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Paul Roubier, *Le droit transitoire : conflits des lois dans le temps*, 2e édition, Éditions Dalloz, réimprimé avec la permission des éditeurs en 1993 par Les Éditions Yvon Blais Inc., 1960, 590 pages, ISBN 2-89073-871-X

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NOTICES BIBLIOGRAPHIQUES

OUVRAGE COLLECTIF, *Le nouveau Code civil du Québec : un bilan*, Montréal, Wilson & Lafleur Ltée, 1995, 176 pages, ISBN-2-89127-336-2.

A little over two years has passed since the *Civil Code of Québec* (C.C.Q.) replaced the *Civil Code of Lower Canada*. On the first anniversary of its adoption, various members of the legal community held a conference in Montréal entitled *Le Code civil du Québec, un an après : son interprétation, son application*. The book which forms the subject of this review is a product of that conference. It was organised by l'Institut Wilson & Lafleur in collaboration with the law firm of Byers Casgrain.

Justice Jean-Louis Baudouin, of the Québec Court of Appeal, provides a brief yet inspiring foreword to this work. As well as introducing the subjects included in this work, Justice Baudouin applauds the collaborative effort of the legal community in Québec and attributes the rapid adjustment to the C.C.Q. to such cooperative effort.

Gil Rémillard provides the preface to this work and adopts a similar encouraging tone to that of Justice Baudouin. M[tre] Rémillard uses this opportunity to describe the evolutive process of the C.C.Q. and its parallel to the *Charter of Human Rights and Freedoms*. His tone becomes cautionary when referring to the challenges the legislator will face in enacting subsequent amendments to the C.C.Q., as well as the role of the courts in protecting the reform when interpreting the new provisions of the C.C.Q., particularly regarding the intrinsic differences between the Civil Code and the common law.

The book contains six articles, each dealing with recent legislative and interpretative developments in some familiar and other more contemporary issues brought to the reform of the C.C.Q. For the most part, the articles in the book parallel the structure of the Civil Code.

"Les personnes et la famille", (pp. 5-26) is presented by Professor Monique Ouellette. Professor Ouellette highlights the relatively new provisions of the C.C.Q. and the tendencies of the courts in their interpretation of the provisions relating to care, the protection of incapable persons, the capacity of a minor and certain matters relating to the name of a person, and the protection of privacy.

The integrity of the person is an issue that holds a more pivotal role in the C.C.Q. than it did in the C.C.L.C. As a result, Professor Ouellette spends the first chapter of her work discussing recent decisions of the Court of Appeal regarding the capacity of a person who is under protective supervision to consent to care. The tests applied by the courts in deciding whether a person possesses the capacity to consent are outlined in detail. Several developments, such as, particulars regarding care for capable persons, material damages for wrongful conception, and the role of ethics committees that now occupy an official place in the C.C.Q. (art. 21), are explored in some detail.

A brief consideration of judgements that comment on and interpret essential changes in particular aspects of the protection of those who are considered incapable follows. The author discusses the problems and questions that these judgements raise and the lacuna present when dealing with the protective supervision of persons of full age.

The capacity of a minor, the name of the child, and the change of name by way of judicial process are the focus of the second part of the authors' text. Details regarding full emancipation and the institution of judicial proceedings by a minor hold the readers' attention. As well, the issue of fundamental rights is raised regarding the refusal of the registrar of civil status in registering names selected by the parents for their child.

The theme of the third and final part of the text is the respect of privacy. This theme is examined in the context of the provisions of both the C.C.Q. (art. 35-41) and the *Act Respecting the Protection of Personal Information in the Private Sector* (S.Q. 1993, c. 17; R.S.Q., c. P-39.1). The author addresses the most difficult issues relating to the respect of privacy. Those being the right to access

information contained in a file, the difficulties that arise in defining a serious and legitimate reason for refusing access to a medical file, and the right to have information in a file corrected (art. 38 C.C.Q.).

Although the author does not embark on a critical analysis of the new provisions concerning the themes discussed, she does outline a number of important decisions that have been rendered by the courts. The problem areas that have not yet been elaborated upon are highlighted and brought not only to the attention of the courts, but to the practitioner as well. A list of the principal judgements referred to and cited by Professor Ouellette is included in this work.

The second article of this book concentrates on the area of obligations. "Une double préoccupation des tribunaux : contrôler les comportements s'adapter au droit nouveau", (pp. 27-51) is presented by Professor François Héleine. This work is divided into two parts : the control of contractual behavior and the courts' adjustment to the new law.

The author begins the first part of his work by outlining the anticipated tendency of the decisions already rendered on the subject of obligations, that being the control on the behaviour of the juridical actors. The principles governing the exercise of one's civil rights are set out (art. 6, 7, and 1375 C.C.Q.) and a general account of the notion and role of good faith, the abusive exercise of a right (as opposed to bad faith), and principles of equity is provided. The author recognizes the privileged role of *good faith in rendering contractual conduct* "virtuous". A non-exhaustive list of behaviour that has been considered to be contrary to good faith is provided. The place that the principles of equity will occupy is put into question and the author refers to the most recent writings that consider the residual use of equity as a means of stabilizing contractual relationships.

Applications on the subject of regulating contractual relations are outlined in two situations. The first in the context of abusive and penal clauses contained in adhesion contracts. Jurisprudential illustrations of economically unacceptable clauses are provided and the author points out that in the majority of cases the judges have preferred to reduce the obligation rather than annul the clause, thereby taking on the role of an arbitrator in stabilizing contractual relations than condemning objectionable conduct. The second situation relates to the lifting of the corporate veil and the legislators' attempt to frustrate fraud and the abusive exercise of a right (art. 316, 317 C.C.Q.).

The second part of this article addresses the courts' reaction to the new provisions of the C.C.Q. The author reviews four trends of the judgements rendered during the first year of application of the C.C.Q. The first trend concerns the "moralisation" of obligational conduct. Notwithstanding articles 6, 7, and 1375 C.C.Q., the author points out certain provisions (art. 1621, 1479 C.C.Q.) that have been used by the courts to "moralise" the conduct of the creators of contractual relationships. The following trend encourages the maintenance of contractual relations through the reduction of obligations. The third trend is the adherence to previous jurisprudence in areas where no changes have been effected. The fourth and final trend relates to the ambivalence encountered by the courts regarding the introduction of new provisions diametrically opposed to the C.C.L.C. This is seen in three specific areas : (1) the prohibition of opting (art. 1458 al. 2 C.C.Q.); (2) the resolution of a contract without judicial proceedings (art. 1605 C.C.Q.); and (3) the mandatory injunction (art. 1509, 1601 C.C.Q.).

The author cautions the courts that the discretion with which they have been provided to regulate contractual behaviour should not be confused with the arbitrary use of such power. His tone becomes desolate as he bids farewell to the law of obligations prior to the reform and acknowledges the prevalence of the "déclin de la liberté contractuelle".

The third article elaborates on the previous one in its consideration of nominate contracts. Written by Gérard Dugré and Stéfan Martin, "Les contrats nommés" (pp. 53-94) considers three particular yet distinct issues related to such contracts. The first issue addresses jurisprudential hesitation concerning the validity of non-competition clauses.

Although article 2089 C.C.Q. imposes three limits to which a non-competition clause must conform, problems arise when it does conform yet is excessive in its range, particularly in the context of a contract of employment. The author points out, in a brief yet concise examination of several recent cases, that the courts are not yet in agreement as to how this should be sanctioned.

The impact of contractual equity in nominate contracts is the second issue dis-

cussed. Although there has not been a plethora of current decisions, the authors conclude that the codification of three important Supreme Court of Canada decisions (arts. 6, 7, and 1375 C.C.Q.) rendered the stability of contracts less stable. The authors embark on a detailed analysis of several contracts that have been qualified as adhesion contracts by the courts. These exceed those that were qualified as such under the C.C.L.C. (*ie* : contracts of suretyship, leasing contracts, and supply and exclusive distribution contracts).

Abusive contractual clauses are discussed by providing recent examples where judicial control has been exercised by drawing upon article 1437 C.C.Q., "[qui] consacre l'avènement d'un certain 'consumérisme commercial' visant à harmoniser les forces économiques des parties contractantes, jusqu'alors délaissé aux exigences et règles du libéralisme économique". (p. 66)

The reduction of penal clauses in certain commercial leases is examined, followed by a study of the principles of equity and their relation to the specific performance of a contract. The authors take their analysis one-step further than that which was presented by François Héleine, however, the two texts complement each other and are surprisingly not repetitive seeing the limited number of decisions that were rendered during the first year of the coming into force of the Civil Code.

Certain procedural aspects inherent to the law of nominate contracts is the third and final issue discussed in this text. Arbitration agreements (art. 2638-2643 C.C.Q.), "les clauses d'élection de *for*", the rule of *forum non conveniens*, and the deposit of shares subject to a moveable hypothec are examined. Interpretative problems that may arise as a result of new provisions and recent decisions are highlighted within this part of the text. Furthermore, it is here where the authors expose the interaction between certain provisions in the *Civil Code of Procedure* and the Civil Code.

A review of the first year of the coming into force of the Civil Code would be incomplete without a study of how procedural aspects have been affected. It is within this context that the fourth article was presented. "Le *Code de procédure civile* depuis le 1er janvier 1994 : Les réponses et les questions", (pp. 95-129) by Hubert Reid tackles the fundamental changes that have been brought to the *Civil Code of Procedure* (C.C.P.).

The first subject discussed is the impact of the C.C.Q. on the C.P.P. (and in some cases related statutory laws). Seven particular aspects are considered briefly (for example, the filing of the examination on discovery of a deceased person, the seizure of instruments of work, applications relating to the land register, recovery of small claims) by referring to the situation in the C.C.L.C., the changes brought by the C.C.Q., the interpretation by the courts, and foreseeable problems that will have to be addressed by the legislator or the courts.

As with any significant reform, transitory provisions are enacted. In the second part of this text, the author addresses the changes brought to the C.C.P. by the *Act Respecting the Implementation of the Reform of the Civil Code*. This act, as well as the *Loi modifiant le Code de procédure civile et la Loi sur les cours municipales* are annexed to the text.

The following article presented is written by Alain Roberge. "Les sûretés réelles, en pratique, au premier anniversaire du *Code civil du Québec*", (pp. 131-153) introduces the changes concerning the parties involved in the creation of a hypothecary agreement and the identification of property charged with a hypothec brought by the C.C.Q.

Three situations are discussed regarding the grantor of a hypothec. The first involves general and limited partnerships. The author shows, through an interplay of the applicable provisions, that uncertainty exists as to whether these partnerships could grant such guarantees. The second situation involves an individual who is not carrying on an organized economic activity. Here we learn that the Québec legislator limited the power of such individuals, as opposed to those Canadian jurisdictions who adopted a *Personal Property Security Act* (s. 7 of the *Personal Property Security Act of Ontario* is annexed to this text for easy reference). The third and final situation involves the grantor domiciled outside of Québec and the effect of article 3105 C.C.Q. on property situated within Québec and claims that are payable or outstanding by a person domiciled in Québec.

Another three situations are presented concerning the holder of a hypothec. The first concerns the non-disclosed mandate, followed by the case of several creditors, and the identity of the beneficiaries of legal hypothecs of construction. The author illustrates the correlation between several statutory laws

and regulations that have an impact on these situations, and relies on the *Commentaires du ministre de la Justice* in certain cases.

After addressing particular situations concerning the parties involved, the author considers the identification of property charged with a hypothec. Several difficulties regarding the identification of the nature of a universality of moveable property charged with a hypothec are highlighted. References to applicable provisions, and how the problem has been addressed in national and international doctrine offer several solutions. A brief mention to specific cases of immoveable hypothecs is considered.

This text provides an elaborate account of the new provisions related to the topics at hand, as well as their interaction and impact on each other. Furthermore, the author outlines the difficulties that have already presented themselves, how they have been considered, and suggests possible solutions for the future. It would have been interesting to have a more extensive account of the jurisprudence on the subject matter.

The final article, "Survol de la législation portant sur la protection de la vie privée au Québec", (pp. 155-171) tackles the protection of privacy in Québec. Although Professor Ouellette accentuated what she considered to be the most difficult issues regarding the protection of privacy, Paul-André Comeau and André Ouimet present an overview of the legislation and jurisprudence governing the protection of personal information and the accessibility of documents gathered in the public sector for the citizens of Québec.

The first part of the text situates the topic and presents a legislative history of the protection of privacy in Québec. The reader learns that the laws governing the accessibility of personal information are an extension of the fundamental right to the respect to privacy recognized by the *Charter of Human Rights and Freedoms*. The culmination of public pressure to protect citizens against the growing intervention of public powers in their private life resulted in the sanction of *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information* (R.S.Q., c. A-2.1). The international influence on the provisions in the Civil Code concerning the respect of reputation and privacy is highlighted, followed by the circumstances that led to the adoption of *An Act Respecting the Protection of Personal Information in the Private Sector* (S.Q., 1993 c. 17).

The second part of the text introduces the jurisprudence that is developing in relation to the *Act Respecting the Protection of Personal Information in the Private Sector.* The new powers of the Commission d'accès à l'information and its mandate are detailed by illustrating several of its recent decisions.

The third and final part of this text discusses and compares the right to privacy in Québec and the West. This "international perspective" situates the place of the "modèle québécois" in matters pertaining to the protection of personal information and access to such information within the western movement during the 1960's and 70's. As well, the authors outline the undertakings of the Organization for Economic Co-operation and Development to harmonise the legislation that was developing in the United States and Europe and its impact on the adoption of Canadian measures to ensure the protection and access to personal information. This helps the reader understand the reasons the Québec legislator adopted certain measures as opposed to those favoured by the federal Parliament.

A very practical bibliography of the laws, international texts, doctrine, and newsletters referred to is provided for those who are interested in learning more about this area of the law.

This book offers two different views on various developments in general and specific areas of the law during the first year of the coming into force of the *Civil Code of Québec*, those provided by practitioners, and those with a more pedagogical approach. Although this is not a lengthy book, it contains a wealth of detailed and practical considerations, presents the most recent jurisprudential tendencies, and highlights the shades of grey which will have to be considered by practitioners when confronted with certain situations. One of the most valuable elements of this book is the influence of supplementary provincial, federal and even american statutory law that affect daily commercial transactions. It will be interesting to see whether subsequent case law will heed to or deviate from the current tendencies, as well as the manner in which the difficulties referred to will be addressed over the next few years.

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Paul ROUBIER, *Le droit transitoire : conflits des lois dans le temps*, 2e édition, Éditions Dalloz, réimprimé avec la permission des éditeurs en 1993 par Les Éditions Yvon Blais Inc., 1960, 590 pages, ISBN 2-89073-871-X.

En 1929, Paul Roubier écrivit ce qui fut considéré la première œuvre traitant en grande partie de la question de l'effet des lois dans le temps[1]. Aucune étude exhaustive sur le sujet n'avait vu le jour et l'on ne recensait qu'un nombre limité d'écrits ne comblant que partiellement un vide juridique. Avec l'avènement du nouveau Code civil et les possibles problèmes d'application de celui-ci, les Éditions Yvon Blais décidèrent l'an dernier de reproduire la seconde édition de cet ouvrage paru en 1960 chez Dalloz.

Il est difficile de présenter en peu de lignes un exposé complet pour un lecteur non avisé : la science de monsieur Roubier est unique et hormis quelques auteurs[2], personne ne s'est intéressé, au Québec, à cet aspect du droit.

Cet ouvrage regroupait originalement deux volumes qui furent refondus en un seul volume. Dans une première partie, Roubier propose une étude historico-juridique de la théorie générale des conflits de lois. Celle-ci est suivie par une synthèse du droit privé transitoire où, entre autres, il propose sa propre théorie sur la non-rétroactivité de la loi et les faits accomplis. Dans une troisième partie, l'auteur termine en étudiant les conflits en dehors du droit privé, en particulier les lois pénales, les lois de procédures et les lois de conflits (c'est-à-dire le droit international privé transitoire).

L'auteur constate ainsi l'échec de la théorie des droits acquis en droit transitoire pour y consacrer une base plus objective, la théorie de l'effet immédiat de la loi. Le traitement d'éléments déjà réunis ou en cours de création aux points de vue juridique, légal et contractuel sont abordés avant d'introduire la théorie du droit acquis devenant l'exception et en étudier la difficulté d'application. Cette doctrine sera reprise par le législateur québécois lors de la réforme du Code civil.

L'auteur ne traite pas du droit public transitoire qui, de son aveu même, obéit peu ou pas aux règles de droit privé, notamment en ce qui concerne le régime des contrats.

Sans vouloir entrer dans les racines de cet ouvrage ni tâcher d'en analyser d'un œil critique chacune des théories et opinions, cette chronique doit découvrir son utilité dans la pratique juridique québécoise. Il éclaircira certainement les dispositions de la loi transitoire au nouveau code civil, notamment en ce qui concerne les mesures de transfert, de vente, de saisie immobilière et leurs publications, mesures qui ne peuvent entrer pleinement en vigueur avant la mise en œuvre complète du registre des droits immobiliers. L'ouvrage de Pierre-André Côté et Daniel Jutras, *Le droit transitoire relatif à la réforme du Code civil* dans le tome trois des textes du Barreau du Québec et de la Chambre des notaires du Québec sur la réforme du Code civil constitue un hommage au juriste français et explique sa théorie dans le contexte de l'article 3 de la *Loi d'application de la réforme du Code civil* (loi d'application). Bien que l'étude de Roubier soit peut-être trop étendue sur la matière, il n'en reste pas moins qu'elle demeure l'outil ultime (ou de base) sur la transition des règles de notre Code et se veut donc un complément de premier choix à l'étude de Côté et Jutras. Et plus de soixante ans d'utilisation par nos confrères d'outre-mer devrait suffire à nous convaincre de son importance.

En conclusion, retenons l'importance de l'ouvrage sur le plan substantif dans le droit civil en général où pour longtemps il a comblé les lacunes de dispositions législatives sur la transition de la législation dans le temps.

Une curiosité: un peu plus de 2 ans après la parution de ce volume au Québec, l'affaire *Bergeron* c. *Communauté Urbaine de Montréal*[3] est la seule cause rapportée où

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1. Voir le commentaire de René DEMOGUE dans (1929) XXVIII *Rev. Trim. Droit Civil* 1044.

2. On recense notamment les ouvrages de P.-A. CÔTÉ, *L'interprétation des lois*; et E.A. DRIEDGER, *Construction of Statute*, dont la première édition remonte à 1974.

3. 94 T. 345 (C.A.L.).

une instance décisionnelle s'est intéressée à ce que monsieur Roubier a écrit. Est-ce à dire que la loi d'application prévoit tout? Sans douter des capacités du législateur, il est permis de croire que les tribunaux prendront encore un peu de temps avant de rendre des décisions étoffées sur les lois québécoises d'applications.

Ce répit permettra aux consœurs et confrères de découvrir la richesse de l'ouvrage de monsieur Roubier.

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