CHAPTER 20

JUDICIAL SYSTEM

20.1 Legal system

20.1.1 Common law and le droit civil

Common law as opposed to le droit civil contrasts two of the world's basic legal systems. Common law originated in England and is in force today in most Commonwealth countries, in the United States, and in the private law of nine Canadian provinces. Le droit civil originated in ancient Rome and prevails today in many Western European countries and in the private law of Quebec. In Canada, Quebec is a droit civil province in its private law only, whereas the other provinces are wholly common law.

Common law began its development in feudal England after the Norman conquest in 1066. It is a system of rules based on statutes and on precedents of previous court decisions. Thus the common law is made up of judicial decisions, and customary practices applied over the years to actual cases and situations.

Two cases are seldom exactly alike. Thus the court frequently needs to modify an earlier common law principle to reflect any new differences. In this way the law is able to grow and change with the times. Perhaps the most important way the law may be changed occurs when Parliament or a provincial legislature enacts a statute which overrides the common law dealing with the same point.

Le droit civil has its roots in the legal codes prepared centuries ago for the Roman Emperor Justinian and later for the Emperor Napoleon. The codification ordered by Napoleon became the model for the Civil Code of Quebec enacted in 1866.

Briefly, a civil code consists of relatively simple but comprehensive statements of rules which embody general principles of law. In theory, when a court is considering a case it does not consult the decisions of earlier courts as in a common law situation. Rather, it looks for the specific rule as found in an article of the civil code.

To contrast these two methods, consider this: the common law of negligence (carelessness causing injury to another) is embedded in several thousands of court decisions taking up many thousands of pages in the law reports. The civil law of negligence of Quebec, on the other hand, can be found in just three brief articles of the civil code, beginning with this basic rule: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault..." (Article 1053).

As would be expected, the reality is considerably different from the theory. The common law of negligence is relatively simple and understandable. A lawyer in a common law province would not normally have to do much research to find the rule that the courts would probably apply to some specific accident case. Nor is the rule in Article 1053 of the Quebec Civil Code as simple as might at first appear. What, for example, does 'fault' mean? In reality, the Quebec courts, which use the civil code, do resort to prior decisions and to the works of respected legal authors to help them determine the meaning of the code rules so that they may apply them to the cases they decide.

Thus decisions of similar cases turn out to be remarkably alike under both common law and civil law. Only the method by which the decision is reached is different.

20.1.2 Civil (non-criminal) law

Civil or non-criminal law is used to settle private disputes between individuals and other private parties. Civil cases (called civil suits) arise because two parties differ on some matter involving financial transactions, property, contracts, a private injury (called a tort) or civil rights.

Civil law in Canada is based on common law except in Quebec where it is governed by the civil code. Authority to pass legislation on civil law matters is divided between Parliament and the provincial and territorial legislatures. Legislatures of the provinces and territories have jurisdiction over contracts, torts and property laws. Both levels of government have power to make laws to regulate the activities of corporations