was, francophone opposition to Benthamite notions about money was visibly waning. The 1858 vote on third reading of the *Usury Bill* saw most *canadiens* still against change, but now only in a proportion of 3–2.¹⁹⁸ By 1860 the francophone leaders of all political factions, Cartier, *rouge* leader and later co-premier, Antoine-Aimé Dorion, and Louis-Victor Sicotte, moderate *rouge* and later co-premier, supported abolition.¹⁹⁹ The issue had become a dying one in French Canada as the process towards codification developed speed and support.

VI. Codification of the Civil Law, 1857–1866

George-Étienne Cartier, Attorney-General East in the Macdonald-Cartier government, initiated the difficult process of codification in 1857. The bill he introduced and recommended in the Assembly, establishing a three-man commission to prepare detailed reports, passed easily through both houses and received royal assent.²⁰⁰ The minister was being very imaginative, for with one “uncanny” exception, the anonymous 1846 plan, the idea of codification in Lower Canada was virtually unprecedented.²⁰¹

If “deadlock” was the real father of Confederation, as Goldwin Smith asserted, then chaos sired codification, with Cartier the persevering, far-sighted midwife. Confusion deriving from the multiplicity of often contradictory sources of law and the ignorance of and purposeful anglicization by the English judges had characterised the civil law since its restoration in 1774. As time passed the problem worsened with the growth of statute and case law, the latter communicated to the profession mainly through hearsay until the inauguration of the *Lower Canada Reports* in 1850. With the *Code Napoléon* of 1804, on-going French doctrine relevant to the *Coutume de Paris* progressively thinned.²⁰² Cartier’s speech to the Assembly and the bill’s preamble suggested reduction of chaos was of prime importance. The endeavour fitted perfectly with his general desire, as Brian Young has convincingly shown, to create a bureaucratic uniformity of legal rules in the interests of efficiency.²⁰³

¹⁹⁷ Gibbs, *supra* note 155, vol. 8 (1849) at 1326.

¹⁹⁸ *La Minerve*, 8 May 1858.

¹⁹⁹ Tassé, *supra* note 152 at 221–24 (Cartier’s speech to the Assembly on interest rates, 12 March 1860, together with an editorial note on the vote).

²⁰⁰ Tassé, *supra* note 152 at 129–31 (speech of 27 April 1857); S. Prov. C. 1857, c. 43.

²⁰¹ Brierley, *supra* note 7 at 529–31. The 1846 project (see note 187 above) contained all the important considerations which later motivated Cartier, namely the need to eliminate judicial chaos and to translate French law, the availability of the French and Louisiana models, and codification as an opportunity to commercialise the law. Cartier was almost certainly influenced by the 1846 piece; indeed he may have authored it: *ibid.* at 530.

²⁰² As one pro-Code commentator put it in 1857: “What are the laws which today govern us? Who can say? Who is the citizen, the lawyer, the judge even who can say ‘there—that’s the law?’”: *La Minerve*, 4 April 1857, (letter of “Marcus”—trans.). See also Morin, *supra* note 1 at 9–12; Normand, *supra* note 1 at 54–58.

Codification would provide such rules by eliminating hundreds of situations where it was “anybody’s guess.” The endeavour also reflected the attorney-general’s immense self-confidence, here buttressed as the act’s preamble indicated, by the existence of models: the famous, continually exported French effort of 1804 and the bilingual *Louisiana Code* of 1808 and 1825. He must also have been encouraged by movements towards statutory revision and consolidation which were becoming commonplace in British North America.²⁰⁴

The other important purpose behind codification, although secondary, was to translate the civil law, since as the preamble complained “the great body of the Laws ... exist only in a language which is not the mother tongue of the inhabitants ... of British origin.”²⁰⁵ Cartier was here being typically sensitive to the interests of the anglophone business community; but it was a measure of simple justice and practicality, considering that about one-quarter of the population did not have French as their mother tongue. The code would be bilingual, as in Louisiana.²⁰⁶

Despite the views of some later francophone commentators, codification derived almost nothing from “survivance” concerns.²⁰⁷ Bi-ethnic political parties, responsible government with its *canadianisation* of the bench, and the acceptance of commercialisation by francophone politicians combined to diminish radically any real or perceived anglicising threat to the civil law. Nationalist pride was of course evident in the period. Writing in *La Minerve* (4 April 1857) one “Marcus” predicted that “the name of a French Canadian [Cartier] will be cited in ages to come ... for this national treasure” and would take his place in the ranks of Justinian, Bonaparte and other great codifiers. In 1871 jurist Charles-Chamilly de Lorimier wrote that the “noble and patriotic” Code had forged “a new link in the chain which must always ally our destinies to those of the ancient mother country.”²⁰⁸ Cartier himself had presented the codifiers’ work to the Assembly (1865) as one “which gives force to our nation.”²⁰⁹

The idea of codification ran into initial opposition from professionals, mainly on grounds that the costly task was impossible and at best would take nearly forever.²¹⁰

²⁰³ Brian Young, “Dimensions of a Law Practice: Brokerage and Ideology in the Career of George-Étienne Cartier” in Wilton, ed., *supra* note 138 at 92. See also 10 DCB 142 at 145. Cartier strongly favoured abolition of the seigneurial régime and took the initiative in bureaucratising the laws relating to education, municipal government and the courts. Typical was his successful project to abolish English land law in the Townships.

²⁰⁴ See Brierley, *supra* note 7 at 554–56; Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Society, 1989), ch. 4: “Consolidation and Codification before Confederation.”

²⁰⁵ The preamble also noted that a few portions of the civil law, mainly regarding commerce “are not to be found in the mother tongue of those of French origin.”

²⁰⁶ The Commission was also given a mandate by the 1857 Act to produce a code of civil procedure. Proclaimed in 1867, it was an unenterprising, ill-digested amalgam of British and French law. See Brisson, *supra* note 5 at 117–64.

²⁰⁷ Brierley, *supra* note 7 at 527–28. He cites, among others, jurist-professor Louis Baudouin writing (1953) that the code had been “born of the need for French [Canadian] survival.”

²⁰⁸ Young, *supra* note 1 at 16.

²⁰⁹ *Ibid.* at 113.

After the codifiers' Reports began to be published in 1861, a new conservative thrust of criticism emerged: a code intended for permanency was incompatible with British parliamentary government, which promoted an insensate, tinkering urge to legislate on everything. "It is absurd," Bibaud claimed, "to undertake a codification of the laws in a country where one changes them every year."²¹¹ The jurist went further in a passage reminiscent of Edmund Burke's attacks on the "abstract" constitutions concocted by the French revolutionaries. The passage was drawn perhaps from Friedrich Carl von Savigny (1779–1861),²¹² the German founder of the romantic-historical and anti-code school of European jurisprudence: "The law of the *Coutumes*" represented "a consensus deriving from the customs of a nation" and was far more "enlightened" than any lawgiver's product.²¹³ Interestingly, the main attack on codification in French Canada based itself on an ideology profoundly distrustful of the French Revolution. This again proved to be the case on matters of substantive law, as the commissioners completed their work.

Like Confederation after it, codification was not designed to emerge from any process even slightly more democratic than the exercise of power as allowed under cabinet government. Cartier, here representative of dominant francophone constitutional opinion in the aftermath of the two failed Rebellions, would not hear even of legal practitioners being named to the commission, while the *bleu*-Tory majority defeated overwhelmingly a *rouge* motion (59–7) that the codifiers be elected by the Assembly.²¹⁴

The three codifying commissioners appointed in 1859, were René-Edouard Caron, judge of the Court of Appeals (former Speaker of the Legislative Council, 1843–47, 1848–53), Augustin-Norbert Morin (a former co-premier, 1851–55) and Charles Dewey Day, both drawn from the Superior Court Bench.²¹⁵ Formerly

²¹⁰ Cartier's speech (31 January 1865) introducing the *Codification* Bill in the Assembly (note 237 below at 3); Cartier's speech (26 June 1866) in the Assembly on the proposed code of procedure (Tassé, *supra* note 152 at 490); Morel, *infra* note 241 at 29–32.

²¹¹ "Observations sur le projet de code *canadien*" in his *Exégèse de jurisprudence* (no publishing information given) 7 at 12. From internal evidence the "Observations" (at 7–32) were written at various times during the years the codifiers published their Reports (1861–1865). See also Joseph-Edouard Lefebvre de Bellefeuille, "Civil Code du Bas-Canada. Législation sur le mariage" (1865) 2 *Revue canadienne* 30 at 30–39. This criticism seems ironical in view of the fact that from the late nineteenth century to the early 1960s there was tremendous resistance in mainstream French Canadian legal and political circles to tamper with the wisdom of the forefathers by amending the Code. This reluctance to amend was part of the more general defensive and *nationaliste* "state of siege" mentality which then prevailed. For amendments see Ernest Caparros, "Overview of an Uncompleted Journey: From the Civil Code of Lower Canada to the Civil Code of Quebec" in *Essays on the Civil Codes of Quebec and St. Lucia*, R.-A. Landry & E. Caparros, eds. (Ottawa: University of Ottawa Press, 1984) 15 at 21–24.

²¹² Savigny believed armchair law making à la *Code Napoléon* doomed to failure. Law had to reflect the *Volkgeist* or inner spirit of a people revealed incrementally over long periods of time. His main work on point was published in 1814 and again in 1828.

²¹³ Bibaud, *supra* note 211 at 12. Bibaud, a cantankerous and arrogant person, took delight in exposing what he considered the codifiers' technical shortcomings and inability to express themselves in French.

²¹⁴ Young, *supra* note 1 at 106–10.

devoted *patriotes*, Caron and Morin had by the mid 1840s-early 1850s moved to the moderately conservative side of the political spectrum. Day, a past principal and from 1864 chancellor of McGill University, had always been Tory. In the 1830s he had outspokenly attacked *patriote* opponents of English business interests; and as Deputy Judge Advocate he pitilessly prosecuted for treason some 106 accused rebels of 1838 before the Montreal General Court Martial. In 1842 he had been appointed to the bench to rid the executive council of a man who inconveniently opposed constitutional liberalisation. None of the judges on the commission then was likely to advocate anything too radical for Cartier to swallow. But of course he could not easily control their work either and apparently did not try to do so.²¹⁶

The three nominees were ideal choices to pursue the Janus-like aim of the exercise: “to legislate for the future” but in such a way as not “to disturb the past,” in Cartier’s words (1865) or more specifically, as Brian Young has emphasised, to reconcile traditional principles related to the family, church and morality with the dictates of capitalist *laissez-faire*.²¹⁷

A.-N. Morin was a devout Roman Catholic whom his friends referred to as “the Reverend,” a man who could be counted on to serve the interests of the church in politics. He had been, for example, a staunch supporter of the usury laws and of denominational schools in both Canadas and been appointed the first law dean at Laval, a university closely controlled by the clergy. Morin’s professional and political concerns included heavy involvement in commercial and industrial enterprise, although he did not seem to have benefited much financially. He had been a senior officer and director of a railway, a bank, a life insurance company and a mining venture. Morin’s francophone colleague had like interests. An avid railway promoter with a large commercial law practice, Caron numbered among his major clients the Séminaire de Quebec. Day, son of a merchant, had also had a thriving business practice in Hull as well as Montreal and had married into the family of Benjamin Holmes, general manager of the Bank of Montreal and vice-president of the Grand Trunk. An Anglican, Day had no quarrel with clerical authority *per se*, seemed not to have laboured under any serious animus against Roman Catholics and was a social conservative on marriage and personal morality. It was only on a very few topics germane to Catholic doctrine that he disagreed with his colleagues.²¹⁸ Day’s role in legislating for the emerging capitalist order was monumentally important. He authored the vital underpinning title “Of Obligations,” virtually all the material on special contracts with a commercial import, that is, concerning loan, partnership,

²¹⁵ See 9 DCB 568 (Morin); 10 DCB 131 (Caron); 11 DCB 237 (Day).

²¹⁶ Brierley, *supra* note 7 at 571.

²¹⁷ These biographical notes are based principally on Young, *supra* note 1, ch. 4 and at 123–31, 150–51 and references in *supra* note 215.

²¹⁸ For examples see text below on civil death; Young, *supra* note 1 at 118–19 (civil death and public celebration of marriage); Second Report at 181, 239 (public celebration of marriage); Third Report at 423 on acquiring non-sacred church-owned real estate by prescription. Day successfully recommended reducing the privileged term of forty to the normal thirty years (Art. 2218). See note 222 below for full references to the codifiers’ reports.

sale and mandate (agency), and Book 4 on "Commercial Law." His tendencies as a judge revealed just how perfectly suited he was to the task at hand.

Brian Young describes numerous decisions where Day opted for a technical, but not inevitable, interpretation of law at the sacrifice of substantial justice, in one case going so far as to excuse flagrant battery of a wife. So he was not likely to worry much about "tradition," "humanity," or "equity" when advocating this or that to boost freedom of contract. Indeed, in one instance cited by Young where a seigneurial tenant made a reasoned argument that the *Edicts of Marty* prohibited the exaction of a sale price, in addition to annual dues, for a concession, Day rejected the contention, while conceding that the legislator in 1711 had not intended to allow sales and that traditional practice was consistent with this. The *Edicts*, however, had not expressly forbidden sales and the parties had come to a sacrosanct and free meeting of minds: "The party who voluntarily contracts waives the right given by the *arrêt* ... there was no compulsion, there was no obligation on the Defendant to buy the land, he did so voluntarily."²¹⁹

Caron acted as *de facto* president of the commission, setting agenda, while Day was given the lead on commercial matters. Morin did exhaustive historical research into civil law subjects. Two lawyers, one French, the other English, acted as secretaries,²²⁰ with the English one from 1862, Aylmer attorney Thomas McCord, publishing the most coherent contemporary account of the changes to the law.²²¹ Eight Reports, of immense importance to legal historians, were submitted by the codifiers to the government and published in the years 1861–65.

The codifiers produced a painstakingly researched, thoroughly documented and remarkably accurate statement of what the law actually was.²²² The main authorities relied on were the *Coutume de Paris*, the commentaries of Pothier, Roman law and the *Code Napoléon*. John Brierley calculated the commissioners used over 350 sources, many of them multiple in nature (e.g., provincial legislation, French cases),²²³ while Cartier stated in the Assembly in 1865 that he had read the various

²¹⁹ *Boston v. L'Eriger dit Laplante* (1854) 4 LCR 404. Day agreed that the *Edicts* did allow a prospective tenant to legally force the seigneur to grant land "à titre de redevances" only, but this right could be and had been waived.

²²⁰ The first French secretary Joseph-Ubalde Beaudry, Clerk of the Court of Appeals replaced Morin on the latter's death in 1865, being himself replaced by Louis-Siméon Morin, Attorney-General East in the Cartier-Macdonald Ministry of the early 1860s. Thomas Kennedy Ramsay, a jurist of note, was the first English secretary, being replaced by McCord in 1862 for political reasons.

²²¹ McCord, *supra* note 17.

²²² *Civil Code of Lower Canada*: (1) First, Second and Third Reports; (2) Fourth and Fifth Reports; (3) Sixth, Seventh and Supplementary Reports (Quebec: George E. Desbarats, 1865). For the First Report, I have relied on the text found in Castel, *supra* note 5 at 562–93.

²²³ Brierly, *supra* note 7 at 547–52. Sources not mentioned in the text included legislation for or enacted in New France, local jurisprudence (especially of the Court of Appeals in property matters and wills), the Louisiana codes of 1808, 1825 (very limited impact outside the area of legal expression), American and British jurists, the common law, *Coutumes* other than that of Paris, a host of French jurists, a few *canadien* writers, the Sardinian code and the law of the Canton of Vaud in Switzerland. See *ibid.*; Marian Karpacz, "La cour d'appel et la rédaction du Code civil" (1971) 6 *Revue juridique thémis* 513; J.P. Richert & E.S. Richert, "The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866" (1973) 8 *ibid.* at 501.

Reports as submitted and never had had occasion to suggest to the governor-general that “the law was not being correctly set forth.”²²⁴ The result was a consolidation and more with some amendments in 2,615 officially bilingual articles, divided into four books dealing with persons, property classifications, modes of acquiring property, including “Obligations,” and special rules applicable to commercial affairs, such as bills of exchange and merchant shipping. As for this last category, much of Book Four became irrelevant almost immediately with several of these matters being allocated to federal jurisdiction in 1867.

The commissioners’ product amounted to much more than an accurate consolidation,²²⁵ in effect to a code, defined as “a more or less comprehensive systematic statement in written form of major bodies of law ... superseding the mixture of customs, decisions, and bits of legislation which had previously applied.”²²⁶ The codifiers were certainly systematic. The subject divisions of the first three books were thought to represent a “natural” classification;²²⁷ uniformity of legal language was largely achieved throughout; the generic title “Obligations” immediately preceded thirteen others dealing with special contracts; cross-referencing was included where necessary, and so on.

As recognised by the 1857 authorising act, systemisation in terms of a code necessarily involved concentration on general principles, excluding specific rules found, for example, in modern *Landlord and Tenant* and *Motor Vehicle Acts*. This goal was achieved by the codifiers, the most spectacular instance being the reduction of the laws of civil responsibility, delicts, to a mere four articles, just over 400 words, as compared to the dozens of individualised torts in the common law.²²⁸ General definitions of major legal concepts abounded, such as those for *hypothecs*, servitudes, ownership, most special contracts like sale (Art. 1472) defined as “a contract by which one party gives a thing to the other for a price in money ... ,” plus a host of lesser notions such as delivery and payment.²²⁹

The most famous was the opening article on delicts (1053): “Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.”²³⁰

²²⁴ Reference in note 237 *infra* at 9.

²²⁵ For the distinctions among statutory revision (chronological), statutory consolidation (topical) and codification, see Brierley, *supra* note 7 at 554–58.

²²⁶ David M. Walker, ed., *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980) at 234. See also Brown, *supra* note 204 at 10–11: the only common feature to those things called legal codes is “the systematization of an existing body of law.”

²²⁷ Brierley, *supra* note 7 at 559.

²²⁸ The *Code Napoléon* had five articles on the topic.

²²⁹ Only “practical” definitions were included; those of a scholastic nature (e.g., in the Napoleonic Code dealing with contracts) were firmly rejected: Brierley, *supra* note 7 at 564–65.

²³⁰ In the early 1980s the Supreme Court of Canada, dealing with a Quebec case of occupier’s liability, rejected the common law division of invitee, licensee and trespasser, preferring to base itself on Art. 1053’s central notion of fault, particularly the foreseeability of the damage which occurred. See Louis Perret, “The Evolution of the Law of ‘Responsibility’ in Quebec” in Landry & Caparros, eds., *supra* note 211, 247 at 254–55 for a useful analysis.

The emphasis on the definitional and deductive mode of legal reasoning was mainstream civilian thinking and contrasted in theory, not necessarily in results, with the empirical and analogical method of English law. From Article 1053, for example, Quebec courts deduced the idea of common fault by percentage, whereas common law rejected it, and inferred the notion that the malicious abuse of property incurred liability ("abuse of rights," which common law also rejected), despite the widely phrased definition of ownership in Article 406.²³¹

The 1857 *Act* directed the codifiers to frame their drafts "upon the same general plan ... [with] the like amount of detail upon each subject as the French [Code]." Excepting the Title "Of Obligations," where the more coherent Pothier prevailed,²³² this directive was implemented. The 1804 work, the codifiers agreed, was "the canvas" on which they were to paint²³³ and "rightly considered a masterpiece of its kind."²³⁴ The *Code Napoléon* was the model for style (excluding Book Four): arrangement and sequence of Books, Titles, Chapters and Sections; preference for generalisation over detail; the number of articles;²³⁵ and even the wording of several hundred articles perceived as morally neutral, such as those on domicile (permanent residence generating legal jurisdiction).²³⁶ There was, however, one notable break with French form and it symbolised differing views of modernity and tradition. While the Napoleonic Code stridently provided for an entire dissociation with the "corrupt" pre-Revolutionary legal past, Article 2613 of the Lower Canadian Code specified that recourse could be had to pre-Code law in cases of textual ambiguity.

Cartier introduced the *Codification Bill* into the Assembly on 31 January 1865, boasting that Lower Canada would soon enjoy the best of all legal worlds, combining the supposedly beneficial criminal law of England with a civilian system derived from the celebrated jurists of Rome and the wisest of *coutumes*, that of Paris; modelled in form after the great *Code Napoléon*; and tailored to the particular conditions of the country.²³⁷ During February and March the drafts were minutely

²³¹ See note 267 *infra*. The leading case is *Brodeur v. Choinière* (1944), [1945] Que. S.C. 334. See on this Castel, *supra* note 5 at 409–27. Castel's delightful summary of the facts in *Brodeur* indicated a slight lack of neighbourliness (at 412–13): "All the circumstances ... pointed unmistakably to the defendant's malice, coupled with his desire to retaliate for previous annoyances from the plaintiff The rough wood fence was hideous in appearance and had no spaces permitting the entry of air or light. Furthermore it was unnecessarily high [8.5 by 47 feet] and provided no advantage to the builder. As a final arrogant gesture of triumph, the defendant had hoisted a flag on the top of the fence."

²³² First Report, *supra* note 222 at 562–63; Thomas Weston Ritchie (Montreal business lawyer), *Some Remarks on the Title "Of Obligations"*, as Reported by the Commissioners (Montreal: John Lovell, 1863) at 4.

²³³ Brierley, *supra* note 7 at 558; Young, *supra* note 1 at 132, 137–38.

²³⁴ Second Report, *supra* note 222 at 141.

²³⁵ The *Code Napoléon* of 1804 contained 2,281 articles. Books 1–3 on civil law in the Lower Canadian Code, plus the terminal articles in Book 4 (2613–15) amounted to 2,180.

²³⁶ Brierley, *supra* note 7 at 560–63.

²³⁷ *Legislative Proceedings in Relation to the Civil Code of Lower Canada* (no publishing information given, c. 1865, copy held by the Law Faculty Library, McGill University) at 3–6. *Legislative Proceedings* was compiled from newspaper reports in *La Minerve*, 4 February 1865 and the *Quebec Morning Chronicle*, 19, 26 August, 1 September 1865.

examined by a Select Committee consisting of thirteen *canadien* and eight English members.²³⁸ That committee successfully proposed a series of largely uncontroversial changes. Assembly debate in late August-early September, dominated by francophone Lower Canadians, was calm and mostly technical, resulting in only three minor amendments.²³⁹ The bill passed on a division, but the opposition must not have been very large or intense because no recorded vote was called for.²⁴⁰ No changes were made in the Legislative Council. This unruffled atmosphere also prevailed out of legislative doors, in contrast to the agitated politics on codification in near-contemporary Massachusetts and New York. The codifiers' drafts elicited extended printed comment from only about six or seven professional men, whom Cartier and the codifiers had purposely ignored, one commercial group and responses from only three judges, although the latter had been presumed critics of codification by the 1857 Act.²⁴¹ In all cases but those of Bibaud and de Bellefeuille the writer's interest was largely technical, not ideological. Royal assent was given to the *Codification Bill* on 18 September 1865 and the *Civil Code of Lower Canada* came into force on August 1st, 1866.²⁴²

VII. Preservation, Reform or Both?

The codifiers were authorised to suggest amendments to existing laws, but only by drafting separate provisions and giving reasons. Commissioner Caron correctly inferred from this that the Legislature presumed against innovation.²⁴³ No areas of law, with one revealing exception, were radically transformed and only about 200 of the 2,615 Articles contained any new law.²⁴⁴ Much useful change clarified cases where authorities were not consistent: for example, in Article 1668 which, following one interpretation of Roman law, established that a labour contract terminated with the death of the labourer.²⁴⁵ The *Code* simplified forms of transactions and modernised that which the economically and socially "progressive" times obviously sanctioned: for example, it reduced delay for presuming death in the case of absence, from ten to five years, in Article 93.²⁴⁶ But the stress on existing law, and reluctance

²³⁸ JLAPC for 1865 (vol. 24) at 75.

²³⁹ *Legislative Proceedings*, *supra* note 237 at 7–16; Brierley, *supra* note 7 at 570–71, 588–89.

²⁴⁰ JLAPC for 1865 (vol. 25) at 138. The *Montreal Gazette* (2 September 1865) reported passage of third reading without comment.

²⁴¹ No effort was expended to actually have practitioners comment. See Young, *supra* note 1 at 106–10, 116. The lobbyist was the Quebec City Board of Trade, which objected to the new law on delivery discussed below. Brierley, *supra* note 7 at 571–72; André Morel, "La codification devant l'opinion publique de l'époque" in *Le droit dans la vie familiale*, J. Boucher & A. Morel, eds. (Montreal: University of Montreal Press, 1970) 27 at 37–43.

²⁴² S. Prov. C. 1865, c. 41.

²⁴³ Brierley, *supra* note 7 at 566.

²⁴⁴ McCord, *supra* note 17 at 38–39.

²⁴⁵ Cairns, *supra* note 176 at 700–02. The codifiers admitted that where the authorities were unsatisfactory—as was often the case—they opted for the rule "practically the most convenient" and not necessarily the one with the greater or greatest "weight of authority": First Report, *supra* note 222 at 593; Second Report, *supra* note 222 at 143.

of later generations to amend, meant that within a few decades the *Code* began to appear increasingly quaint to interested observers who lived in Quebec's industrialising cities and towns. The codifiers, for example, included almost as much detail to explain ownership of swarming bees (Art. 428) as to treating labour contracts (Arts. 1666–1671). There was even a special provision on duelling. Where death resulted, not only its immediate author but seconds and witnesses bore civil responsibility (Art. 1056, para. 2).

A close study of codification can provide the historian with reasonably precise information about values prevailing among the francophone political and legal élites of the 1860s. This was so particularly because of the following elements in the process: two of three codifiers were *canadien*; the commission was forced to opt for or against the old law right across the system; and the Select Committee, as well as the Assembly debate, was dominated by *canadiens*. This suggested that the values held by the framers and supporters of the *Code* were decidedly mixed, looking backward to supposed certainties of the *ancien régime* and forward to endless commercial progress.

During the final codification period, *rouge* lawyer Gonsalve Doure complained that “advocates of French-Canadian nationality are unwilling to accept modern France, but rather the France at the time of the Conquest. If you ask them to accept the laws ... of present-day France, they shout blasphemy and infamy.”²⁴⁷ One of the men Doure undoubtedly had in mind was young attorney and would-be jurist, Joseph-Edouard Lefebvre de Bellefeuille. In a series of articles published by the religiously nationalist *La Revue canadienne*, de Bellefeuille “revealed” that proposals relating to marriage, practised for a generation or more, did not follow, jot and tittle, Roman Catholic norms.²⁴⁸ Believers could escape proper scrutiny by marrying before a Protestant minister or abroad and many canonical prohibitions, such as adultery between intending spouses, were not written into the law. These shortcomings were evidence of a more general failure. The codifiers had become intellectual slaves to the modernising *Code Napoléon*, an atheistic product made for “a people emerging from anarchy—an expression and consequence of the ... Revolution.” Why couldn't they leave to *canadiens* those things most cherished: their religion, traditional customs and nationality?²⁴⁹

While de Bellefeuille's criticisms gained some support among the hierarchy, and sparked controversy that echoed to Rome, which found nothing amiss in 1870,²⁵⁰ they were ridiculously wide of the mark. Far from aping the “atheistic” *Code Napoléon* in matters of substance, the codifiers rejected its modernisms on numerous

²⁴⁶ Another good example was Art. 123 abolishing the almost obsolete but occasionally strife-torn obligation of having intending adult spouses seek parental blessing. See Second Report, *supra* note 222 at 179.

²⁴⁷ “Le Principe des nationalités” [December 1864] printed in English by Ramsay Cook, ed., *French-Canadian Nationalism* (Toronto: Macmillan, 1969) 107 at 108.

²⁴⁸ “Civil Code du Bas-Canada. Législation sur le mariage” (1864) 1 *La Revue canadienne* 602, 654, 731. For the ideology of this journal, see the prospectus in vol. I, at 3–6.

²⁴⁹ *Ibid.* at 604, 654.

²⁵⁰ Morel, *supra* note 241 at 41–43.

occasions. By the middle decades of the nineteenth century most elite *canadiens*, although not most of the *rouges*, looked upon the French Revolution with horror and upon the British conquest as ordained by providence to preserve French Canada from bloodshed and impiety. The father of codification, Cartier, was quoted by his biographer as praising the Conquest for having “saved us from the misery and the shame of the French Revolution.”²⁵¹ It was not surprising, then, that in this as in other cultural endeavours circa 1840–1940, for example in novels and paintings, French Canada borrowed “form” from France, but rejected “substance” where values diverged. The commissioners themselves understood the distinction. They were using the “French code as a model with respect to ... all that is ... accessory and regards the form; as to substance, it is declared that the code ... shall be composed ... of our own [pre-Revolutionary] laws.”²⁵²

Several examples illustrated this important point.²⁵³ French puritanism (or Jansenism) of the *ancien régime* was reflected in a number of articles for which there were no equivalents in the *Code Napoléon*. Thus tavern-keepers could not collect for liquor consumed on credit (Art. 1481) and expensive gifts to concubines were void (Art. 768). Family law, discussed below, provided further examples.

Unlike the case in secular France, Roman Catholic priests and other clergy could inherit through wills drafted during the last illness (Art. 839). Their right to tithes, a tax on the parishioners set by the church, unknown to contemporary French civil law, was enforceable in the courts, privileged in a case of a parishioner’s insolvency (Art. 1994) and could not be lost through prescription, however long (Art. 2219). In contrast to France after the Revolution, registers of civil status establishing births, marriages and deaths were to be kept not by civil officials but as in the past by religious personnel with duplicates filed in court (Arts. 42ff.). Civil death (i.e., no capacity to own, contract, sue, inherit, etc.) for Roman Catholics taking perpetual vows in a religious order, which had been abolished in France in 1789, stressed the other worldly component of monastic and convent life. The two Catholic commissioners, here representing the church’s interest, argued for continuance; while Day contended that this kind of civil death had been abolished by the Conquest and in any case was incompatible with equality in “civil and religious rights.” The legislature compromised, with the result that only five female orders and possibly the Jesuits were covered (Arts. 34–36).²⁵⁴ By contrast to the *Code Napoléon*, there were no provisions for civil marriage, with ceremonies to be performed exclusively by priests, ministers or rabbis, none of whom was obliged to perform against the dictates of his faith (Arts. 128, 129).

²⁵¹ Young, *supra* note 155 at 73–74.

²⁵² Second Report, *supra* note 222 at 141. De Bellefeuille provides an excellent example of rejecting modern France in substance but accepting its value in matters of form. He described the hated *Code Napoléon* as “un chef-d’oeuvre de clarté et de rédaction.” See references in *supra* notes 248–49.

²⁵³ For the similarities and differences between the codes see Pierre-Basil Mignault, *Le droit civil canadien*, 9 vols. (Montreal: Whiteford & Théoret/C. Théoret/Wilson & Lafleur, 1895–1916); Louis Baudouin, *Le droit civil de la Province de Québec* (Montreal: Wilson & Lafleur, 1953); Castel, *supra* note 5; Brierley, *supra* note 7.

²⁵⁴ Second Report, *supra* note 222 at 153–55, 238; Mignault, *supra* note 253, vol. I at 150–60.

But it was in family law that the disjunction between the modernity of 1804 and the traditionalism of 1866 was most apparent and this despite the fact that Napoléon himself much preferred the old law on marital régimes to the concepts of equality generated by the Revolution. Where in one case he did innovate, by preventing the husband from giving away major assets of the family, the *canadien* codifiers balked (Art. 1292).²⁵⁵ Illegitimate children could not inherit except by will²⁵⁶ and tutors (i.e., guardians) in Lower Canada were to be appointed only by the courts, on the advice of a family council and not, for example, by nomination in a will (Art. 249). While the 1804 code, for reasons related to the medical health of the French population, raised the minimum ages of marriage to eighteen for males and fifteen for females,²⁵⁷ the Lower Canadian codifiers retained the canon and customary law rule of fourteen and twelve years (Art. 115). Unlike France there were no provisions for adoption, which in devout Roman Catholic circles was thought to encourage illegitimacy and discourage propagation. Article 185 declared marriages “indissoluble” except by death, whereas the French code had originally allowed divorce. The sanctity of the marital tie was such that the codifiers unhesitatingly rejected a Louisiana innovation permitting the husband or wife to remarry after the partner had been absent for ten years or more.²⁵⁸ The codifiers did permit separation from bed and board but only for cause, e.g., “ill-usage,” not by mutual consent as in France (Art. 186). Finally, Articles 187 and 188 enunciated a blatant, if far from unique, “double standard” whereby the husband could obtain a separation for his wife’s adultery, while the wife had no legal cause for complaint unless the husband had his concubine living in the common residence.²⁵⁹ This had its roots in the *Coutume de Paris*; there was no similar provision in the Napoleonic code. The notion that women could and should be sexually purer than men²⁶⁰ followed Pothier’s aphorism that it “does not behove the wife who is an inferior to inspect the conduct of her husband who is her superior.”²⁶¹

²⁵⁵ By way of contrast, when the 1804 *Code* articulated a more traditional rule than found in the case law of the *ancien régime*, by incapacitating the wife, in community, from contracting, without marital or judicial authorisation, to release her husband from debtor’s prison or to establish their common children when the husband was absent, the codifiers followed suit (Art. 1297). See Fifth Report, *supra* note 222 at 211, 213; Young, *supra* note 1 at 146, 151–52.

²⁵⁶ Baudouin, *supra* note 253 at 1101–02.

²⁵⁷ Marcel Planiol & Georges Ripert, *Traité pratique de droit civil français*, 2nd ed., André Rouast, vol. 2 (Paris: R. Pichon & R. Durand-Auzias, 1952) at 83.

²⁵⁸ Richert & Richert, *supra* note 223 at 510.

²⁵⁹ Beginning in 1861 all the Australian states enacted a discriminatory rule whereby “a man might petition for separation or divorce from his wife on the grounds of a single act of adultery; by contrast the woman had to prove her husband guilty of either incestuous adultery, or rape, or sodomy, or bestiality, or adultery coupled with cruelty”: C.M.H. Clark, *A History of Australia*, vol. 4 (Melbourne: Melbourne University Press, 1980) at 234.

²⁶⁰ Mignault, *supra* note 253, vol. I at 496–97. Mignault gave two additional reasons.

²⁶¹ Quoted in Baudouin, *supra* note 253 at 203, note 24. The codifiers adopted the old rule without comment: *Second Report*, *supra* note 222 at 193. I am aware that Art. 127 recognising religious impediments to marriage, for example, relationships of first, second or third cousins for Roman Catholics, other than those nullifying ones specified in Arts. 115–26, might have strengthened my the-

Thus with regard to morality, the rights of the Roman Catholic clergy and above all that church's anti-modernist family law²⁶² were enshrined in the Lower Canadian civil law in 1866, as definitely pre-revolutionary and not Napoleonic in inspiration.

VIII. Private Property and *Laissez-Faire*

The codifiers, then, often looked backwards to a remote past in ideas if not in years. The one significant exception was the advance of capitalism, to be achieved by freeing private property from remaining feudal restrictions and by enacting freedom of contract in many spheres, free from constraints of a higher morality. Secretary McCord noted that modernity required "Things," including real estate, be brought "under complete subjection to the will of man" and this had been done. The end result, he claimed, was "to increase and facilitate business relations; and ... [thereby] promote the material welfare of the community."²⁶³

Liberating use and disposition of private property motivated several changes. Such was the strength of individualism that the framers gave no thought to confining testamentary discretion in the interests of the family, although the subject still had some life in the 1860s.²⁶⁴ Indeed, the principle involved, unfettered autonomy of will, was extended to gifts, thereby entirely eliminating the heirs' "*legitim*" (Art. 775).²⁶⁵ The codifiers also recommended that customary dower, which was often almost impossible to discover by potential parties to a real estate contract, should be either abolished or made preservable only by registration, the latter being enacted (Art. 2116).²⁶⁶

sis. But in the present state of research I find it impossible to say whether the codifiers intended the said impediments to have civil effects, or to be matters of conscience only. See Mignault, *supra* note 253, I: 358–66; Baudouin, *supra* note 253 at 160–67; Ernest Caparros, "La 'civilization' du droit canonique: une problématique du droit québécois," (1977) 18 *Cahiers de droit* 711; *Despatie v Tremblay* (1921) 1 AC 702 (JCPC).

²⁶² The force of tradition was so strong here, the codifiers often rejected changes found in the *Code Napoléon* even when those changes were not particularly alien to the spirit of the *coutumes*. Thus the Lower Canadian code contained no rule prohibiting widows from remarrying within ten months of the husband's death and Article 245 allowed the parents only a right of "moderate correction," while the French code permitted the father to incarcerate his child without any due process whatever: Second Report, *supra* note 262 at 175, 199.

²⁶³ Unless otherwise specified what follows is based on the codifiers' First Report, *supra* note 222; McCord, *supra* note 17, *passim*; *Legislative Proceedings*, *supra* note 237; Brierley, *supra* note 7 at 568–70 (especially valuable for Day's comments, taken from the manuscript working papers of the Commission discovered by Brierley); and Cairns, *supra* note 176 at 680–84. McCord included a third rubric under which to classify the new laws: "Protection of Third Parties." Many of these changes facilitated commercial transactions in minor, technical ways. For example, Articles 2047 and 2130 rendered *hypothecs* ineffectual, even between the parties, unless registered. See also Article 1488 (despite McCord's classification) validating certain sales where the item sold did not belong to the vendor.

²⁶⁴ Brierley, *supra* note 7 at 541, 568. The anonymous author of the 1846 codification proposal (*supra* note 187 at 340) thought the question should be reopened, as did Bibaud.

²⁶⁵ *Legitim*, although under the name *réserve* remained in French law. In Lower Canada gifts had often been "ratified" in wills, hence avoiding the problem of *legitim*: Morin, *supra* note 1 at 21.

²⁶⁶ Sixth Report, *supra* note 222 at 64–66.

Changes in the law to strengthen autonomy of the will usually sacrificed traditional values. But there was one such change, highly revealing and deemed highly important by the framers, which did not, except in doing away with the "old-fashioned." This was the set of articles providing that ownership passed, and hence liability for loss or damage, upon the contractual consent of the parties to an exchange, gift or sale (Arts. 777, 1025, 1472, 1596). These no longer required physical or even symbolic delivery. The sufficiency of various attempts at the latter, for example, marking furniture, had been recurrently litigious since 1838 and the codifiers remarked that the notion raised "subtle and perplexing questions." McCord nominated this simplifying rule as the "most important" innovation "introduced by the *Code* in connection with the free disposal of property." Brian Young aptly concludes that the "new law on delivery was an ideological beacon, emphasizing the importance of human will and commodity exchange."²⁶⁷

McCord informed his readers that in ancient times the link of the family to its lands, protected by myriad rules like the *retrait lignager*, formed the legal basis for "social stability." Now, a new dispensation had been found: "... by rendering contracts ... definitive" amendments would "furnish elements of stability, for which formerly the nature of immoveable property was relied upon." The "integrity of contracts," lauded by McCord and the codifiers but never justified, became a core principle of the civil law. In the spirit of Adam Smith and David Ricardo, the contracting parties, regardless of bargaining power, should make the law between them free from notions of equity enforceable by the courts. Significantly, abolition of the usury laws passed without any apparent controversy among the codifiers or in the Legislative Assembly²⁶⁸ and several new departures, usually pressed by Commissioner Day, were sanctioned.²⁶⁹

Despite its hallowed place in the old law and its retention in the *Code Napoléon*, *lesion* among adults was abolished (Art. 1012), on the ground that it had no place in a "country, where real property is ... made an object of daily speculation." An adult should not "be relieved from imprudence in this description of contract than in any other. The [old] rule violates that integrity of contracts upon which the Commissioners ... have been anxious to insist." For Judge Day *lesion* was absurdly antiquarian in assuming that "humanity" rather than self-interest should govern. The codifiers also provided that a stipulated sum, even a clearly excessive one, for damages resulting from breach of contract could no longer be lowered by the courts, the French article on point having improved the old law. The main rationale was that the

²⁶⁷ First Report, *supra* note 222 at 568; McCord, *supra* note 17 at 8; Young, *supra* note 1 at 170-72, 179. Some provisions of the old law, of course, were perfectly suited to the furthering of a capitalist society. Article 406, based on old law, for instance, read in part as follows: "Ownership is the right of enjoying and of disposing of things in the most absolute manner;" that is, regardless of the interests of family and regardless largely of neighbours, until the middle years of the twentieth century.

²⁶⁸ The codifiers supported the status quo with the simple statement that "This subject is altogether governed by statute" and felt no necessity to justify their decision: Sixth Report, *supra* note 222 at 18, commenting on what would become Art. 1785.

²⁶⁹ Blaine Baker has demonstrated that the "*laissez-faire*" Montreal firm of Torrance & Morris worked closely with the commission: Baker, *supra* note 138 at 66-68.

“doctrine of judicial interference with the plain meaning of contracts is regarded with disfavour by modern jurists” (Art. 1076). Day remarked that the idea of varying the “clear stipulations” of a contract to apply an “uncertain equity” was a definite “evil,” and he had yielded to it in his “own judicial decisions always with reluctance.”²⁷⁰ In the interests of fairness traditional law had prohibited the unpaid lender from retaining as owner a thing pawned as security, since in all likelihood the thing would be much more valuable than the debt. This was now permitted if stipulated in the loan agreement (Art. 1971). It was done to align pawning contracts with the abolition of usury.²⁷¹ The power of the courts to grant delinquent purchasers delay, to make payment and thus avoid cancellation of the sale, was done away with (Art. 1538).²⁷² Another of many examples is provided by the chapter on labour contracts (Arts. 1666–1671). This was placed in the title on lease and hire (i.e., of things, work, or both), rather than included as part of the law of persons, as in Blackstone, the Louisiana Code in part and some expositions of traditional, including Roman, law. John W. Cairns makes a convincing case that this choice represented the codifiers’ desire, manifest elsewhere as well, to have the employment relationship defined almost solely by contractual agreement rather than on a pre-established status of master-servant, which involved many familial rights and duties, such as a right of moderate correction, right to board, etc.²⁷³

Considerations of fairness and protecting family interests did not pass away without participants understanding what, in general, were the stakes. Bibaud would have liked to reopen the question of testamentary freedom on moral grounds and hence attacked the abolition of *legitim* in relation to gifts.²⁷⁴ He raged about the proposal to eliminate *lesion* among majors:

I really hope the Legislature rejects this ... recommendation, because natural law dictates that [rough] equality is required in contracts They [the codifiers] want to ape the United States where one can legally acquire something worth a thousand louis for a dollar [One could] only admire the presumption of three Canadian jurists who have undertaken to rip apart everything sanctioned by the collective wisdom of the ages.²⁷⁵

²⁷⁰ First Report, *supra* note 222 at 565, 575; Brierley, *supra* note 7 at 569.

²⁷¹ Sixth Report, *supra* note 222 at 50; Normand, *supra* note 1 at 53.

²⁷² This traditional power had been questioned, denied and reaffirmed in a series of cases during the union period. See Morin, *supra* note 1 at 21.

²⁷³ Cairns, *supra* note 176 *passim*. Cairns also points out that the code “eschewed the elaborate regulation, found in the *ancien droit* and the Louisiana code, of the ending of a contract of hire of service.” This was “determined” by the codifiers’ “beliefs in freedom of contract” (at 707). For further examples of “freedom of contract”, see the codifiers’ Reports and McCord on articles 816/1536, 1186 and 1549 c.c.

²⁷⁴ On the general principle Bibaud wrote: “Who can approve a Christie who gave all his property to his adulterous children to the exclusion of his legitimate ones! A citizen can dispose of his property freely, provided however he fulfils his natural obligation to provide for the needs of his family:” *supra* note 211 at 27–28. The reference is probably to General Gabriel Christie (1722–1799), a large land-owner in the Montreal area, who had four illegitimate children. Bibaud’s accusation is false, at least with regard to Christie’s real estate. See 4 DCB 149.

²⁷⁵ *Supra* note 211 at 16. Day had earlier dismissed this concept of a rough equality in contracts: “The true idea is that each party receives in consideration not that which is really of equal or proximate value but that which he *consents to consider as an equivalent for that which he gives.*” quoted in Bri-

Perhaps because of its symbolic importance *lesion* provoked a “long and earnest discussion” among the codifiers.²⁷⁶ It did not, however, divide them, or despite Bibaud’s invitation, become a subject of debate in the Assembly’s committee of the whole.²⁷⁷ Such was not the case with regard to stipulated damages. Commissioner Morin disagreed with colleagues, thinking it “safer and more equitable to adhere to the present [old] rule.”²⁷⁸ In the assembly *rouge* opposition leader Antoine-Aimé Dorion furthered Morin’s concern by arguing that a “person failing to carry out the agreement might be absolutely ruined by being made to pay, not the actual damage” but a usurious sum. Cartier confidently and successfully answered this, and another similar objection by pointing to the codifiers’ wise decision that “the consent of the parties should be the rule everywhere.”²⁷⁹

IX. Conclusions

From 1774 to 1866 Quebec’s civil law, a much contested battlefield rich in historical meaning, underwent profound change, sloughing off older concerns grounded in feudal and Roman Catholic morality, so as to promote autonomous individual will, particularly in areas impinging on commerce.²⁸⁰ Many rules aimed at preserving the linkage of the family to its lands were repealed;²⁸¹ legally enforceable equity in contracts disappeared; the married woman was empowered to renounce customary dower; and gifts as well as testaments were freed from familial constraints. Despite these last two examples, family law in general, which looked to pre-Revolutionary France for inspiration, continued to qualify the preceding generalisation by rejecting autonomous will in many spheres. There was no divorce, no separation by consent, no adoption; to protect creditors and the families, spouses could not contract with each other;²⁸² expensive gifts to concubines were prohibited; tutors were appointed by the courts, and in most cases the nominated tutor could not

erley, *supra* note 7 at 569, note 150, [emphasis added].

²⁷⁶ Brierley, *ibid.* at 569.

²⁷⁷ Cartier did not include it among the “important” changes he brought to the attention of the Assembly and no other member is recorded as mentioning it. Montreal business lawyer Thomas Ritchie found the proposed change “in accordance with modern ideas” and therefore “probably ought to be adopted”: *supra* note 232 at 9.

²⁷⁸ First Report, *supra* note 222 at 575.

²⁷⁹ *Legislative Proceedings*, *supra* note 237 at 7, 10. Dorion also objected to what became Article 1549. This new law denied the courts power to extend the term stipulated, within which a vendor-debtor had to exercise his right of redeeming real estate sold to a purchaser-creditor in a contract known as sale with the “Right of Redemption.” The codifiers opted for the rule on the principle of “adhering to contracts and preventing the modification ... of them by the courts”: Fourth Report at 16–18. As usual the codifiers proceeded to recommend *laissez-faire* as self-evidently wise and not requiring justification.

²⁸⁰ It might be noted that a very great degree of anglicisation had taken place in the *canadien* legal culture as inherited from France and considered as a whole: e.g., in criminal and constitutional law, wills and gifts, evidence, procedure, jury trials and laws relating to commercial transactions.

²⁸¹ One of those which remained was the incapacity, in the presence of any other heir(s), of either spouse to inherit on an intestacy from the other. This was changed in 1915.

²⁸² Arts. 1260, 1265. The opposite prevails today: Art. 438 C.C.Q.

decline the office; financial maintenance, which extended to in-laws, could not be dispensed with by contract (Art. 1258). Finally, while great latitude was conferred on pre-nuptial marriage agreements (e.g., by allowing irrevocable “wills”), there were truly fundamental restrictions imposed on freedom: “the consorts cannot derogate from ... the authority of the husband over the wife and the children, or belonging to the husband as the head of the conjugal association.”²⁸³

In 1865-66 the French Canadian political élite looked both to the ideals of pre-Revolutionary, Roman Catholic France and to a more secular future where law accommodated the needs of commerce. How this tension, neatly reflected in the *Civil Code of Lower Canada*, worked itself out over the next century or so—is another history.

²⁸³ Art. 1259 cc. The same rule applies today, but of course in relation to a marital régime which stresses equality (Art. 34 C.C.Q.).