Letter from Québec: A Plea for Aliment

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I. GENERAL

Oyez: the defeat of the private law as a social construct is now complete. The primacy of the technical agenda, that is to say, the exegesis of legislation and precedent, has distracted modern men and women from due consideration of social factors and all "broad political, social-economic and intellectual developments and disputes."[1] The imbalance between the technical and social factors underscoring the private law is a popular theme at international conferences. More than a theme, it is a plaything—technical factors are deemed the true material of law; social factors are dismissed as the stuff of "soft" symposia and the remit of "academic" fora. Small wonder given that the divisiveness of the laws of persons, family, inheritance and property and their conflicting and contradictory rules of application are destructive of the authority and persuasiveness of the law as a device for social and moral integrity.

Take, for example, the plight of the wife where the matrimonial law targets the change of status, the law of successions determines the conveyance of property on death, and the law of property regulates possession and ownership of movables and immovables. These laws considered together display a smorgasbord of spousal equilibration techniques. The following is a non-exhaustive list of these

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1. R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 180 (1992).

techniques: post-mortem alimentary maintenance; compensatory allowance (rectification of patrimonies as a result of unjust enrichment); homestead rights (primary or principal residence rights); usufruct (life use); dowry and dower, curtesy and other customary law devices; multiple spousal rights to enjoy detention, possession and ownership of acquests, conquests, private, incorporeal, corporeal, movable, immovable, chattel and real property; constructive and resulting trusts, remedial or otherwise; and community matrimonial regimes. In none of these fields is the law obvious either to lawyer or to spouse. Many of these equalization techniques require judicial intervention and are subject to public policies of the most limited shelf-life. All of these techniques depend upon definitions of property determined by laws of property that have not, at least conceptually, changed over the last half-century and further depend on laws of family that have perhaps changed too rapidly.

The laws of property and family should ideally form a seamless web with the law of inheritance and with succession planning. Strangely, however, succession, estate or retirement planning, howsoever named, is largely structured to avoid aliment either by depriving a family of its due measure of succour (through freedom of lifetime disposition and liberty of testation) or by failing to make an appropriate return to the State (avoidance of taxes). All international conferences have this double agenda. Estate planning as internationally promoted seeks to enhance all freedoms and suppress all duties especially fiscal.

This letter summarizes statements that I have made at three International Bar Association conferences.[2]

Firstly, it sets out an analysis of the institution of succession in the private law of the Province of Québec. The Province's 1994 recodification and its contemporary expression of civil law values present a stale vision of private law as divisible and divided into component parts that have changed little since the XII Tables. Many Western jurisdictions have all or some of the same inadequacies as the law of the Province of Québec be they civil law or common law, codified or uncodified, jurisdictions. Yet, the complaints of the law-minded in Québec, indeed in every jurisdiction, are not well focused. The individual rules of application may not be as deficient or as inadequate as the very structure housing these rules. In other words,

2. Michael McAuley, Address to the Int'l Bar Ass'n in New Delhi, India (Nov. 4-5, 1997); Vancouver, Can. (Sept. 16-17, 1998); and London, Eng. (Feb. 15-17, 1999).

the definitional architecture of the private law, especially that of inheritance, is deficient.

Secondly, a new construct must be advanced, that is to say a law of aliment: a law that embraces the alimentary concerns of persons, family, succession, and related matters of property. It is this law of aliment that will provide a new focus for international conferences such as the ones that I have attended and will continue to attend. The reasons compelling this construct are evident in light of the discombobulated state, for example, of the Québec law of inheritance. However, every reader of this letter will recognize like failings in his own jurisdiction.

II. IDEAS OF SUCCESSION

A. Introduction and Notions

The institution of succession is the pivot of private law. Inheritance reflects the vocation of a people and the success of continuity of their mission. Papyrus and stele, vase and stone, in fact most pictoral and literal material of the classical age testify to the constancy of human interest in this field. Rhetorical and divine texts in ancient literature give substance to the statement of the Prophet Muhammad, reliably reported,[3] that the law of succession represents half the sum total of human knowledge.

Modern civil law systems embrace this interest and this tradition by devoting large parts of their private law to the intergenerational acquisition of property. A review of the laws of persons, family and successions, as documented in the nineteenth-century codes of the French model, indicate that the then redactors and legislators carefully conceived the orderly transfer of property within the family and from one generation to another as the stuff that a codified private law should regulate.

In recent times, the primacy of the business agenda and the inability of the population to resist utilitarian approaches to family property and wealth transfer have shifted the focus of the private law from family and succession to contract and delict. The consequence has been a disjunction of the laws of persons, family and succession but a harmony of vision in the law of obligations.[4] The fragmentation especially of family and successoral legislation is, in part, due to this

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3. M.C. Meston, *Some Features of the Scots Law of Succession*, a paper presented at the Int'l Bar Ass'n Section on General Practice's Conference in Edinburgh, Scot. (June 11, 1995).

4. *See* Michael McAuley, *Forced Heirship Redux: A Review of Common Approaches and Values in Civil Law Jurisdictions*, 43 LOY. L. REV. 53 (1997).

shift of focus and, in part, the legacy of the lawmaker's inability to fashion a comprehensive and logical construct for the transfer of property within the family and on death. The private law of the Province of Québec and its Civil Code[5] illustrate a disharmony of action, a spirit of disinvolvement and an absence of a unified vocation for the citizenry, their families and their successions.

The ideas of succession disclosed below are the rudiments of the new Québec codification but a review of these notions and concepts will interest advocates in other jurisdictions who wish either to emulate or to avoid the pitfalls of this late twentieth-century recodification. An examination of ideas of succession and their mechanical operation in the civil law and Civil Code of Québec will hopefully demonstrate that the 1994 recodification refreshed a number of substantive rules of application in the law of inheritance but did nothing to reformulate the social contract. The successoral vocation of the population is quotidian, media-driven and highly tax sensitive. Its legal expression is confused and contradictory. There is, therefore, an urgency for the implementation of a new vision for the law of inheritance. If the insufficiency of the current expression of inheritance in the Civil Code of Québec is not remedied, the value of the Code itself will be debased and the civil law of the Province, already well on the way to maturity as a customary and adjectival legal system of judicial precedent and intervention, will expire.

B. The Notion of Inclusiveness

Most civil codes purport to apply to all residents of their jurisdiction whatever their citizenship.[6] They may exclude and traditionally have excluded certain individuals from the full expression of their civil rights, as we now understand these rights. Yet, they nonetheless have had the merit of at least noting the existence of these individuals. In this way, illegitimate children and concubines have historically had limited or no ability to receive inherited or donated property, principally as a result of express codal

5. The Civil Code of Lower Canada of 1866, partially amended by the Civil Code of Québec of 1980, as itself amended, was entirely repealed by a wholly new Civil Code of Québec that came into force on 1st January 1994.

6. Civil Code of Lower Canada [C.C.L.C.], S.L.C., art. 6, paras. 3-4 (1866), states:

> The laws of Lower Canada, relative to persons, apply to all persons being therein, even to those not domiciled there, subject, as to the latter, to the exception mentioned at the end of the present article. An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

restrictions or prohibitions. The legislators, accordingly, have considered that the desired social contract at the relevant time could not or should not accommodate them.

In the law of inheritance it is essential that civil codes recognize the diversity of a population and, on the occasion of a review of these codes or their recodification, either make coherent provisions that reflect contemporary social values and customs by including individuals formerly excluded or expressly exclude these individuals as part of a new social vision. However, in no circumstance should the methodology of codification deny the existence of individuals who form a significant part of the population. To so deny is to limit the purview of a Code's application and to restore a status-oriented, citizen-metic distinction[7] that the nineteenth-century codes largely repealed.

Cohabitation is a significant demographic factor in Québec.[8] The decline of the institution of marriage within a population given to secularism has resulted in a substantial portion of adults who share property in structures not contemplated by the law of the family or successions. A late 1970s proposal to recognise de facto consorts has not seen its way into the 1994 Code. As a result, these de facto consorts cannot take solace, in the event of dissolution of their union, in the provisions of the Code governing support or property distribution, let alone inheritance. De facto consorts are, therefore, constrained to make use of the provisions of the law of contract and, in particular, of partnership.

The exclusion of de facto consorts from the social contract evidenced by the Code is directly contradicted by their inclusion under a host of federal and provincial statutes, notably the public

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7. *See The Oxford Classical Dictionary* 333-34 (3d ed. 1996) (entry for *Citizenship, Greek*).

8. *See* Statistics Canada—Demography Division, *People living in common-law unions, Canada, the provinces and territories*, Press Release (June 19, 1996), which summarizes as follows:

> The prevalence of common-law relationships reflects the changing attitudes of Canadians towards marital union. It appears that common-law union is not only a prelude to marriage, but also an alternative to marriage and remarriage. For more than a decade, common-law unions have been far more prevalent in Québec than any other province. Québec accounted for more than 4 of every 10 common-law unions in Canada in 1995, or about 442,000. That was more than three times the number in 1981. Similarly, common-law relationships accounted for 21% of all families within Québec in 1995, compared with only 11% in 1986 and 7% in 1981. No other region had such a striking trend in the number and proportional increase in common-law living. In 1995, for the rest of Canada, the proportion of common-law families was about 9%.

pension scheme. Moreover, while the Québec codifier has yet to recognise de facto consorts of different sexes, the courts and the human rights commissions of various provinces have commenced awarding property rights to de facto consorts of the same sex. This is because the notion of the family in Canadian society is larger than the Civil Code of Québec is prepared to admit. The population of Québec has also been significantly influenced by notions of so-called common law spouseship which prevail in the rest of the country and which Canadian courts, elsewhere than in Québec, have with time buttressed and protected. It does, therefore, seem an extraordinary oversight to have neglected de facto consorts of different sexes and not insignificant shortsightedness in failing to conceive of other family relationships and partnerships.

C. The Notion of Mobility

The law of successions in the Province of Québec in the nineteenth century, as identified in the 1866 Code, reflected a relatively static, agricultural society in which the incidence of mobility of residence and assets was not significant. That reflection of society was not strictly speaking accurate in light of the large-scale migration of Québeckers to New England especially in the years following codification. Yet, to the extent that the property subject to the succession was situated within Québec, three major legal institutions affected the devolution of this property. They were: the legal regime of community of property, the exclusion of the spouse as an intestate heir (until 1915), and the absolute freedom of willing.

The end of the twentieth century is an era of high mobility of people and assets. That mobility is now well considered by the addition to the 1994 Code of a book on private international law in which it is provided that a person may designate the law applicable to the succession.[9] However, the mobility is not entirely well dealt with by the Code's provisions on the family and on successions. In Québec it has been the subject of a most unsuccessful legislative endeavour with significant impact on the law of inheritance and testation—the family patrimony.

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9. Book Ten of the Civil Code of Québec reads in part:

> However, a person may designate, in a will, the law applicable to his succession, provided it is the law of the country of his nationality or of his domicile at the time of the designation or of his death or that of the place where an immovable owned by him is situated, but only with regard to that immovable.

Civil Code of Québec [C.C.Q.], S.Q., art. 3098 (1994).

In the United States and in Canada, at large, matrimonial property is dealt with by statutory expressions of public policy which generally apply to residents or domiciliaries, however defined. Québec has aligned itself with this practice by the introduction of a family patrimony scheme self-described as an "effect of marriage."[10] The family patrimony regime is, in its essence, the equal sharing of the increase in value over the course of the marriage of a pool of property composed of residences, furniture, motor vehicles and retirement benefits. The equal partition applies on dissolution of the marriage, including dissolution by death. As an effect of marriage the law provides that family patrimony is a matter of public order.[11]

However, as an effect of marriage, the family patrimony compounds poorly with the notion of a matrimonial regime. Accordingly, residents of Québec have matrimonial regimes that can be modified by consent and without judicial process and have pseudo-regimes, like the family patrimony, from which no derogation is permitted. This dichotomy is the result of the unhappy marriage of common and civil law methodology and also the consequence of a failure to understand that the public policy regimes of common law jurisdictions are, in general, not exportable nor are they equivalent to a generalized scheme or regime of matrimonial property that attaches to the spouses at the commencement of the marriage and that follows them wherever they may sojourn.

The introduction of the family patrimony legislation in Québec in 1989, its incorporation into the then Code and its carry-over into the 1994 Code are violent departures from traditional civil law teaching that insists that a matrimonial regime, historically immutable and inalterable, govern spousal property and come into effect on the occasion of marriage erstwhile qualified as the single more important change in civil status. The family patrimony, in a highly mobile world, does little to prevent matrimonial fraud nor encourage a comprehensive vision of marital property. The institution subscribes to the common law tradition of circumstantial legislative enactments.

Accordingly, the rampant mobility of modern times, one would have thought, should encourage the introduction of a regime that starts with marriage and is transportable. If the legislator is concerned that immigrants into the Province might be subject to a regime that is not in harmony with an equal contributory approach to marriage, then

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10. Book Two, Chapter IV of the Code considers the "Effects of Marriage." C.C.Q. arts. 414-426.

11. The Code states that: "In no case may spouses derogate from the provisions of this chapter, whatever their matrimonial regime." C.C.Q. art. 391.

compulsory adherence might be provided after a long residence. However, a single regime or scheme is necessary and not two schemes one of which is ordained as a public necessity and the other of which, dealing with the same assets, is privately mutable.

Abundant support for a single marital property scheme can be found in other fields of legal endeavour such as in the interjurisdictional recognition of support and custody orders. The portability of pension rights, at least within Canada, gives every good reason to believe that marital property rights can be considered equally portable.

Moreover, it is not evident that the Québec legislator adequately considered the contradiction, on the one hand, between the public policy character of the family patrimony, and on the other hand, the freedom of testation, the liberty of choice of law applicable to the succession, and the permission to elect by contract a matrimonial regime, even a foreign regime, whether or not expressly contemplated by the Code.[12]

Mobility, in conclusion, is a brief for a comprehensive non-elective scheme of marital property. This, in turn, will assist in stabilizing the law of successions.

D. The Notion of Suppression of the Circumstantial

Inheritance in the Province of Québec has undergone broad agitation and its coherent structure enfeebled principally as a result of ad hoc legislation. The most important legislative amendments to the 1866 Code can be summarized as follows: the abintestate hereditary vocation of the spouse (1915); the replacement of the legal regime of community of moveables and acquests by the legal regime of partnership of acquests (1970); the conceptualization of a primary regime to enhance equality among spouses (1980) by way of a network of support obligations, a redress for unjust enrichment called the compensatory allowance, and more secure family residence rights; the repeal or limitation of customary and conventional dowers and the spousal usufruct in community regimes (1969-1994); the survival of the obligation of alimentary support in favour, principally, of the spouse and children (1989); the introduction of the family patrimony (1989); the right of the spouse to aggregate matrimonial and

12. "Any kind of stipulation may be made in a marriage contract, subject to the imperative provisions of law and public order." C.C.Q. art. 431.

successoral benefits (1989)[13]; and the improved abintestate rights of the spouse (1994).[14]

The purported end of spousal inequality and the convergence of spousal inheritance rights with rights awarded by the courts in separation as to bed and board and divorce proceedings, both highly dominated by Canadian common law case law, and in the case of divorce, by a 1985 federal statute, has placed the spouse in a position of patrimonial dominance not first or after contemplated by the 1866 Code and not explicit from the provisions of the book on successions in the 1994 Code considered without reference to the book on family. Furthermore, relatively absolute freedom of willing is still possible in Québec and the population at large considers as self-evident the ability to disinherit, presumably on the basis of the generalized misconception that testamentary dispositions affect all property owned or recorded in the name of the decedent.

The reform of the law of successions, therefore, has largely been circumstantial in that the statutory amendments have been made without consideration of the structure as a whole. The quantum of some rights is by operation of law (testacy, intestacy, and matrimonial property). The quantum of other rights (support, compensatory allowance, and family patrimony) is by judicial determination.[15] Some spousal and inherited rights are real rights (community of property, intestacy, testacy); others are rights primarily to the value of property (partnership of acquests, compensatory allowance, family patrimony, support) although sometimes and on judicial application convertible into real rights. Some rights are transmissible on death and others arguably not transmissible (partnership of acquests and family patrimony rights).

It is within the context of spousal equality that the 1994 Code was drafted. However, as a social model for future generations the Code is deficient. The achievement of equality between spouses has been at the expense of the child. It is now manifestly evident that the spousal nexus is considerably more tenuous than in previous generations. The legislator, therefore, has simply rectified injustices of the past without establishing a contract for the future when clearly

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13. "The surviving spouse's heirship is not dependent on the renunciation of his matrimonial rights and benefits." C.C.Q. art. 654.

14. For example and in general, the spouse takes two-thirds where the father and mother survive, C.C.Q. art. 672, and two-thirds where the father and mother do not survive but brothers and sisters survive, C.C.Q. art. 673.

15. With respect to the family patrimony, the partition is in principle equal, *see* C.C.Q. art. 416, although there is a surprising abundance of case law ordering an unequal partition, *see* C.C.Q. art. 422, and not solely on the grounds originally contemplated by the legislator.

the principal family bond will be between parent and child. This enduring blood relationship is, of course, one that the Québec legislator has conveniently forgotten notwithstanding the wise traditions of forced heirship in other sophisticated civil law jurisdictions favouring the child and Québec's own pre-1774 customary legal history.

The institution of succession must include more than spousal security provisions. A civil code should concentrate less on adjusting for historical inequality and more on establishing a policy for the future within the framework of which individuals can securely plan the devolution of their property.

E. The Notion of Architecture

Succession is more than a method of acquiring ownership. This traditional focus of nineteenth-century codes has long been effaced by the evolution of law and society.[16] The construction of a new paradigm for the law of successions and physical positioning of the law of successions in the 1994 Civil Code of Québec is the major achievement of this Code.

As a first step, the law of successions was awarded its own field of operation in the new Code—Book Three. Secondly, trusts and substitutions were removed from the structure of successions and dispatched, with good reason, to the book on property—Book Four. Gifts are now dealt with in Book Five on obligations.

The opening article of new Book Three (Successions) does not define the institution nor directly tie it into the law of property although the terms "devolution," "patrimony," and "property" make their appearance in the first few articles.[17]

The success of the new Book, however, lies in the establishment of an appropriate balance between testacy and intestacy and the equal treatment of both. Under the old Code, the very definition of heirship

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16. Consider, for example, the opening article of Book Third (Of the Acquisition and Exercise of Rights of Property) of the 1866 Civil Code of Lower Canada, which states: "Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise by the effect of law and of obligations." C.C.L.C. art. 583. Title First deals with the essential matters of successions (opening, seizin, qualities requisite to inherit, abintestate succession, acceptance and renunciation, partition, and returns (collation). Title Two deals with gifts, wills, substitutions and trusts. The Book continues to consider the entire law of obligations, registration and prescription. *See* C.C.L.C. bk. 3, tits. 1-2.

The first article of Title First (Of Successions) underscores the connection with property: "Succession is the transmission by law or by the will of man, to one or more persons, of the property and the transmissible rights and obligations of a deceased person." C.C.L.C. art. 596.

17. C.C.Q. arts. 613-615.

and the fundamental notions of qualification and acceptance were defined within the harbour of intestacy. Testation, therefore, was understood within the context of intestacy. The 1866 Code confirmed this approach by establishing two methods of acquiring property,[18] by obscurely referring to wills in the definition of succession,[19] and by providing for the different orders of succession without reference to testamentary provisions.[20] Although it is true to say that the primacy of testation was recognized in the 1866 Code,[21] the overall environment demeaned the dynamism of the will.

The new Code, in addition to relegating abintestate succession to its proper forum, marshalls the provisions of both legal devolution and devolution by will into two separate titles, Title Three (Legal Devolution of Successions) and Title Four (Wills). The opening articles of both titles make appropriate cross-reference.

There is, nonetheless, the curious inclusion, under the title on legal devolution of successions, of the provisions relating to the survival of the obligation to provide support. The rights of creditors of support lie against the succession in the event of disinheritance. Although it is true to say that the quantum of the "financial contribution" as support is determined with reference to the rules of intestate devolution, the right to claim this contribution manifestly merits a separate title since it constitutes, together with the family patrimony, the inception of an embryonic forced heirship regime, queerly sourced in the common law and judicially umpired.[22]

As a final note on the new architecture of successions, many of the provisions relating to the liquidation or administration of the succession can be found in the Book on Property where, in a master stroke, the Québec legislator has collected the fundamental rules relating to the administration of the property of others. These rules

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18. The French version of the Article provides that ownership is acquired *inter alia* "par succession" or "par testament."

19. *See* C.C.L.C. art. 596 (stating ". . . by the will of man").

20. C.C.L.C. art. 614 (stating, "Successions devolve to the surviving consort capable of inheriting, children and descendants of the deceased, and to his ascendants and collateral relations, in the order and according to the rules hereinafter laid down."). The Article on heirship in the new Code reads: "Unless otherwise provided by testamentary dispositions, a succession devolves to the surviving spouse and relatives of the deceased, in the order and according to the rules laid down in this Title. Where there is no heir, it falls to the State." C.C.Q. art. 653.

21. "Abintestate succession is that which is established by law alone, and testamentary succession that which is derived from the will of man. The former takes place only in default of the latter." C.C.L.C. art. 597, para. 1.

22. *See* Luce M. Dionne, *La survie de l'obligation alimentaire, in* DÉVELOPPEMENTS RÉCENTS EN DROIT FAMILIAL 25 (1996); *see also* Renée-Claude Ouellet, *L'incidence du patrimoine familial sur la liberté de tester*, 10 R.J. DES ÉTUDIANTS ET DES ÉTUDIANTES DE L'UNIVERSITÉ LAVAL 96-99 (1996) (describing the impact of the family patrimony on testamentary freedom).

apply to executors (called liquidators), trustees, mandataries, depositaries, sequestrators, hypothecary creditors, and the like in possession of others' property. The rules present overall guidelines and are supplemented by the prescriptions relating to the particular legal institutions. Since both testate and abinsteste successions require administration and the appointment of liquidators, the notion of the settlement of an estate being the administration of property belonging to another, temporarily isolated in a separate patrimony, is the ligament joining successions to property.

F. The Notion of Bias

Although the new law of successions evinced by the 1994 Code rectifies the historic imbalance between abinstestate and testate devolution, there is a bias in favour of the will, within the codal provisions on wills, that can only be imperfectly reconciled with other family and succession law institutions and that places the magistrature in the uncomfortable position of validating all manner of testamentary paper and, at the same time, determining rights of support for claimants who might otherwise qualify as intestate heirs.

The new Code allows for three forms of wills and provides, at Article 713, that "the formalities governing the various kinds of wills shall be observed on pain of nullity." The Code then announces another agenda, at Article 714, as follows: "A holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased." The contradictory thrust of these two articles has been most carefully and recently examined.[23] Notwithstanding the dangers inherent in this new codal position, considered below, the courts seem unabashed as the recent probate of a will on computer disk demonstrates.

The insecurity as to the form of will and the judicial inculcation of *animus testandi*[24] in just about anything has upset the new balance between legal devolution and testamentary disposition, a balance further muddled, in the field of termination of testamentary trusts, by

23. *See* Nicholas Kasirer, *The "Judicial Will" Architecturally Considered*, 99 R. DU N. 3 (1996).

24. The squeamish distaste of the magistrature for intestacy is well documented in Québec. The population does not share this distaste.

an extravagant emphasis on the testator's intention.[25] This insecurity cannot help but rattle liquidators appointed under otherwise valid wills who are expressly mandated to assess the validity of testamentary paper, provide support, pay creditors and dispose of matrimonial rights, as well as make allowance for particular legatees, in accordance with highly particularized marshalling rules.[26] Furthermore, the determination of unquestionable and unequivocal intention is reliant on a host of evidentiary techniques not historically admitted in Québec.

Inclusiveness (or lack thereof), mobility (or its absence), suppression (or advancement) of the circumstantial, and bias, discussed above, are some features of the Québec codification. Other factors, not discussed here, include the patrimonial imperfections of owning property on death (in whose hands? what is seizin?), deficiency of reception (partial reception of common law institutions), and evasion of subject matter (once again, the de facto consort). They debilitate the Code. The architecture of inheritance has been reconsidered but a review of its structure and components has ignored the significant nexus with the law of family. Alive, you're one thing. Dead you're another.

In sum, this examination of contemporary Québec approaches should bring to mind lacunae in other jurisdictions, which similarly and as briefly viewed and reviewed, demonstrate like problems. However, the problems do not lie just with Québec or with civil law systems or codes but rather with an international lack of interest in conceiving of and proposing wholly new and perhaps revolutionary schemes of providing aliment to people. This is a personalist vision that the private law must now adopt for the next millennium. It is peremptorily considered below.

III. IDEAS OF ALIMENT

One of the surprising purposes of estate planning is to actually see the plan through and to have it implemented. This implementation is usually premised on some sort of familial consensus as to the distribution of property on death. Where there is no consensus, discrete or overt, there is a risk of litigation.

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25. The Civil Code of Québec permits the variation and termination of a trust, under special circumstances, where "a trust has ceased to meet the first intent of the settlor." C.C.Q. art. 1294.

26. The collocation (marshalling) of all creditors, matrimonial or otherwise, is set out in the new Civil Code of Québec. *See* C.C.Q. arts. 808-814.

Estate planning is largely concerned with the avoidance of the lawsuit. Litigation in estate planning is generated by will contestations (either based on incapacity or undue influence); avoidance of probate by the use of non-probate planning techniques such as insurance policies, pension plans, annuities and inter vivos trusts; wills and trusts variations; and family and dependants' maintenance. There are, of course, other reasons for litigation such as defects in the formal requirements of testamentary instruments. However, the four items first noted above are the most significant grounds for litigation. All litigation can be reviewed and examined as an attempt to avoid aliment and the provision of support to alimentary creditors.

The real issue in estate planning is very much the same as in matrimony and family matters, i.e. an issue of alimentary planning. In most jurisdictions, this alimentary planning has favourable tax consequences especially where the spouse and descendants are concerned whether by reason of spousal roll-overs or reduced or non-existent rates of estate tax. Estate planning is also of greater interest in common law jurisdictions where a comprehensive alimentary support system is not evident in the law or, if evident, certainly not comprehensible. In contrast, civil law jurisdictions suffer less since marital property regimes, forced heirship, rights of return or collation of ante mortem gifts, and spousal ownership or usufruct generally promote a balanced harmony among close relatives.

Common law jurisdictions are burdened with a number of false freedoms. These freedoms and the planning based on them are collectively the subject matter of all international conferences. They are reasons for litigation. Some of these freedoms are sourced in the law of succession, others in property law, and yet others in administrative and tax law. The false freedoms may be listed as follows: (1) the freedom of willing; (2) the freedom to arrange one's tax matters in the way best able to reduce tax; (3) the freedom to dispose ante mortem of one's property; (4) the freedom to choose an administrator or executor; and (5) the freedom to convey property without due concern for life interests especially beneficial and spousal life interests.

Each of these so-called freedoms actually negates the free choice of civil status. Accordingly, citizens are encouraged to elect to parent, marry or enter into other relationships. The private law and the public law both textually promote marriage and parenthood. The natural consequences of marriage and parenthood are not promoted or, to be fair, not fairly promoted by contemporary estate planning since both

marriage and parenthood are undermined by a parallel promotion of the five false freedoms. A sterling example of this contradiction of public effort comes from our civil law colleagues. Has there ever been an international symposium on adherence to forced heirship and estate planning in full compliance therewith?

Moral bankruptcy need not be the foundation for estate planning. This planning should be premised on attention to aliment and should be concerned with the following issues: (1) an attention to the natural objects of one's bounty; (2) an attention to spouses, loosely defined, of opposite or same sex and the children of these unions; (3) the expectations of alimentary creditors; and (4) the means and needs of these creditors by considering the amount of bequests, lifetime gifts, and entitlements under intestacy and family maintenance statutes.

Estate planning is, therefore, not so much a technical consideration of wills, trusts and taxes but rather a due and proper attention to status and the consequences of the exercise of the freedom to choose one's own particular and perhaps peculiar civil status and social position.

This law of aliment must be inclusive and mobile and it must propose uniform rules for the treatment of persons and property before and after death. It must be of some longevity like the forced heirship rules of the civil law. In this way, late-in-life and dramatically different willing patterns, much of them tax induced, will be suppressed.

How best to obtain this new construct and this new harmony of action and what techniques are most appropriate should be the real subject matter of estate planning.