A-335-99

2001 FCA 63

Attorney General of Canada and **Treasury Board of Canada** (*Appellants*) (*Respondents*)

v.

Constance St-Hilaire (*Respondent*) (*Applicant*)

INDEXED AS: ST-HILAIRE V. CANADA (ATTORNEY GENERAL) (C.A.)

Court of Appeal, Desjardins, Décary and Létourneau, JJ.A.—Québec, January 31; Ottawa, March 19, 2001.

Public Service — Pensions — Respondent, charged with second degree murder of husband, pleaded guilty to manslaughter — Husband, public servant, contributing to Superannuation Account under PSSA, s. 4 — Widow claiming allowances prescribed in Act as surviving spouse, heir of husband's succession — Treasury Board refusing to pay on basis of public policy rule no one may profit from own crime — Necessary to refer to Civil Code of Québec where Act silent on meaning of words " surviving spouse "," succession "— Manslaughter conviction supporting unworthiness to inherit by operation of law under Civil Code of Québec, art. 620 — Respondent committing aggravated assault, inflicting serious bodily harm likely to cause death, unworthy by operation of law of inheriting from husband.

Civil Code — Respondent claiming allowances as surviving spouse, heir under Public Service Superannuation Act after husband's death during violent domestic quarrel — Charged with second degree murder, pleading guilty to manslaughter — Words" surviving spouse"," estate" not defined in Act — Complementarity of Quebec civil law with federal law where latter silent — Civil law suppletive law where Court must interpret, apply federal enactment silent in dispute concerning civil rights in Quebec — Unworthiness to inherit under Civil Code of Québec, s. 620(1) attaching to person convicted of making attempt on deceased's life — Civil Code of Québec recognizing principle no one should profit from own crime — Canadian, English case law reviewed — Art. 620 not substantially altering previous law within context of legal succession — Not excluding from its purview all cases of manslaughter.

This was an appeal from a Trial Division decision allowing the respondent's application for a declaratory judgment that would recognize her right to the benefits provided by the *Public Service Superannuation Act*, and ordering the Treasury Board to pay her the sums she claimed. In February 1995, the respondent killed her husband during a violent domestic quarrel. Charged with second degree murder, she pleaded guilty to a reduced charge of manslaughter. The husband was a public servant who had worked for the Canadian Coast Guard for 25 years and had been contributing to the Superannuation Account under section 4 of the Act and the Public Service death benefit account opened under section 56. The respondent asked the Treasury Board to pay her, in her capacity as a surviving spouse and as heir of her husband's succession, the allowances prescribed in the Act. The Treasury Board refused to pay anything on the basis of a public policy rule that no one may profit from his own crime. The respondent then applied to the Federal Court, Trial Division for a declaratory judgment that would recognize her right to the benefits provided by the Act. Allowing the application, Blais J. ruled that the applicable law was the law of successions defined in the *Civil Code of Québec* and that under that law there is no unworthiness to inherit by operation of law unless there is an intention to commit the alleged crime and that the offence of manslaughter falls outside this rule. The main issue on appeal was whether the civil law of Quebec is the suppletive law

where a court must interpret and apply a federal enactment which is silent concerning civil rights in Quebec and if so, whether the respondent was unworthy by operation of law of inheriting from her husband under subsection 620(1) of the *Civil Code of Québec*.

Held (Décary J.A. dissenting in part), the appeal should be allowed.

Per Létourneau J.A.: The Federal Court of Appeal has on many occasions recognized the complementarity of the Quebec civil law with federal law where the latter is silent. It has also endeavoured to harmonize the effects of federal statutes in order to avoid possible inequities as a result of disparities while acknowledging a right to be different where harmonization proves impossible. The unworthiness to inherit under subsection 620(1) of the *Civil Code of Québec* attaches to the person convicted of making an attempt on the life of the deceased. The wording of this article creates serious difficulties since there is no offence in Canadian criminal law of making an attempt on the life of the deceased. In our criminal law, manslaughter is a residual category which encompasses whatever is not otherwise assigned to murder and infanticide. The three categories of offences in the *Criminal Code* (murder, manslaughter and infanticide) are far from being mutually watertight and it would be an error to hide behind the label "manslaughter" and conclude that each and every attack on life that falls within that category cannot be a source of unworthiness to inherit by operation of law. Moreover, one could not infer from the presence of the word "*involontaire*" in the concept of "*homicide involontaire coupable*" (manslaughter) a lack of intention to kill or to produce the death. Subsection 620(1) of the *Civil Code of Québec* does not exclude from its purview all cases of manslaughter. Where, as here, a person commits aggravated assault or inflicts serious bodily harm likely to cause death, knowing that death may result but being indifferent as to whether or not it results, that person is by operation of law unworthy of inheriting from his victim. This act fulfills all the conditions of murder prescribed in subparagraph 229(*a*)(ii) of the *Criminal Code* and constitutes a murder. The respondent wanted, if not to kill her husband, to at least cause serious bodily harm to him likely to cause his death. She consciously and deliberately made an attempt on the life of the deceased within the meaning of subsection 620(1) of the *Civil Code of Québec*. Therefore, she was unworthy by operation of law of inheriting from her husband under that provision and could not receive the surviving spouse annuity.

Per Desjardins J.A.: To determine the meaning of the words "surviving spouse" and "succession" when the federal statute in question, the *Public Service Superannuation Act*, is silent, it is necessary to refer to the *Civil Code of Québec* and not the common law. The *Civil Code of Québec* is the foundation not only of all other Quebec laws, but also of the relevant provisions of the Act in question. The first paragraph of article 620 of the Code, which states that "a person convicted of making an attempt on the life of the deceased" is unworthy of inheriting by operation of law, does not rule out the applicability thereto of some cases of manslaugther, let alone the manslaughter committed by the respondent. If the Quebec legislature had actually intended to exclude any recourse to the courts of civil procedure in article 620 of the *Civil Code of Québec*, it could have borrowed the terminology peculiar to the criminal law in drafting the first paragraph of article 620, but refrained from doing so. Since the respondent was "convicted of making an attempt on the life of the deceased", she was unworthy by operation of law of inheriting from her husband under that provision and could not receive the surviving spouse's annuity.

Per Décary J.A. (*dissenting in part*): The benefit in the form of a monthly allowance contemplated in subsection 13(3) of the Act is payable to the "surviving spouse" and the "children". There was no child herein and the respondent was the "surviving spouse". The parties erred in assuming that the respondent and her husband's "succession" were one and the same. The *Criminal Code* of Canada recognizes three kinds of culpable homicide: murder, manslaughter and infanticide. In the case at bar, the respondent, in criminal law terms, intentionally caused serious bodily harm that resulted in the death of her husband. At the relevant time the *Public Service Superannuation Act* did not contain any provision concerning the disqualification of a beneficiary for attempting to take the contributor's

life. In Quebec the “ordinary law” of the province is constituted by the *Civil Code of Québec* and the *Code of Civil Procedure*, although these are statutory documents. A judge who must interpret and apply a federal enactment that is silent in a dispute concerning civil rights in Quebec must know that, as a general rule, the suppletive law is the civil law. The Attorney General’s submission that the eligibility for benefits of federal government employees is a question of administrative law governed by the rules peculiar to public law, and therefore by the common law, had two flaws. First, the *Public Service Superannuation Act* is not a statute that is exclusively administrative in nature. Second, the common law rule that a person may not profit from his crime is not a rule of public law but a rule of private law. What should determine whether it is necessary to resort to the private law (in Quebec, the civil law) is not the public or private nature of the federal enactment at issue but the fact that the federal enactment in a given case must be applied to situations or relationships that it has not defined and that cannot be defined other than in terms of the persons affected. When the latter are litigants and their civil rights are in dispute and have not been defined by Parliament, it is the private law of the province that fills the void. The civil law applies in Quebec to any federal legislation that does not exclude it. A federal statute, albeit one characterized as public law, that refers to a private law concept such as succession without defining it, should be interpreted in Quebec in terms of civil law. Since it is the civil rights of the surviving spouse and the heirs that are in dispute, Parliament’s silence should be interpreted as an acquiescence in the application of the principle of legal asymmetry that characterizes Canadian federal law.

The *Civil Code of Québec* recognizes the principle that no one should profit from his crime. Article 620 of the *Civil Code of Québec*, which states that a person convicted of making an attempt on the life of the deceased is unworthy of inheriting by operation of law, has not substantially altered the previous law, at least within the context of the legal succession. The solution that appears to be the most restrictive, the most objective, the most certain and the only one that can entail automatic exclusion should be adopted. This solution is likewise the one adopted in France by the majority of judges and legal scholars. Under the current Quebec law of succession, the respondent, in her capacity as heir, was not unworthy by operation of law. Since she has not been judged unworthy by judicial declaration and the limitation period within which successors may seek a judicial declaration of unworthiness has expired, the respondent was entitled to claim from the Treasury Board, as the heir of her husband’s succession, the sum of $81,750 payable under subsection 55(1) of the Act as the supplementary death benefit. However, under article 2443 of the *Civil Code of Québec* which governs the present situation, an attempt on the life of the contributor by the beneficiary entails the forfeiture of this beneficiary. The circumstances of the crime in the case at bar lead to the disqualification of the respondent. The description of the events revealed a clearly settled intention to take advantage of the opportunity that was presented to” stick it to” the victim once and for all. This was an attempt on the life of the victim within the meaning of the law of insurance and the respondent would profit from her crime if she were allowed to receive the benefits payable to a surviving spouse. The respondent was forfeited from her entitlement to the benefits payable to a surviving spouse under subsection 13(3) of the Act, but she was entitled in her capacity as heir, to the minimum amount of $75,202.50 payable under subsection 27(2) of Part I of the Act and to the supplementary death benefit of about $81,750.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Act to Abolish Forfeitures for Treason and Felony, and to otherwise amend the Law relating thereto (U.K.), 33 & 34 Vict., c. 23.

Bill S-4, *Federal Law-Civil Law Harmonization Act, No. 1*, 1st Sess., 37th Parl., 2001.

Civil Code of Lower Canada, Arts. 610, 611, 813, 893, 2559.

Civil Code of Québec, S.Q. 1991, c. 64, Arts. Preliminary Provision, 6, 7, 9, 613, 620, 621, 622,

623, 653, 696, 697, 1373, 1411, 1413, 1836, 1837, 2379, 2443, 2445, 2453, 2460.

Code civil (Fr.), Art. 727.

Code of Civil Procedure, R.S.Q., c. C-25.

Code pénal (Fr.), Arts. 295-317.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 92(13), 94.

Criminal Code, R.S.C., 1985, c. C-46, ss. 222(2),(3),(4), (5), 223(5), 229, 231 (as am. by R.S.C., 1985 (1st Supp.), c. 27, ss. 7, 40(2), Sch. I; S.C. 1997, c. 16, s. 3; c. 23, s. 8), 232, 234, 235, 239 (as am. by S.C. 1995, c. 39, s. 143), 745 (as am. by S.C. 1995, c. 22, s. 6), 745.1 (as enacted *idem*).

Federal Court Act, R.S.C., 1985, c. F-7, ss. 39(1), 56 (as am. by S.C. 1990, c. 8, s. 18).

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, s. 18(1)(*a*).

Nouveau Code civil (Fr.), Art. 726.

Nouveau Code pénal (Fr.), Arts. 221-1, 221-2, 221-3, 221-4, 221-5, 221-7.

Ontario Municipal Employees Retirement System Act, R.S.O. 1980, c. 348.

Public Service Staff Relations Act, R.S.C., 1985, c. P-35.

Public Service Superannuation Act, R.S.C., 1985, c. P-36, ss. 4, 12(9) “child” (as am. by S.C. 1989, c. 6, s. 2), 13(3) (as am. by S.C. 1996, c. 18, s. 30), 25(4) (as am. by S.C. 1999, c. 34, s. 75), (8) (as enacted *idem*), 27(2) (as am. *idem*, s. 78), 42(1)(*mm*), 43 (as am. *idem*, s. 93), 54, 55(1), 56 (as am. by S.C. 1992, c. 46, s. 27).

Public Service Superannuation Regulations, C.R.C., c. 1358, s. 41.

Quebec Act, 1774 (The), R.S.C., 1985, Appendix II, No. 2, s. VIII.

Social Security Act 1975 (U.K.), 1975, c. 14.

CASES JUDICIALLY CONSIDERED

APPLIED:

R. v. National Insurance Comr, ex parte Connor, [1981] 1 All E.R. 769 (Q.B.); *Gray v. Barr (Prudential Assurance Co Ltd, third party)*, [1971] 2 All ER 949 (C.A.).

CONSIDERED:

R. c. St-Hilaire, [1996] A.Q. No. 597 (Que. Sup. Ct.) (QL); *Foncière Compagnie d’Assurance de France v. Perras*, [1943] S.C.R. 165; [1943] 2 D.L.R. 129; (1943), 10 I.L.R. 45; *Millar (Charles), Deceased, In re Estate of*, [1938] S.C.R. 1; (1938) 1 D.L.R. 165; *Brissette Estate v. Westbury Life Insurance Co.; Brissette Estate v. Crown Life Insurance Co.*, [1992] 3 S.C.R. 87; (1992), 96 D.L.R. (4th) 609; 13 C.C.L.I. (2d) 1; 47 E.T.R. 109; 142 N.R. 104; 58 O.A.C. 10; *65302 British*

Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804; (1999), 179 D.L.R. (4th) 577; [2000] 1 W.W.R. 195; 69 B.C.L.R. (3d) 201; 99 DTC 5799; 248 N.R. 216; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; 23 Q.A.C. 1; (1989), 45 M.P.L.R. 1; 94 N.R. 1; *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc. et al.*, [1986] 1 S.C.R. 752; (1986), 28 D.L.R. (4th) 641; 34 B.L.R. 251; 68 N.R. 241; *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.); *Couture-Lauzon c. Industrielle Alliance (L'), compagnie d'assurances sur la vie*, [1993] R.R.A. 406 (C.Q.); *Galarneau et Beaupré*, J.E. 81-1085 (Que. Sup. Ct.); *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147 (C.A.); *Lundy v. Lundy* (1895), 24 S.C.R. 650; *Nordstrom v. Baumann*, [1962] S.C.R. 147; (1961), 31 D.L.R. (2d) 255; 37 W.W.R. 16; *Ontario Municipal Employees Retirement Board and Young et al., Re* (1985), 49 O.R. (2d) 78; 15 D.L.R. (4th) 475; 21 E.T.R. 1 (H.C.).

REFERRED TO:

Shaw v. Gillan (1982), 40 O.R. (2d) 146; 143 D.L.R. (3d) 232; 32 C.P.C. 251; [1983] I.L.R. 6179 (H.C.); *Goulet c. Cie d'assurance-vie Transamerica Canada*, [2000] R.J.Q. 1066; [2000] R.R.A. 325; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; (1996), 140 D.L.R. (4th) 577; 42 Admin. L.R. (2d) 1; 205 N.R. 1; *Exchange Bank of Canada v. Reg.* (1886), 11 App. Cas. 157 (P.C.); *Canada v. Construction Bérou Inc.* (1999), 99 DTC 5868; 251 N.R. 115 (F.C.A.); *Biderman v. Canada* (2000), 2000 DTC 6149; 253 N.R. 236 (F.C.A.); *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; (1983), 2 D.L.R. (4th) 193; 4 Admin. L.R. 205; 7 C.C.C. (3d) 385; 37 C.R. (3d) 289; 51 N.R. 81; *T.S.C.O. of Canada Ltd. c. Châteauneuf*, [1995] R.J.Q. 637 (C.A.); *Ménard v. Canada*, [1992] 3 F.C. 521 (1992), 146 N.R. 92 (C.A.); *King, The v. Central Railway Signal Co*., [1933] S.C.R. 555; [1933] 4 D.L.R. 737; *Héritiers de feu Michel Prézeau c. Legault-Prézeau*, J.E. 83-96 (Que. Sup. Ct.).

AUTHORS CITED

Baudouin, Louis. *Le droit civil de la province de Québec: modèle vivant de droit comparé*. Montréal: Wilson et Lafleur, 1953.

Beaulne, Jacques, "Les successions (Ouverture, transmission, dévolution, testaments)" in *Réforme du Code civil: Personnes, successions, biens*. Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec. Presses de l' Université Laval, 1993.

Bergeron, Jean-Guy. *Précis de droit des assurances*. Sherbrooke: Éditions Revue de droit Université de Sherbrooke, 1996.

Bonenfant, J.-C. "Droit canadien des compagnies" (1967), 70 *R. du N.* 253.

Brière, Germain. *Le nouveau droit des successions*, 2nd ed. Montréal: Wilson & Lafleur, 1997.

Brière, Germain. *Les successions*. Montréal: Centre de recherche en droit privé et comparé du Québec, 1990.

Brière, Germain. *Les successions ab intestat*, 8th ed. Montréal: Thémis, 1979.

Brisson, J.-M. "L'impact du Code civil du Québec sur le droit fédéral: une problématique" (1992), 52 *R. du B.* 345.

Brisson, J.-M. and A. Morel. "Droit fédéral et droit civil: complémentarité, dissociation" (1996), 75 *Can. Bar Rev*. 297.

Caron, Yves. "Correspondance" (1968), 70 *R. du N.* 372.

Commentaires du ministre de la Justice: le Code civil du Québec: un mouvement de société. Québec: Ministère de la Justice, 1993.

Faribault, Léon. *Traité de droit civil du Québec*, Vol. IV. Montreal: Wilson et Lafleur, 1954.

Garant, Patrice, *Droit administratif*, 4th ed., Vol. 1. Cowansville, Qc: Yvon Blais, 1996.

Langelier, F. *Cours de droit civil de la Province de Québec*, Vol. 2. Montréal: Wilson et Lafleur, 1906.

Library of Parliament. Parliamentary Research Branch. *Bill C-50: Federal Law-Civil Law Harmonization Act, No. 1*. Prepared by Luc Gagné, Law and Government Division, November 1998.

Lordon, Paul. *Crown Law*. Toronto: Butterworths, 1991.

Macdonald, R. A. and F. R. Scott. "Harmonizing the Concept and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law" in *Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of studies*. Ottawa: Department of Justice, 1997, page 29.

Malaurie, Philippe. *Les successions, les libéralités*, 4th ed. Paris: Éditions Cujas, 1998.

Mayrand, Albert. *Les successions ab intestat*. Montréal: Presses de l'Université de Montréal, 1971.

Mignault, P. B. *Le droit civil canadien*, Vol. 3. Montreal: C. Théoret, 1897.

Morel, A. "Harmonizing Federal Legislation with the *Civil Code of Québec*: Why? and Wherefore? in *Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of studies*. Ottawa: Department of Justice, 1997, page 1.

Robilliard, St. John. "Public Policy and the Widow" (1981), 44 *Mod. L. Rev.* 718.

Tarnow, N. M. "Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates" (1980), 58 *Can. Bar Rev*. 582.

Terré, François et Yves Lequette. *Droit civil: les successions, les libéralités*, 3e éd. Paris: Dalloz, 1997.

APPEAL from a Trial Division decision ([1999] 4 F.C. 23 (1999), 32 E.T.R. (2d) 126; 167 F.T.R. 46) allowing the respondent's application for a declaratory judgment that would recognize her right to the benefits provided by the *Public Service Superannuation Act*, and ordering the Treasury Board to pay her the sums she claimed. Appeal allowed.

APPEARANCES:

Guy A. Blouin for appellants (respondents).

Suzy-Guylaine Gagnon for respondent (applicant).

SOLICITORS OF RECORD:

Deputy Attorney General of Canada for appellants (respondents).

Rochon, Belzile, Carrier, Auger & Associés, Québec, for respondent (applicant).

The following is the English version of the reasons for judgment rendered by

[1] DESJARDINS J.A.: I subscribe to the reasons expressed by my colleague Décary J.A., in which he explains that the Quebec civil law is the applicable law in this case. His detailed analysis of the relevant law leaves no doubt in my mind. To determine the meaning of the words "surviving spouse" and succession" when the federal statute in question, the *Public Service Superannuation Act*, R.S.C., 1985, c. P-36 (the Act) is silent, it is necessary to refer to the *Civil Code of Québec* [S.Q. 1991, c. 64] and not the common law. I note in passing that, notwithstanding the current usage in French of the expression "*la common law*", perhaps in memory of the old French expression, "*la Common Ley*", I adhere to the school of those who prefer to put the expression" common law" in the masculine gender since it designates the law (*le droit*) and not legislation or particular statutes (*la loi*). (See J.-C. Bonenfant, "Droit canadien des compagnies" (1967) 70 *R. du N.* 253, and Yves Caron, "Correspondance" (1968) 70 *R. du N.* 372.) The *Civil Code of Québec* is not only the foundation of all other Quebec laws (*Civil Code of Québec*, Preliminary Provision), but also the foundation of the relevant provisions of the Act in the case at bar.

[2] However, it remains to determine the exact scope of the first paragraph of article 620 of the *Civil Code of Québec*, which states that "a person convicted of making an attempt on the life of the deceased" is unworthy of inheriting by operation of law. These words substantially replicate the provisions of article 610 of the *Civil Code of Lower Canada*, which stated that "He who has been convicted of killing or attempting to kill the deceased" was unworthy of inheriting and, as such, was excluded from successions.

[3] In this regard, I differ with Décary J.A.

[4] Charged with second degree murder, the respondent pleaded guilty to a reduced charge of manslaughter. The circumstances of her act, as related during the judgment given at sentencing by Mr. Justice André Trotier of the Quebec Superior Court [*R. c. St-Hilaire*, [1996] A.Q. No. 597 (QL)] and reproduced by Décary J.A., in paragraph 25 of his reasons, and in particular the respondent's words to the police, on the night of the crime, February 3, 1995: "I was the one who stuck it to him, the bastard!", are not beyond the purview of the language of the first paragraph of article 620 of the *Civil Code of Québec* or of the Quebec legal theory and Canadian and English case law as analysed by Létourneau, J.A. This leads him to conclude that the first paragraph of article 620 of the *Civil Code of Québec* does not rule out the applicability thereto of some cases of manslaughter, and certainly not the manslaughter committed by the respondent.

[5] I share that opinion.

[6] It could happen, however, in some situations other than this one, that the attempt on the life of the deceased might be more or less present during a conviction for manslaughter. Faced with this debate, and for all the reasons he gives, Décary J.A. opts for a relatively restrictive interpretation limited to murder (see paragraphs 88 to 90 of his reasons), because it appears to him to be more objective, more certain and the only one likely to entail automatic exclusion, the exclusion by operation of law provided in the first paragraph of article 620 of the *Civil Code of Québec* (see paragraphs 95, 96, 97 and 98 of his reasons).

[7] Exclusion by operation of law seems to me, however, compatible with the fact that a court of civil jurisdiction may have to determine whether an individual has been" convicted of making an attempt on the life of the deceased". The civil judge then finds, in light of the record of the criminal trial, that there is unworthiness by operation of law within the meaning of the *Civil Code of Québec*. The judge need not exercise his discretion in the manner of the old French law (see paragraph 91 of the reasons of Décary J.A. and his reference to Mayrand [*Traité élémentaire de droit civil: les successions ab intestat*, 1971]) but he is required to exercise some judgment. Of course, there is often a narrow line between a judicial finding and a judicial declaration (compare articles 620 and 621 of the *Civil Code of Québec*). But the law is no stranger to such distinctions.

[8] And it is this judicial finding by a court of civil jurisdiction to which, I think, the Minister of Justice is referring in his Commentaries on the first paragraph of article 620 of the *Civil Code of Québec* [*Commentaires du ministre de la Justice: le Code civil du Québec: un mouvement de société*] (Volume I, page 367):

> [TRANSLATION] The seriousness of the situations contemplated by the article and the existence of a judgment that records the facts justify the fact that the resulting incompetency is established by operation of law. [Emphasis added.]

[9] The criminal court, for its part, does not "record" the facts or the "seriousness of the situations contemplated by the article"; it "investigates" the facts according to the indictment.

[10] If we compare the Commentaries of the Minister of Justice concerning article 620 of the *Civil Code of Québec*, as reproduced above, with those he makes about article 621 of the Code, he writes (Volume I, page 367):

> [TRANSLATION] This article complements the preceding one, setting out the grounds for getting a person declared unworthy to inherit. Since the proof of the relevant facts has not been made in a court, or has been made in another proceeding, a person who wishes to allege unworthiness will have to have it pronounced for any one of the causes that is referred to. [Emphasis added.]

[11] In the case of article 621, the civil court conducts an inquiry and declares the unworthiness.

[12] Supposing that this ambiguity is not fully resolved by the Commentaries of the Minister of Justice (owing to the words "or has been made in another proceeding"), it is

still nevertheless the case that if the Quebec legislature had actually intended to exclude any recourse to the courts of civil procedure in article 620 of the *Civil Code of Québec*, it could have borrowed the terminology peculiar to the criminal law in drafting the first paragraph of article 620, and this it refrained from doing.

[13] I would conclude, for the reasons expressed by Létourneau J.A., that the respondent Constance St-Hilaire was "convicted of making an attempt on the life of the deceased", and that she is unworthy by operation of law of inheriting from her husband under the first paragraph of article 620 of the *Civil Code of Québec*. I would also conclude, for the reasons expressed by Décary J.A., that she may not receive the surviving spouse's annuity.

[14] I would allow the appeal, overturn the decision of the Trial Judge [[1999] 4 F.C. 23 and, proceeding to render the judgment he should have rendered, I would dismiss the respondent's application for declaratory judgment, the whole without costs given that each party has been partially successful.

* * *

The following is the English version of the reasons for judgment rendered by

[15] DÉCARY J.A. (*dissenting in part*): On February 3, 1995, the respondent knifed her husband (Mr. Morin) during a violent domestic quarrel. Mr. Morin died a few hours later. Charged with second degree murder, she pleaded guilty to a reduced charge of manslaughter and was sentenced to imprisonment for two years less a day accompanied by an order of three years' probation effective upon her release.

[16] Mr. Morin was a member of the Public Service of Canada. He worked in the Canadian Coast Guard, a Department of Transport component. For some 25 years he had been contributing to the Superannuation Account under section 4 of the *Public Service Superannuation Act*, R.S.C., 1985 c. P-36 (the Act) and the Public Service death benefit account opened pursuant to section 56 [as am. by S.C. 1992, c. 46, s. 27].

[17] The couple lived in Charlesbourg, a suburb of Québec City. They married in 1981 under the regime of separation of property. They had no children. At the time of Mr. Morin's death there was no testamentary disposition other than the one provided in the contract of marriage. Under that provision, the spouses mutually gifted, in contemplation of death, the universality of movable and immovable property making up the succession of the first spouse to die (A.B., at page 43). The record indicates that Mr. Morin had at least one nephew, Mr. Mario Richard (A.B., at pages 74, 140) and the respondent, at least one sister (A.B., at page 140). No successor of Mr. Morin requested, pursuant to article 623 of the *Civil Code of Québec* [hereinafter C.C.Q.] (see paragraph 69) that the respondent be declared unworthy. Under article 613 C.C.Q., a gift *mortis causa* is a testamentary disposition governed by the provisions pertaining to the opening of successions and qualities for succession.

[18] The respondent asked the Treasury Board of Canada (the Treasury Board) to pay her, on the one hand in her capacity as a surviving spouse and on the other hand in

her capacity as heir of Mr. Morin's succession, the allowances prescribed in the Act. The Act provides, in Part I, for the payment to the surviving spouse of a benefit in the form of a monthly allowance (subsection 13(3) [as am. by S.C. 1996, c. 18, s. 30]) and, where there is no one (spouse or child) to whom an allowance may be paid, the payment of a minimum amount to the succession equivalent to five times the basic pension of the deceased (subsection 27(2) [as am. by S.C. 1999, c. 34, s. 78]), and, in Part II, the payment to the succession of a supplementary death benefit equivalent to double the deceased's annual salary (section 54 and subsection 55(1)). In the case at bar, it is acknowledged by the Treasury Board that the amount of the said benefits, if it were to be paid, would be as follows: about $626.68 per month for the surviving spouse's benefit, about $81,750 for the supplementary death benefit payable to the succession and about $75,202.50 for the minimum amount payable to the succession if there were neither surviving spouse nor child (A.B., at page 52).

[19] Under section 43 [as am. by S.C. 1999, c. 34, s. 93], the necessary amounts for the payment of the benefits established by subsections 13(3) and 27(2) are paid out of the Superannuation Account. Under section 56, the supplementary death benefit established in sections 54 and 55 is paid out of the Consolidated Revenue Fund and charged against the Public Service Death Benefit Account.

[20] The Treasury Board refused to pay anything to the respondent, citing the public policy rule that no one may profit from his or her own crime.

[21] The respondent then applied to the Trial Division of this Court for a declaratory judgment that would recognize her right to the benefits provided by the Act. The respondent essentially pleaded as follows (A.B., at pages 35-36):

> [TRANSLATION]
>
> 9. It is clear from the record as a whole and from my conviction for manslaughter that I never intended to make an attempt on my husband's life, thus ruling out the application of article 620 of the *Civil Code of Québec*, which provides for unworthiness by operation of law;
>
> 10. Furthermore, only successors could raise the issue of relative unworthiness in the year following the opening of the succession. But more than three (3) years have elapsed and since no one has appeared the proceeding is now prescribed thus leaving me as the sole heir;
>
> 11. There is no provision in the Canada Pension Plan or any other pension benefits legislation that would add to the possible grounds for unworthiness provided in the *Civil Code of Québec*;
>
> 12. Likewise, I fulfill all of the conditions pertaining to the definition of "surviving spouse" prescribed in that Act.

[22] Mr. Justice Blais allowed the respondent's application and ordered the Treasury Board to pay her the sums she claimed. In a decision published at [1999] 4 F.C. 23(T.D.), he said that in his opinion the applicable law in this case is the law of

successions defined in the *Civil Code of Québec*, that under the Quebec law of successions there is no unworthiness to inherit by operation of law unless there is an intention to commit the alleged crime and that the offence of manslaughter falls outside this rule. Incidentally, he refused to order the Treasury Board, in the context of an application for judicial review, to pay interest; this part of the order was cross-appealed by the respondent although she abandoned it at the hearing.

[23] The appellants (the Attorney General of Canada and the Treasury Board of Canada) (hereinafter the Attorney General) submit that the subject-matter of the litigation falls exclusively within public law, and more particularly administrative law, that the common law is the source of federal public law and applies to the federal government even on Quebec territory, that at common law there is a rule of public policy or public order that no one may profit from his or her own crime, and that this rule applies to the crime of manslaughter, that Quebec private law cannot exclude this rule having regard to federal public law, and, finally, that in any event the crime of manslaughter entails unworthiness by operation of law under Quebec's civil law.

Preliminary observations

[24] Before resolving this formidable legal puzzle, it will be useful if I describe in some detail the circumstances of the crime, determine the identity of the beneficiary of the allowances payable under the federal legislation, recall certain basic notions of criminal law, review the role of the courts in the adoption or definition of rules of public policy and take into account the concern expressed in the Act itself in relation to the perpetration of criminal acts.

A. The circumstances of the crime

[25] The circumstances of the crime are described in the reasons for judgment given at sentencing by Mr. Justice Trotier of the Quebec Superior Court ([1996] A.Q. No. 597 (QL), at paragraphs 8, 9, 10, 11, 13, 14, 15 and 22):

> [TRANSLATION] On the eve of the tragedy, February 2, 1995, you had both drunk too much again, resulting in a new intervention by the police. On February 3, 1995, drunk again, the conflict deteriorated at dinner time: not only were you criticizing and insulting each other but ultimately it became physical: he shoved you against the kitchen wall and you, grabbing a knife in a drawer, delivered a fatal blow to his abdomen.
>
> The witness Gilles Gasse, who was present at the time, told us about the violent situation that existed that night. The victim wanted to know who was supplying you with cocaine and threatened to have you followed, if necessary, by some Hell's Angels. Also, your husband was trying to get some information about your extramarital relationships, which you have admitted to us.
>
> What was your psychological state during this dinner? You told about it during your testimony. You acted "in a fit of anger" owing to the presence of a stranger. But the witness Gilles Gasse tells us that your husband's threats about the Hell's Angels did not seem to affect you particularly, that the atmosphere of tension was palpable that night, but not so different from that observed during his previous visits.

As to the events that followed, they illustrate at the outset your state of panic. You tried to revive your husband, but faced with the irremediable situation that had been created, you quickly regained your equanimity. For example, you gave some instructions to Gasse, the witness, about putting the knife back in the drawer and with him you went about changing the clothes on the victim. Subsequently, there was a call to the ambulance attendants and the police. You lied to Constable Tougas, telling him you had put the knife in the dishwasher, and added: “I was the one who stuck it to him, the bastard!”, repeating with these words a previous threat made in front of this same officer in 1994 during another intervention. At that time you told him: “Some day I am going to stick it to him, the bastard!”

…

When it comes to remembering the events of a year ago, Madam, you no longer have a very clear idea of them. Time has eroded your memories and you have enriched them, embellished them in your favour. Between what actually happened and what you have described for the first time in Court, there is a world of difference. You testified with sincerity, of course, but sincerity is not necessarily the truth. Of course, you did not want to kill your husband that night, but you acted “in the heat of anger” and not “out of fear” for the purpose of avoiding danger.

…

With respect for this expert, it was not in a context of collapse of your defence mechanisms that the unfortunate act was committed, but through a lack of control inspired by “anger accentuated by substance abuse”. You wanted to respond to the assault against you through intimidation, which implies the use of your own defences.

The context of constant and excessive family violence in which your husband and you lived pointed to this outcome unless you were to separate. You were both used to it, even in front of other people, and again, I do not think the theory of self-repression and self-denial is at the basis of this fatal event. This was not an ultimate desperate act of a woman who sincerely believed that her life was endangered. Moreover, that night you had other alternatives or outlets that were often used such as locking yourself in your room, leaving the premises and going to bars, or calling the police.

…

WHEREAS, in the circumstances, the offence committed was prompted by anger, not fear, and this precludes any claim that it was an accident.

B. The beneficiary of the allowances owing

[26] The benefit in the form of a monthly allowance contemplated in subsection 13(3) of the Act is payable to the “surviving spouse” and the “children”. The word “child” is defined in subsection 12(9) [as am. by S.C. 1989, c. 6, s. 2] and subsection 25(4) [as am. by S.C. 1999, c. 34, s. 75] describes which person is considered to be the “survivor”. There is no child in this case and it is not disputed that the respondent is the “surviving spouse”.

[27] The minimum amount provided in subsection 27(2) is payable to the succession if “there is no person to whom an allowance provided in this Part may be paid, or if the persons to whom that allowance may be paid die or cease to be entitled to that

allowance and no other amount may be paid to them under this Part." The "Part" referred to in this subsection is Part I of the Act, "Superannuation", which covers sections 1 to 46. The Attorney General did not argue that this clause would not apply if the reason why no allowance could be paid was the ineligibility of the beneficiary. The minimum amount is the greater of the amount of a return of contributions or an amount equal to five times the annuity to which the contributor would have been entitled at the time of his death. The record does not indicate to which of these amounts the $75,202.50 conceded by the Attorney General corresponds. The expression "estate" (*succession*) in subsection 27(2) is not defined in the Act.

[28] The supplementary death benefit in subsection 55(1) (which is in Part II of the Act," Supplementary Death Benefits") would be payable in this case to the succession. The expression "estate" (*succession*) is not defined in the Act.

[29] The parties appear to have assumed that the respondent and Mr. Morin's "succession" were one and the same. That is an error. As I noted earlier, we know, through a letter appearing at page 91 of the Appeal Book, that Mr. Morin had at least one nephew. We also know, through a letter of the notary of the "succession" dated March 8, 1996, that the notary was busy "[TRANSLATION] getting the heirs of the succession to mandate and appoint, in accordance with the *Civil Code of Québec*, a liquidator of the succession who will become the interlocutory of the succession" (A.B., at page 43).

[30] It would have been preferable had this" liquidator of the succession" been a party to this proceeding. Were the Court to decide that the respondent was unworthy of inheriting and consequently could not claim as an heir any of the amounts payable to the succession, the respondent's claim as an heir could only be dismissed, but the Treasury Board would be no less liable to the other heirs of the Morin succession, whom we do not know. If this were the case, therefore, this judgment could not put an end to the Treasury Board's obligations.

C. The *Criminal Code*

[31] Under the *Criminal Code* of Canada [R.S.C., 1985, c. C-46 (hereinafter Cr. Code)], culpable homicide essentially consists of causing the death of a human being by means of an unlawful act or by negligence (subsection 222(5) Cr. Code). The *Criminal Code* distinguishes three kinds of culpable homicide (subsection 222(4)), which reflect some differences in terms of the moral culpability of the perpetrator: murder (section 229), where the person who "causes the death of a human being means to cause his death" or "means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not". Murder may be in the first degree, i.e. when it is "planned and deliberate" (section 231) [as am. by R.S.C., 1985 (1st Supp.), c. 27, ss. 7, 40(2), Sch. I, S.C. 1997, c. 16, s. 3; c. 23, s. 8] the second degree, i.e. a murder that is not first degree murder (subsection 231(7)); manslaughter, which is neither murder nor infanticide (section 234) and may be a murder committed "in the heat of passion caused by sudden provocation" (subsection 232(1)); and infanticide, caused "by a wilful act or omission" of the mother (section 233). These three forms of

culpable homicide presuppose that their perpetrator successfully and contrary to law took the life of the victim. In other words, these three forms of culpable homicide refer to the same act, albeit from three different angles. A person who fails in his action is guilty of attempted murder (section 239) [as am. by S.C. 1995, c. 39, s. 143].

[32] In the case at bar, the respondent was convicted of homicide because she had caused the death of her husband by means of an unlawful act (paragraph 222(5)(*a*)). The unlawful act consisted of aggravated assaults, inflicting blows with a knife. For reasons that are peculiar to the administration of criminal justice, the Crown attorney agreed to accept a guilty plea to a charge of culpable homicide of lesser gravity than murder, namely, manslaughter. In this case it is certain—the circumstances of the crime leave no doubt on the matter—that the respondent, in criminal law terms, intentionally caused serious bodily harm that resulted in the death of her husband.

D. The role of the courts in the adoption or definition of public policy rules

[33] The notion of public policy or public order is an elusive concept that the courts should be wary of. In *Foncière Compagnie d'Assurance de France v. Perras*, [1943] S.C.R. 165, Rinfret J. noted, at page 174, that the Supreme Court of Canada,

> [TRANSLATION] … in *The Estate of Charles Millar* ([1938] S.C.R. 1), warned against the danger of accepting new theories of public order that were not contained within the statutory law or were not recognized by strict legal precedent. And this Court referred to the judgment of Lord Wright in *Fender v. Mildway* [*sic*].

In the *Millar* case [*Millar (Charles), Deceased, In re Estate of*, [1938] S.C.R. 1] referred to by Rinfret J., Duff C.J. specifically stated, at page 5:

> Alderson B., in his opinion in *Egerton* v. *Brownlow*, agrees that such a principle "would altogether destroy the sound and true distinction between judicial and legislative functions," and he adds, "my duty is as a judge to be governed by fixed rules and settled precedents." And Parke B. in his opinion in the same case observes (p. 123):
>
> > It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments.
>
> The subject is discussed in, if I may say so, a very illuminating way by Lord Wright in *Fender* v. *Mildmay*. His conclusion is that the modern view of the law is that expressed in the observations, which he quotes, of Parke B. in *Egerton* v. *Brownlow*, and of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Ltd.*
>
> The passage from Parke B. is in these words:
>
> > It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of

> marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we may think for the public good, and prohibit everything which we think otherwise.
>
> The sentence taken from Lord Lindley's judgment is this:
>
> public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson B., and Parke B., in *Egerton* v. *Brownlow*.

[34] These principles, as is apparent from the opinion of Rinfret J. rendered in the context of a civil law appeal, are equally applicable to the common law. (See also: *Shaw v. Gillan* (1982), 40 O.R. (2d) 146 (H.C.); *Goulet c. Cie d'assurance-vie Transamerica Canada*, [2000] R.J.Q. 1066 (C.A.); *Brissette Estate v. Westbury Life Insurance Co.; Brissette Estate v. Crown Life Insurance Co.*, [1992] 3 S.C.R. 87, Cory J., dissenting, page 107.)

[35] The Supreme Court of Canada quite recently reaffirmed its reluctance to serve as an instrument of definition of rules of public policy. In *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, the Court had to determine whether it was contrary to public policy to so construe paragraph 18(1)(*a*) of the *Income Tax Act* [R.S.C., 1985 (5th Supp.), c. 1] as to allow the deduction of fines and penalties. Although pronounced in a tax law context, these remarks by Iacobucci J. clearly illustrate the dilemma in which the courts find themselves when they are asked to define public policy (at pages 838-841; paragraphs 59, 62-65):

> These difficulties outlined above demonstrate that the public policy arguments ask courts to make difficult determinations with questionable authority….
>
> …
>
> While various policy objectives are pursued through our tax system, and do violate the principles of neutrality and equity, it is my view that such public policy determinations are better left to Parliament. Particularly apposite is this Court's statement in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 112, that "a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation". This statement was approved of by the Court in *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 41, adding that "[t]he law of income tax is sufficiently complicated without unhelpful judicial incursions into the realm of lawmaking. As a matter of policy, and out of respect for the proper role of the legislature, it is trite to say that the promulgation of new rules of tax law must be left to Parliament".
>
> This approach and conclusion are supported by the fact that Parliament has expressly disallowed the deduction of certain expenses on what appear to be public policy grounds.…
>
> …
>
> These provisions in the Act also reduce the force of the argument that allowing the deduction of fines and penalties permits the taxpayer to profit from his or her own wrongdoing. This line of reasoning is often traced to the statement of Lord Atkin in

Beresford v. Royal Insurance Co., [1938] 2 All E.R. 602 (H.L.), at p. 607: "the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime". However, as several commentators note, *Beresford* involved a payment under an insurance policy where the insured had committed suicide, at a time when suicide was characterized as a heinous crime. See E. M. Krasa, "The Deductibility of Fines, Penalties, Damages, and Contract Termination Payments" (1990), 38 *Can. Tax J.* 1399, at p. 1417, and Krishna, *supra*, at pp. 31-32. There is therefore little authority to extend Lord Atkin's statement more generally, especially when one considers the clear authority, as mentioned above, to the effect that expenses incurred in the pursuit of illegal activities are deductible expenses.

Moreover, given that Parliament has expressly turned its mind to the deduction of expenses associated with certain activities that are offences under the *Criminal Code*, outlined in s. 67.5 of the Act, I do not find a legitimate role for judicial amendment on the general question of deductibility of fines and penalties. Since the Act is not silent on the issue of restricting the deduction of some expenses incurred for the purpose of gaining income, this is a strong indication that Parliament did direct its attention to the question and that where it wished to limit the deduction of expenses or payments of fines and penalties, it did so expressly. I am also sceptical that the deduction of fines and penalties provides the taxpayer with a "benefit" or "profit" —indeed, their purpose is to calculate the taxpayer's profit, which is then taxed.

E. The perpetration of criminal acts as envisaged in the Act itself

[36] I note, in concluding these preliminary observations, that Parliament gave some thought, in paragraph 42(1)(*mm*) of the Act, to the rule that no one should profit from his or her crime, but its consideration stopped at an indictable offence committed by an employee that constituted" misconduct in office" :

42. (1) The Governor in Council may make regulations

…

(*mm*) providing, notwithstanding anything in this Part, for the reduction of any annuity or annual allowance payable under this Part to or in respect of a person who has been convicted of an indictable offence committed by him while employed in the Public Service, where, in the opinion of the Minister, the commission of that offence by him constituted misconduct in office;

[37] Section 41 of the *Public Service Superannuation Regulations*, C.R.C., c. 1358, provides:

41. Where a contributor is convicted of an indictable offence committed by him while employed in the Public Service, if the Treasury Board is of opinion that the commission of the offence by the contributor constituted misconduct in office, any annuity or annual allowance payable under the Act to or in respect of the contributor shall be reduced by such amount as the Treasury Board, in its discretion, considers appropriate.

Part I—The applicable law: the civil law of Quebec or the common law?

[38] At the relevant time the Act did not contain any provision concerning the disqualification of a beneficiary for attempting to take the contributor's life.

[39] At the risk of simplifying some ongoing debates, I will say that the following are the generally applicable rules. I have drawn them primarily from the reasons of Beetz and L'Heureux-Dubé JJ. in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705 and of L'Heureux-Dubé J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool*), [1996] 3 S.C.R. 919, the study by Professors Brisson and Morel, "Droit fédéral et droit civil: complémentarité, dissociation" (1996), 75 *Can. Bar Rev.* 297, the study by Professor Brisson, "L'impact du Code civil du Québec sur le droit fédéral: une problématique" (1992), 52 *R. du B.* 345, and the collection of studies, *Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of studies* published in 1997 by the Department of Justice of Canada. I will start with the following extracts from the study by Professor Brisson, at pages 347-348, 352-353:

> [TRANSLATION] Unless indicated otherwise, however, no document other than the Civil Code shall serve as ordinary law, in private law, in the federal legislation applicable to Quebec.
>
> This is explained, first, by the fact that the federal government is an order of government and not a territory. The federal law now in force was constituted not on the basis of a system borrowed and introduced historically through a process of colonization, like the law of the provinces, for example, but through the active intervention of the federal Parliament and the authorities vested by Parliament with the authority to make laws. Thus, *federal legislation*, understood in its broadest sense, expresses in itself the *federal law*, unless in some particular statutory or regulatory text the competent authority has expressly designated a law that is to serve in some suppletive capacity. Absent such designation, there is no set of fundamental legal rules in federal law that can serve as a reservoir for legislation, because the federal government, unlike the territories that make up Canada, has never received any such rules.
>
> In principle, therefore, it is the law of the provinces that constitutes this reservoir, the content of which may consequently vary by necessity from one province to another. To block the use of the provincial law in a suppletive capacity, it suffices, but it is necessary either to compensate for the deficiency that renders this use indispensable in a given case or to impose specifically by name some other law of reference in its place. To put it bluntly, it must be kept in mind that there is no ordinary law that is strictly federal in a particular area, without words to that effect.
>
> …
>
> Indeed, whenever a federal statute that is to be applied to Quebec resorts to a private law concept without defining it, and the *Interpretation Act* is likewise silent, or the federal statute does not fully occupy the possible field of private law jurisdiction in question, it is the Civil Code that supplies the necessary conceptual support for an intelligent application of that statute. The implicit dependency of federal legislation is therefore by far the situation that is most widespread.

[40] In the first place, it is *The Quebec Act, 1774* [R.S.C., 1985, Appendix II, No. 2] that sealed the fate of the two legal systems that were to govern the applicable law in Quebec: the French civil law as it existed prior to 1760 with its subsequent alterations in Quebec in regard to anything affecting property and civil rights, and the common law as it existed in England at the same time with its subsequent alterations in Quebec and in Canada in regard to anything affecting the public law. Article VIII of *The Quebec Act,*

1774, which prescribed that "in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada," was the precursor of subsection 92(13) of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982 c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]].

[41] Secondly, the provincial public law in Quebec is composed on the one hand of the written law (the provincial statutes) and on the other hand of the common law. Only that part of the common law that is said to be public in character is applicable, however, although it is not easy to distinguish the public common law from the private common law. The Quebec legislature may amend within the limits of its jurisdiction the public common law, provided it does so clearly and unambiguously.

[42] Thirdly, the federal public law in Quebec is composed on the one hand of the written law (the federal public law statutes) and on the other hand of the public common law. The Parliament of Canada may alter the common law, provided it does so clearly and unambiguously.

[43] Fourthly, the federal private law in Quebec is composed of the private law defined in a statute of the Parliament of Canada and the civil law if it is necessary to resort to an external source in order to apply a federal statute. The Parliament of Canada may enact private law legislation that will form a complete code in which case there is no need to resort to an external source, the civil law, or it may enact private law legislation which, because it is incomplete, will refer either expressly or by implication to the civil law for its implementation.

[44] Fifthly, the Parliament of Canada may derogate from the civil law when it legislates on a subject that falls within its jurisdiction.

[45] Sixthly, as the Supreme Court of Canada held, in *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc. et al.*, [1986] 1 S.C.R. 752, the Federal Court is not bound to apply only federal law in cases before it (at page 781, *per* McIntyre J.):

Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties.

[46] I will add the following observations:

[47] In Quebec it is trite law that the "ordinary law" of the province is constituted by the *Civil Code of Québec* and the *Code of Civil Procedure* [R.S.Q., c. C-25], although these are statutory documents. (See *Exchange Bank of Canada v. Reg.* (1886), 11 App. Cas. 157 (P.C.); *Crown Law* by Paul Lordon, Cowansville: Y. Blais, 1992, at page 148).

[48] In *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, the Judicial Committee of the Privy Council (*per* Lord Montague Smith, at page 111) recognized in the following words the principle that the words "property" and "civil rights"

in section VIII of *The Quebec Act, 1774* and subsection 92(13) of the *Constitution Act, 1867* should be construed in their largest sense:

> It is to be observed that the same words, "civil rights," are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the province of Quebec. Sec. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are mainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

[49] It is the Constitution of Canada itself which provides that some federal laws have differing effects according to whether they are applied in Quebec or in the other provinces. By guaranteeing the perpetuity of the civil law in Quebec and encouraging in section 94 the uniformization of the laws of provinces other than Quebec relative to property and civil rights, the *Constitution Act, 1867* enshrines in Canada the federal principle that a federal law that resorts to an external source of private law will not necessarily apply uniformly throughout the country. To associate systematically all federal legislation with common law is to ignore the Constitution.

[50] A judge who must interpret and apply a federal enactment in a dispute concerning civil rights in Quebec must know that as a general rule, and subject to what will be said later in regard to so-called public law statutes, the suppletive law is the civil law. This does not mean that no attempt should be made to harmonize the effects of federal statutes throughout the country wherever this is possible in the private law. (See: *Canada v. Construction Bérou Inc.* (1999), 99 DTC 5868 (F.C.A.); *Biderman v. Canada* (2000), 2000 DTC 6149 (F.C.A.).) What it does mean is that asymmetry is the rule under the Constitution. It also means that if there is harmonization, it may draw equally on both the civil law and the common law.

[51] A Quebec litigant involved in an action pertaining to his civil rights under a federal enactment that is silent in this regard is entitled to expect that his civil rights will be defined by the Quebec civil law, even if the adverse party is the federal government. As Professor Morel clearly states (at page 15), in "Harmonizing Federal Legislation with the *Civil Code of Québec*: Why? and Wherefore?", a study published in the Department of Justice Canada Collection of studies (*supra*, paragraph 39):

> The complementarity of federal private law legislation with Quebec civil law—as with the basic law of every province—is the rule both in principle and, if only because Parliament rarely interferes with it, in practice.

[52] For the reasons that I will set out in detail later on, I do not believe it is realistic to divide federal statutes into two watertight categories, those that are supposedly public law and therefore in principle entirely immune from the civil law, and those that are supposedly private law that will if necessary be complemented by the civil law.

[53] Finally, I note that the *Federal Court Act* [R.S.C., 1985, c. F-7], in subsection 39(1), adopts the principle of juridical asymmetry in cases involving the federal

government by prescribing, without distinguishing between a public law enactment and a private law enactment, that the laws relating to prescription and the limitation of actions are governed by the law of the province in which the cause of action of the proceeding arose. The same could be said, in relation to the procedural law, of the reference in section 56 [as am. by S.C. 1990, c. 8, s. 18] of the *Federal Court Act* to the provincial law as it pertains to writs of execution.

[54] I will now apply these rules and observations to the case at bar.

[55] To promote the application of the common law in this case, the Attorney General argues that the Act in dispute, the *Public Service Superannuation Act*, is a component of the federal public law, which is based on the common law. According to the Attorney General, this Act governs the relations between the federal government and its employees and in this sense is a part of administrative law, which is identified with public law. He cites this extract from the work by P. Garant, *Droit Administratif*, 4th ed., Vol. 1 (Cowansville: Yvon Blais, 1996), at pages 7-8:

> [TRANSLATION] As a scientific discipline, administrative law can be defined as the branch of public law that concerns the Administration of the public sector. The public administration is the collection of activities, agents and agencies responsible for carrying out the manifold initiatives of the modern State at the instigation of the political authority.
>
> …
>
> It then includes the study of governmental and administrative activity and response options; the public administration engages in various acts, hence the need to develop a theory as a basis for analyzing these acts; the public administration needs a staff of public officers and officials who are subject to a special legal regime; the public administration also needs physical assets, etc. Finally, the public administration must be controlled so as not to deviate in the pursuit of the general interest; these controls are numerous and concern above all the review by the courts not only of the legality of administrative action but also of the compensatory remedies for damages caused by the administration in the exercise of its powers.

and he concludes that the eligibility for benefits of federal government employees is a question of administrative law governed by the rules peculiar to public law, and therefore by the common law.

[56] I see two fatal flaws in this proposition. The first: the *Public Service Superannuation Act* is not a statute that is exclusively administrative in nature. The second: the common law rule that a person may not profit from his or her crime is not a rule of public law but a rule of private law. I will examine this second aspect first.

[57] The rule that one should not profit from one's own crime was developed primarily in the context of the law of wills, intestate succession and insurance. This is definitely private common law. Beetz J. wrote, in *Laurentide Motels Ltd.*, *supra*, (at page 721) that it can be a difficult task to distinguish the public common law from the private common law. In this instance the task is easy, especially because, at page 723, Beetz J. added the following:

> A rule which has application only to public bodies, which exists and is justified by the public nature of those bodies, is surely a rule of public law. Lord Wilberforce writes at p. 754 of *Anns v. Merton London Borough Council*, *supra*:
>
> > … the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law.

[58] Clearly, in this case, the rule does not apply only to public bodies and neither its existence nor its justification originate in the public character of the federal government. The rule was not designed for government employees and it applies to them in the same way that it applies to some employees in the private sector. To illustrate and confirm the gulf between this rule and the rules of public common law, it suffices to note that the public common law rule at issue in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, was the principle of confidentiality of police information sources, and, in the *Régie des permis d'alcool* case (supra, paragraph 39), the principle of independence and impartiality of an administrative tribunal.

[59] The second flaw lies in the characterization of the *Public Service Superannuation Act*. This Act definitely has some of the characteristics of an administrative law and hence a public law enactment. But it also has some characteristics peculiar to an enactment of private law.

[60] The purpose of the Act is not to determine the duties exercised by government employees or their mode of appointment, promotion, dismissal or even remuneration. It does not cover the liability engendered by the exercise of these duties. It has no impact on the relationships between the federal government and the public. It does not define the powers and obligations of the government in terms of public law. It simply regulates the employees' superannuation plan, which is essentially composed of the contributions paid into it by everyone; such a plan, as LeBel J.A., then a member of the Quebec Court of Appeal, noted in *T.S.C.O. of Canada Ltd. c. Châteauneuf*, [1995] R.J.Q. 637, at page 675, is "[TRANSLATION] a factor in the employee's working conditions" and "fits within the employee's labour relations". The Act, in the part that concerns us, simply designates the beneficiary of the plan in which a government employee was participating. The nature of the Act does not appear to me to differ from that in the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, and yet, in *Ménard v. Canada*, [1992] 3 F.C. 521(C.A.), this Court applied the civilian theory of unjust enrichment rather than the common law theory of estoppel to order Her Majesty the Queen to pay overtime to an employee of the Correctional Service of Canada. And this Court routinely applies the civil law in Quebec cases pertaining to the *Income Tax Act*, a so-called public law enactment.

[61] Brisson and Morel, in the article cited earlier [at paragraph 39] (page 309), write that the implied dependency of federal legislation in relation to the civil law

> [TRANSLATION] is not peculiar to certain categories of statutes; it is found in both public and private law, since very few such statutes expressly provide a means for determining their suppletive law.

[62] Similarly, Professor André Morel, in the study I referred to earlier [at paragraph 51], says (at pages 6-10):

> When federal private law legislation is applied in Quebec, the role of the civil law in relation thereto is at once anomalous and self-evident. The fact that the common law system is the legal system common to all the other provinces, and the territories, and that it constitutes the basic law of all legislation of any nature, helps create the impression that there is a sort of organic bond, an association inherent in the nature of things, between federal law and common law—and the language used in those statutes tends to reinforce that impression. In this context, it may seem remarkable that the civil law is applied. Yet, it is a reality that Quebec commentators and courts appear to have taken for granted, so rarely is any effort made to justify or challenge it.
>
> Of course, Parliament can always choose to modify the effects of the complementarity between the laws it enacts and the general law (the *jus commune*) of the provinces.
>
> …
>
> First, there are a number of situations in which the civil law is required to assume what might be called a passive role. Such situations include every instance where, in furtherance of its own purposes, a federal statute assigns certain effects to juridical acts or facts governed by the Civil Code. Examples abound. One need only think of legislation concerning bankruptcy, bills of exchange, or bank security, which in order to have effect, depends on the existence of contracts such as loans, sales, and movable or immovable hypothecs. Divorce and the extracontractual liability of the Crown are equally good examples. The *Income Tax Act*, which determines the tax consequences of sales, assignments of claims, gifts, or legacies, illustrates how certain public law statutes also require that recourse be had to the Civil Code to identify the precise nature of the juridical act in question. This is an example of how the Civil Code governs a private law relationship that comes into indirect contact with federal law, which in turn intervenes to determine the consequences of such relationship as far as the federal legal order is concerned.
>
> More frequent, however, are situations in which the civil law plays an active role by applying directly to complement federal private law statutes, just as it does with regard to provincial statutes of the same type. Most of the time, of course, these laws do not contain all that is necessary for their application. In one way or another, they are almost always incomplete. They employ civil law concepts without defining them; they refer to institutions enshrined in the Civil Code or fail, wittingly or unwittingly, to state all of the principles that apply to the field they regulate. The civil law is therefore called upon to fill in the lacunae or gaps left by federal law. It completes federal law by addressing that which federal law did not foresee but which is necessary for its implementation, or that which can be added without interfering with Parliament's purpose.
>
> The courts offer countless examples of this, in almost every area of the civil law, including the law of persons, family law, property law, obligations, security on property, and prescription. Moreover, there is an immense variety of federal statutes which give rise to this complementary application of the Code. Where Parliament does not prevent it, the courts readily accept the complementarity of the civil law and federal private law legislative provisions. In fact, the courts are almost unanimous in this regard, so that cases that draw instead on the common law—most often for reasons of uniformity—occur so infrequently in Quebec that they can only be considered marginal.

[63] Messrs. Macdonald and Scott, in another study published in the Collection of studies prepared by the federal Department of Justice, entitled “Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law”, also state, at pages 47 and 48:

> … it can be assumed that the Parliament of Canada intends the word “contract” in one of its statutes to refer, in so far as the application of that statute within the province of Ontario is concerned, to the common law notion of contract operative in Ontario and in so far as the application of that statute within the province of Quebec is concerned, to the civil law notion of contract operative in Quebec.

[64] Moreover, Chief Justice Duff, in *King, The v. Central Railway Signal Co.*, [1933] S.C.R. 555, stated at page 567:

> … we doubt if a line can be drawn between major and minor prerogatives or between public and private law with sufficient precision to provide a guide for the determination of individual cases.

[65] What, in my view, should determine whether or not it is necessary to resort to the private law (in Quebec, the civil law) is not the public or private nature of the federal enactment at issue but the fact, quite simply, that the federal enactment in a given case must be applied to situations or relationships that it has not defined and that cannot be defined other than in terms of the persons affected. In some ways the circle is closed and we come back to the point of departure, in section VIII of *The Quebec Act, 1774*: when these affected persons are litigants and their civil rights are in dispute and have not been defined by Parliament, it is the private law of the province that fills the void. In short, the civil law applies in Quebec to any federal legislation that does not exclude it.

[66] This conclusion, I think, is fully consistent with the position that was adopted by the Government of Canada when, on June 12, 1998, it tabled Bill C-50 to harmonize federal law with the civil law. I understand that this was only a bill, but these comments dated November 4, 1998 prepared by the Library of Parliament, Parliamentary Research Branch describe the state of the current law, it seems to me [*Bill C-50: Federal Law—Civil Law Harmonization Act, No. 1*] at pages 4-5:

> A. Reminder of the Complementary Nature of Federal and Civil Law
>
> Since 1867, the Parliament of Canada has enacted more than 300 statutes, some or all of whose provisions are designed to regulate matters of private law. It has done so primarily under Parliament’s exclusive jurisdiction over matters that, had it not been for the division of powers in the *Constitution Act, 1867*, would have fallen under the provinces’ jurisdiction over property and civil rights. Examples of these matters are marriage and divorce, bankruptcy and insolvency, bills of exchange and promissory notes, interest on money, admiralty law, patents of invention, and copyright. To the same end, albeit less directly, Parliament has enacted statutes designed primarily to regulate questions of public law with some provisions relying upon private law concepts or regulating private law relationships.
>
> All these statutes do not create an independent legal system. Because these Acts derogate from or add to the *jus commune* of each province, they are supplemented by the relevant provincial law, which is used to interpret them and to apply them. There is, therefore, a

complementary relationship between federal legislation and the *jus commune* of the provinces.

…

The Government of Canada has also cited other reasons to justify the need to harmonize federal statutes with the civil law of Quebec, some of which are set out in in the preamble to Bill C-50. This states, among other things, that all Canadians are entitled to have access to federal laws in keeping with their legal tradition, that the civil law reflects the unique character of Quebec society, that the harmonious interaction of federal and provincial legislation is essential and that the full development of our two major legal traditions gives Canadians a window on the world and facilitates exchanges with the vast majority of other countries.

[67] It is worth quoting at this point some extracts from Bill S-4 [*Federal Law-Civil Law Harmonization Act, No. 1*], which was given second reading in the Senate on February 7, 2001. This bill replaced Bill C-50 following the dissolution of both Houses in the fall of 2000:

WHEREAS all Canadians are entitled to access to federal legislation in keeping with the common law and civil law traditions;

WHEREAS the civil law tradition of the Province of Quebec, which finds its principal expression in the *Civil Code of Québec*, reflects the unique character of Quebec society;

WHEREAS the harmonious interaction of federal and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

WHEREAS the full development of our two major legal traditions gives Canadians a window on the world and facilitates exchanges with the vast majority of other countries;

WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

…

Property and Civil Rights

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

[68] I do not think there can be any doubt that this part of the Act, which refers to" succession" without defining it, should be interpreted in Quebec in light of the civil law. This is a good example of the danger in concluding that a federal statute is either public law or private law and that once it is public law any reference to a private law concept must be interpreted in light of the common law. I have a hard time imagining how, in the case at bar, Mr. Morin's succession would be determined otherwise than under the *Civil Code of Québec*. In my opinion, there is no avoiding the fact that a federal statute, albeit one characterized as public law, that refers to a private law concept such as succession without defining it, should be interpreted in Quebec in terms of the civil law.

[69] The answer is not so obvious when it comes to defining the rights of the "surviving spouse". This expression, as I said earlier, is defined in the Act and furthermore does not correspond to any concept that is defined in the *Civil Code of Québec*. The Act appears, *prima facie*, to constitute a complete code in this regard. But is this really the case?

[70] What we are looking for here is not who is the surviving spouse. We know her. What we are asking ourselves, rather, is whether this surviving spouse is eligible to receive the benefit provided by the Act. Since the Act is silent on the question of eligibility, the Attorney General submits that the legislative void must be filled by the common law. This argument cannot succeed, since the question of eligibility is a question of civil rights and the applicable rule is one of private law, and thus, in this case, of civil law.

[71] I comprehend the Treasury Board's interest in applying to the surviving spouse an eligibility rule that is valid irrespective of the province in which the deceased public employee resided. However, this same interest would require that similar considerations apply in regard to the public employee's succession, and I have already concluded that this proposition is untenable.

[72] I do not think Parliament intended that in a given province the surviving spouse's eligibility and the eligibility of an heir of the deceased public employee should be determined under two systems of law. I do not think the Constitution of Canada can be so interpreted that in Quebec a person's right to receive what is, basically, the product of someone else's work be decided, for the purpose of applying federal legislation that is silent on this point, on the basis of private law rules other than those contained in the civil law of the province of Quebec. Since, at the end of the day, it is the civil rights of the surviving spouse and the heirs that are in dispute, I am inclined to interpret Parliament's silence as an acquiescence in the application of the principle of legal asymmetry that characterizes Canadian federal law.

[73] In reaching the conclusion that this litigation must be resolved in light of the *Civil Code of Québec*, I am in a way responding to the invitation launched by Brisson and Morel [*supra*, at paragraph 39] at the very end of their study (at page 334):

> [TRANSLATION] We are inclined to think, therefore, that the complementarity of federal law and the civil law, natural as it may be for all the obvious reasons, must constantly be maintained and reaffirmed, if not reinvented, if it is to continue to thrive.

Part II—Quebec civil law

[74] The *Civil Code of Québec* recognizes the principle that no one should profit from his or her crime. It does so directly in articles 620 to 623 and article 2443 and indirectly in articles 1836 and 1837. These articles read:

QUALITIES FOR SUCCESSION

…

Art. 620. The following persons are unworthy of inheriting by operation of law:

(1) a person convicted of making an attempt on the life of the deceased;

(2) a person deprived of parental authority over his child while his child is exempted from the obligation of providing support, in respect of that child's succession.

Art. 621. The following persons may be declared unworthy of inheriting:

(1) a person guilty of cruelty towards the deceased or having otherwise behaved towards him in a seriously reprehensible manner;

(2) a person who has concealed, altered or destroyed in bad faith the will of the deceased;

(3) a person who had hindered the testator in the writing, amendment or revocation of his will.

Art. 622. An heir is not unworthy of inheriting nor subject to being declared so if the deceased knew the cause of unworthiness and yet conferred a benefit on him or did not modify the liberality when he could have done so.

Art. 623. Any successor may, within one year after the opening of the succession or becoming aware of a cause of unworthiness, apply to the court to declare an heir unworthy if that heir is not unworthy by operation of law.

…

REVOCATION OF GIFTS ON

ACCOUNT OF INGRATITUDE

…

Art. 1836. Gifts *inter vivos* may be revoked on account of ingratitude.

Ingratitude is a ground of revocation where the donee has behaved in a seriously reprehensible manner towards the donor, having regard to the nature of the gift, the faculties of the parties and the circumstances.

Art. 1837. The action in revocation may be brought only during the lifetime of the donee and within one year after the ingratitude became a ground or the day the donor became aware of it.

…

INSURANCE OF PERSONS

…

Art. 2443. An attempt on the life of the insured by the policyholder entails, by operation of law, cancellation of the insurance and payment of the surrender value.

An attempt on the life of the insured by a person other than the policyholder entails forfeiture only in respect of that person's right to the coverage.

[75] The *Civil Code of Québec* no doubt also recognizes the principle implicitly, in articles 6, 7 and 9, 1373, 1411 and 1413. These articles read:

ENJOYMENT AND EXERCISE

OF CIVIL RIGHTS

…

Art. 6. Every person is bound to exercise his civil rights in good faith.

Art. 7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

…

Art. 9. In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

…

OBLIGATIONS

…

Art. 1373. The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something.

The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order.

…

CONTRACTS

…

Art. 1411. A contract whose cause is prohibited by law or contrary to public order is null.

…

Art. 1413. A contract whose object is prohibited by law or contrary to public order is null.

[76] The question then is what the civil law understands by the principle that no one should profit from his or her crime. A number of questions are raised, and they are not easy to answer: Did the legislator, in enacting specific and distinct provisions governing unworthiness in matters of succession, gifts and insurance, limit the rule to those areas alone? Is it possible to invoke the notion of public order in order to extend the scope of the rule to a surviving spouse who is claiming from a superannuation plan? Did the heiress who is guilty of manslaughter" make an attempt on the life of the deceased" within the meaning of subsection 620(1) of the *Civil Code of Québec*?

1. Did an heir convicted of manslaughter" make an attempt on the life of the deceased" within the meaning of article 620 of the *Civil Code of Québec*?

[77] Article 620 states that a person convicted of making an attempt on the life of the deceased is unworthy of inheriting by operation of law. The Minister of Justice, in his commentaries (Tome I, at pages 366-367), explains:

> [TRANSLATION] This and the following article list the causes of unworthiness of inheritance and substantially replicate the previous provisions in articles 610 and 893 of the Civil Code of Lower Canada. Combining the causes of unworthiness common to both testamentary and intestate successions, articles 620 and 621 distinguish those that entail automatic exclusion—disqualification to inherit by operation of law—from those that necessitate a prior application to have a person declared unworthy.
>
> The gravity of the situations contemplated by the article and the existence of a judgment that records the facts justify the fact that the resulting incompetency is established by operation of law.

[78] This article, the Minister tells us, "substantially replicate[s] the previous provisions in articles 610 and 893 of the *Civil Code of Lower Canada*". Those articles read as follows:

> **Art. 610** The following persons are unworthy of inheriting and, as such, are excluded from successions:
>
> 1. He who has been convicted of killing or attempting to kill the deceased;
>
> 2. He who has brought against the deceased a capital charge, adjudged to be calumnious;
>
> 3 The heir of full age, who, being cognizant of the murder of the deceased, has failed to give judicial information of it.
>
> …
>
> **Art. 893** The revocation of a will or of a legacy may also be demanded: 1. On the ground of the complicity of the legatee in the death of the testator, or by reason of grievous injury done to his memory, in the same manner as in the case of legal succession, or, if the legatee hindered the revocation or modification of the will; 2. By reason of the resolutive conditions.

[79] In the document on the reform of the Civil Code produced jointly by the Barreau du Québec and the Chambre des notaires du Québec [*Réforme du Code civil: Personnes, successions, biens*], Professor Jacques Beaulne [in an article entitled "Les successions (ouverture, transmission, dévolution, testaments)" page 241] expresses the following opinion (Volume 1, at pages 251-252):

> [TRANSLATION]
>
> 16. Concerning an attempt on the life of the deceased, we note that article 620 C.C.Q. does not substantially alter the present law in any way, at least in the context of the legal succession: there is unworthiness by operation of law once the successor is convicted of an attempt or a homicide. Furthermore, only culpable homicide results in unworthiness, for it is precisely the intention to kill that is punished by forfeiture of the right to inherit; a successor who kills without that culpable intention is not barred from inheritance. It is therefore essential that there be a conviction, pronounced by a court of criminal jurisdiction, if the right of inheritance is to be forfeited. However, the sentence has no impact on the unworthiness; the successor will still be unworthy regardless of whether there is a remission of sentence of an appeal of the sentence.
>
> …
>
> 22. Where the successor is unworthy by operation of law, it is unnecessary to apply to the court, obtain a declaration of unworthiness or even to have it officially reported; this is because the acts justifying the unworthiness have already been recognized by a judgment. Accordingly, if the unworthiness results from an attempt on the life of the deceased, a court of criminal jurisdiction will have already convicted the successor; the unworthiness resulting from this judgment need not be reported anew in another judgment, therefore.

[80] Professor Beaulne explains that article 620 C.C.Q. does not substantially alter the present law in any way, "at least in the context of the legal succession". The detail is important. In matters of testamentary succession, article 893 of the C.C.L.C. did not require a criminal conviction, was addressed to "complicity … in the death" rather than an attempt on the life and did not impose revocation of the will by operation of law. In matters of gifts, an attempt on the life constituted a cause of revocation, but article 813 C.C.L.C. did not require a conviction and the ingratitude was not by operation of law. In insurance matters, the attempt on the life of the insured by the owner of the policy entailed *ipso facto* the termination of the insurance under article 2559 C.C.L.C., but no criminal conviction was required. Successions, gifts and insurance have at all times been subject to distinct regimes that must not be confused. Some incongruities result, but it is not the job of the courts to combine what the legislator has separated.

[81] Consequently, article 620 C.C.Q. must be interpreted, as article 610 C.C.L.C. was before it, solely in the context of the law of succession. For example, in an insurance matter, Dumais J. of the Court of Quebec made it clear, in *Couture-Lauzon c. Industrielle Alliance (L'), compagnie d'assurances sur la vie*, [1993] R.R.A. 406, that it is the lack of a conviction requirement in article 2559 C.C.L.C. that allowed an insurance policy to be automatically nullified for a beneficiary who had pleaded guilty to a charge of manslaughter of the insured. And it is lack of this criminal conviction requirement that

prompts Professor Bergeron, in *Précis de droit des assurances* (Éditions Revue de droit Université de Sherbrooke, 1996) to say in relation to article 2443 C.C.Q. [at page 132]:

> [TRANSLATION] An attempt on the life does not presuppose a criminal conviction. A conviction for manslaughter also disqualifies its perpetrator, therefore.

[82] In support of his opinion that in the *Civil Code of Lower Canada* there was no unworthiness by operation of law in the absence of a guilty intent, Professor Beaulne refers to the *Traité* by Professor Brière [*Les successions*, 1990] and the judgments of the Quebec Superior Court in *Galarneau et Beaupré*, Quebec Sup. Ct., 200-05-002 869-811, October 5, 1981, *per* Philippon J., J.E. 81-1085 and *Héritiers de feu Michel Prézeau c. Legault-Prézeau*, J.E. 83-96 (Sup. Ct.). I note that Professor Beaulne does not comment on the debate among the legal scholars as it pertains to manslaughter.

[83] Here, for example, is what Brière says in the most recent edition, published in 1997 by Wilson & Lafleur, *Le nouveau droit des successions*, 2nd ed., page 53:

> [TRANSLATION] There is an issue as to whether manslaughter results in unworthiness by operation of law under article 620 C.C.Q., as there was under article 610 C.C.L.C. There is reason to consider that such homicide does not entail unworthiness to inherit since the expression “attempt on the life” implies the intention to kill. However, the first case in article 621 C.C.Q. could be applicable in those circumstances.

[84] Like Professor Beaulne, I am of the opinion that article 620 C.C.Q. has not substantially altered the previous law, at least within the context of the legal succession. I would add that this article has made the rule of unworthiness in testamentary succession more rigorous. I do not think the words “convicted of making an attempt on the life of the deceased” in article 620 C.C.Q. have a different meaning from the words “convicted of killing or attempting to kill the deceased” in the old article 610. The words “*déclaré coupable*” and “*convaincu*” (in the French versions of articles 620 and 610, respectively, both of which are rendered in English as “convicted”) have the same meaning, it seems to me. As to the words “*avoir attenté à la vie*” (in article 620), in my opinion they simply combine the words “*avoir donné ou tenté de donner la mort*” in the old wording (in article 610). The changes are cosmetic in nature.

[85] What about the controversy among the authorities, then, in relation to the requirement of an intention to kill?

[86] The Quebec legislature, when it enacted article 620 C.C.Q. and, before it, article 610 C.C.L.C., was careful not to use the known vocabulary in the criminal law. The words “*déclaré coupable*” (convicted) presuppose, of course, that there is a conviction by a court of criminal jurisdiction, but the words“ *avoir attenté à la vie*” (making an attempt on the life) are words that are not found in the *Criminal Code* sections dealing with murder, manslaughter and infanticide. Clearly, the legislature did not wish to commit itself, perhaps because it did not want to anchor the *Civil Code of Québec* in a reference to *Criminal Code* language that could change.

[87] It is for me then to determine what was this previous law preserved by article 620 C.C.Q. One group of writers was of the opinion that the expression "*donné ou tenté de donner la mort*" (killing or attempting to kill) included manslaughter (Mignault, P.B., *Le droit civil canadien*, Volume 3, 1897, at page 282; Langelier, F. *Cours de droit civil de la Province de Québec*, Volume 2, 1906, at page 362; L. Baudouin, *Le droit civil de la province de Québec: modèle vivant de droit comparé*, 1953, at pages 1093 et seq.).

[88] Another group was of the opinion that "*donné ou tenté de donner la mort*" covered only murder (Faribault, L. *Traité de droit civil du Québec*, Volume 4, 1954, at pages 161 et seq.); Mayrand, A. *Les successions ab intestat*, 1971, à la page 66; Brière, G. *Les successions ab intestat*, 8th ed. Cours de Thémis, 1979, at pages 23 et seq.).

[89] Curiously, it seems the question has never been directly examined by the Quebec Court of Appeal and the Attorney General referred us to only one decision rendered in the Quebec Superior Court by Philippon J. in *Galarneau et Beaupré* (Sup. Ct., October 5, 1981, J.E. 81-1085). Philippon J. sided with the Mignault camp and held that article 610 C.C.L.C. also covered manslaughter. Since this decision is not reported, I think it is worth quoting it extensively:

> [TRANSLATION] I note that no evidence presented in the criminal case was filed in this case, so we are completely ignorant of the circumstances of the act that resulted in the conviction.
>
> Counsel suggested connecting article 610,1 of the Civil Code with articles 813,1 (revocation of the gift if the donee has attempted the life of the donor) and 893,1 (revocation of a legacy if the legatee was an accomplice in the death of the testator). The underlined words prompt one to compare with caution. Counsel cited Mignault and Faribault to draw attention to a controversy. If one adds other opinions, it is possible to adopt the following in Mignault, volume 3, page 282:
>
> > *But whether there is murder or only manslaughter, and the jury renders a guilty verdict against the accused, we find ourselves in the case of article 610. The heir is convicted of having killed the deceased. The article does not distinguish one case from the other and each of these cases involves a culpable homicide.*
>
> With Mignault: Langelier, *Cours de droit civil*, volume II (1906), page 362) and Baudouin, (*Le Droit civil de la province de Québec*, 1953, pages 1093-1094).
>
> Faribault, on the contrary, teaches that article 610,1 is inapplicable to manslaughter (Faribault, *Traité de droit civil du Québec*, vol. 4, pages 161-162):
>
> > *Manslaughter occurs when one causes someone's death without a prior intent, or without having placed himself in a situation such that there was reason to apprehend that death might ensue. Such is the case of someone who kills in a fit of anger or in a state of drunkenness, or who causes the death of another person through his gross negligence. Article 610 is inapplicable to this kind of homicide.*
> >
> > *Provocation may excuse a wilful homicide, but, from the standpoint of the unworthiness of the heir, this excuse is valid only if the jury accepted it in acquitting him.*

The fact of having, through one's negligence, caused the death of the deceased may result in an order to pay damages, but it cannot entail unworthiness.

With Faribault, we find the following writers: Albert Mayrand (Les successions ab intestat-Traité élémentaire de droit civil, 1971, page 66); Germain Brière (Les successions ab intestat", 1977, page 12), Aubry and Rau (Droit civil français, 1875, volume 7, page 414), Colin and Capitant ("Précis de droit civil français", volume 3, p. 288) and Planiol and Ripert ("Successions", volume IV, 1956, pp. 97-98).

Essentially, those who deny unworthiness in the case of manslaughter point to the lack of intention to kill, the restrictiveness of the interpretation that must be given to a provision of a penal nature, or they analogize with the word "murderer" in article 611 of the Civil Code.

…

The strict construction of a penal provision is hardly debatable, but is it really the penal nature of article 610,1 C.C. that entails this type of interpretation or is it instead the civil condemnation of a criminal deed? The condemnation in question, without a punishment in the usual meaning of the word penal (fine or imprisonment) has no penal purpose but is intended rather to restore the situation that the deceased would presumably have wished to restore himself, had he known that the guilty heir wanted to kill him, even in the heat of passion caused by sudden provocation (Criminal Code 215) or by means of an unlawful act or by criminal negligence (205,5'a and b).

To require the intention to kill appears to empty the notion of unworthiness introduced in the Civil Code of part of its content, in so far as it it is necessary to find in the Criminal Code rather than in a literal sense the meaning of the expression "donner la mort" (*kill*). Yet there does not appear to be any doubt about this, since there must be a conviction that only the Criminal Code can provide. Mignault thus eliminates non-culpable homicide (at p. 282, op. cit.).

Obviously, it is not non-culpable homicide that is at issue here, for since there is no crime (Criminal Code, s. 220), there can be no conviction of the accused heir. The condition prescribed by article 610 is therefore not fulfilled in this case.

Now, the Criminal Code stipulates in part, in section 205:

205. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act,

(b) by criminal negligence,

(c) by causing that human being, by threats or fear of violence or by deception, to do

anything that causes his death, or

(d) by wilfully frightening that human being, in the case of a child or sick person.

So, for there to be an offence under the Criminal Code, the culpable aspect of the act must be indissociable from the involuntary aspect. To my way of thinking, the Criminal Code suggests a type of act in which a conscious element is present in some form in any unintentional act. In any event, it does not rule out implied consciousness, which is theoretically possible in the case of gross negligence, in those circumstances in which the perpetrator cannot really be considered to have been unaware of the imminent consequences of an act.

But the essential thing, is it not, is to recognize that killing is homicide—either through committing a murder (and thus an intentional homicide) or, for example, through striking someone with a blunt object to the point of causing his death without an intention to do so (manslaughter)—and in both cases culpable homicide. Logically, it can be presumed that in both cases the notion of unworthiness is satisfied if we recognize that the unworthiness depends on a suitable relationship between what the deceased might have accepted and what the heir might have committed.

Furthermore, section 215 of the Criminal Code demonstrates that unworthiness is consistent with even unintentional culpable homicide within the meaning of the Criminal Code, such as murder committed in the heat of passion caused by sudden provocation.

…

In short, I am of the opinion that the expression "*donner la mort*" in 610.1 C.C., because of the word "*convaincu*" (convicted) therein, refers to culpable homicide, whether a murder or a manslaughter. In such a clear context, there is no reason to make a distinction between them.

[90] With respect for Philippon J., I am of the opinion that the Faribault school is the one that should be followed, for the following reasons.

[91] The authorities in both camps are in agreement that article 610 must be strictly construed. Mignault had the following to say about the causes of unworthiness, at page 279:

> [TRANSLATION] **1. Causes of unworthiness.**—There were many of these in the old law, and the list was not closed. Today the list is closed, and the judge may on no account pronounce unworthiness outside the cases that are prescribed in so many words.

It is not really, as Philippon J. suggests, because article 610 C.C.L.C. is a provision of a penal nature that it is strictly construed but rather, as Mayrand notes at pages 64 and 65, because the intention was to remove from the judges the discretion they had in the old French law to determine on a case-by-case basis "[TRANSLATION] whether the heir had committed a sufficiently serious fault to incur unworthiness". Mayrand goes on to say, at page 65:

> [TRANSLATION] Thus in determining the causes of unworthiness to inherit, the law acquires greater certainty; admittedly, however, the unworthiness to inherit is unduly restrictive.

[92] The use of the word “murder” in subsection 610(3) C.C.L.C. is important, in my view. It specifies in my opinion what the legislature had in mind when it used the expression “*donner la mort*” in subsection 610(1) C.C.L.C. I am unable to give subsection 610(3) C.C.L.C. any other reading than to declare unworthy the heir of full age who has failed to inform on the person who, within the meaning of subsection 610(1) C.C.L.C., had killed the deceased—the “murderer”.

[93] The use of the word “*donner*” rather than “*causer*” (the death) is likewise revealing. The *Criminal Code* uses the word “*causer*” (cause)], and this word seems to me to be more general than “*donner*” in the sense that it can be said of manslaughter that the death is caused by the act of a person whose primary intention was not to produce the death (*donner la mort*). Had the civilian legislators intended that the presumptions of causality established by the *Criminal Code* be referred to in order to include persons who caused a death they had not intended to produce as such, they would have used the word” *causer*” rather than the word “*donner*” .

[94] The words “*avoir tenté*” (attempting) also invite comparison with the word “*tentative*” (attempt), which, in the *Criminal Code*, is used only in relation to murder (section 239).

[95] The actual wording of subsection 610(1) C.C.L.C. requires that a purely objective test be applied: once the heir has been convicted by a court of criminal jurisdiction of killing or attempting to kill, the unworthiness applies by operation of law. To accept manslaughter as a cause of unworthiness by operation of law is either to decide that any conviction for manslaughter automatically results in unworthiness, irrespective of the circumstances of the crime—I am not certain that this is the result that is sought by those who favour this thesis—or to transform an unworthiness that is meant to be by operation of law into an unworthiness that might vary at the dictate of a judge who is necessarily required to determine in each case whether there was indeed, in the circumstances, an intention to kill, as opposed to an intention, for example, to injure. An invitation, therefore, to retry the criminal proceeding in a civilian court, while the purpose sought by subsection 610(1) C.C.L.C. is to avoid any recourse to the courts.

[96] It should be recalled that in introducing the concept of unworthiness by operation of law the legislature literally put itself in the shoes of the deceased and presumed that the latter, had he foreseen the future, would have disinherited whoever had intentionally killed him or intentionally attempted to kill him. It was not the intention of the legislature to presume that the deceased, had he known the circumstances of a crime that, by definition in this case, he had himself provoked and that, by definition, was committed by an heir in a fit of anger, would necessarily, irrespective of the circumstances, have disinherited the perpetrator of the crime. The legislature intended to rely, in such cases, on the successor who was of the opinion that there was unworthiness and who would ask the Court to declare the heir unworthy (article 623 C.C.Q.), and on the civilian judge, who would determine following a new trial whether the facts are such that the perpetrator of the crime should be barred from the succession.

[97] I am not unaware that the *Civil Code of Québec* probably allows someone who is the sole "successor" to elude the unworthiness pronounced judicially once that person does not himself seek to be declared unworthy. Such is, however, the choice of the legislature, and the situation of a person convicted of manslaughter does not differ in this regard from that of a person who had abused the deceased and was the only person "in line". I thought for a moment that the state, through the Public Curator, might intervene, but the language of articles 653 and 697 indicates that the state cannot be considered a "successor" capable of invoking an heir's unworthiness.

[98] I opt therefore for the solution that appears to me to be the most restrictive, the most objective, the most certain and, to repeat the Minister's words in his commentaries (*supra*, paragraph 77), the only one that can entail "automatic exclusion".

[99] This solution is likewise the one adopted in France by the majority of judges and legal scholars. Article 727 of the French *Code civil* reads:

> [TRANSLATION]
>
> **Art. 727** Unworthy of inheriting and, as such, barred from successions are:
>
> 1. He who is convicted of killing or attempting to kill the deceased;
>
> 2. He who has brought against the deceased a capital charge, adjudged to be calumnious;
>
> 3. The heir of full age, who, being cognizant of the murder of the deceased, has failed to give judicial information of it.

Article 610 C.C.L.C. is therefore almost a perfect copy of the text of the French *Code civil*.

[100] Now, as is indicated by the following extract from *Droit civil: les successions, les libéralités*, by François Terré and Yves Lequette (3rd ed., Paris: Dalloz, 1997), manslaughter is not, in France, a cause of unworthiness by operation of law [at pages 45-46]:

> [TRANSLATION]
>
> ***2. Case of unworthiness***—Desirous of reducing the discretionary authority previously enjoyed by the judges in such matters, the drafters of the Code civil provided for unworthiness in three limited cases (art. 727).
>
> (*a*) First, unworthy to inherit is "*he who is convicted of killing or attempting to kill the deceased"*. The formula requires two conditions: a reprehensible deed and a conviction.
>
> In the first place, he must have killed or attempted to kill the deceased. Thus, the attempt is in this case tantamount to the completed offence. Still, it must be observed that the only offence contemplated is that of murder, which covers various cases (murder, assassination, poisoning, parricide, infanticide) but implies a homicidal intention so that, in view of the strict construction adopted by the courts, there is no unworthiness in the case of a conviction for homicide by carelessness (art. 221-6, new code pénal) or for blows and

> injuries resulting in death without the intention to kill (art. 222-7, new code pénal).

One might also refer to this passage from the Cours de droit civil, *Les successions, les libéralités*, by Philippe Malaurie (4th ed., Édition Cujas, 1998) [at page 53]:

> [TRANSLATION]
>
> **57. Causes**—Three restricted causes result in unworthiness (art. 727).
>
> 1. The murder of the deceased by the heir. The law treats the attempt as tantamount to murder, but the case law, through a literal textual interpretation, does not tie unworthiness to either complicity or manslaughter. One could say that there are "*some cases in which one inherits from those one has murdered*".

[101] Although it has a different structure than our *Criminal Code*, the French *Code pénal* likewise distinguishes voluntary homicide from involuntary homicide. The old *Code pénal* distinguished "[TRANSLATION] murders and other capital crimes, threats to murder individuals" (articles 295 to 308) from "[TRANSLATION] injuries and deliberate blows that are not characterized as murder" (articles 309 to 317). For example, article 295, in the section "[TRANSLATION] murders", characterized "[TRANSLATION] homicide committed deliberately" as murder and article 311, in the section "[TRANSLATION] injuries", read:

> **Art. 311**—Anyone who deliberately struck or committed violent acts or assaults resulting in death without the intention to kill will be punished by a sentence of five to fifteen years of penal servitude.

[102] The present *Code pénal* in France distinguishes "[TRANSLATION] voluntary attempts on life" (articles 221-1 to 221-5) from "[TRANSLATION] involuntary attempts on life" (articles 221-6 and 221-7). Only the first, as we have seen, are covered by article 727 of the *Code civil* and are causes of unworthiness by operation of law.

[103] I note, in closing, that the proposed reform of the law of successions, in France, proposes that it be said from now on that the intention to kill is not required in order for there to be unworthiness by operation of law. Article 727 of the present *Code civil* would be replaced by a new article 726, which would read:

> [TRANSLATION] **Art. 726**: Unworthy of inheriting and, as such, barred from succession are: 1. He who is convicted in a criminal proceeding, as a perpetrator or accomplice, of deliberately killing or attempting to kill the deceased; 2. he who is convicted in a criminal proceeding, as a perpetrator or accomplice, of deliberately striking or committing violent acts or assaults resulting in the death of the deceased <u>without the intention to kill</u>. [Emphasis added.]

(See F. Terré and Y. Lequette, *supra*, paragraph 100, at page 45.)

It would appear that the Quebec legislature has not yet reached this point and it is not up to me to so anticipate it, should it wish to go there.

[104] I conclude, therefore, that under the current Quebec law of succession, the respondent, in her capacity as heir, is not unworthy by operation of law. Since she has not been judged unworthy by judicial declaration and since the limitation period within which successors may seek a judicial declaration of unworthiness has expired, the respondent is entitled to claim from the Treasury Board, as the heir of the Morin succession, the sum of approximately $81,750 payable to the succession under subsection 55(1) of the Act as the supplementary death benefit. I will come back to the minimum amount payable to the succession under subsection 27(2), since this amount is payable only if the surviving spouse does not receive any allowance under Part I of the Act.

[105] If my interpretation is erroneous and if the respondent is unworthy by operation of law owing to the fact that she was convicted of manslaughter, the Attorney General's troubles are far from over since it would then be necessary to determine to whom, other than the respondent, the deceased's succession would devolve. I noted in paragraph 17 of these reasons that Mr. Morin had a nephew. Are there other successors? Or if there are none, should not the Public Curator of Québec, at the end of the day, in view of articles 653 and 696 C.C.Q., have a claim to the amount owing to the Morin succession by the Treasury Board, which is payable out of the Public Service Death Benefit Account?

2. Is a surviving spouse who pleaded guilty to a charge of manslaughter deprived of the right to benefits?

[106] What about the respondent's claim as the surviving spouse, then? As we know, the *Public Service Superannuation Act* designates, in subsection 13(3), the surviving spouse as beneficiary.

[107] The *Civil Code of Québec*, as we saw, is sparing of penalties in cases of murder or manslaughter committed by a person who derives a monetary benefit from the death of another person. In *ab intestate* and testamentary succession, there is unworthiness by operation of law only if the heir is convicted of making an attempt on the life of the deceased, and unworthiness by way of a court declaration, for example because of cruelty, must be applied for within the year following the opening of the succession or knowledge of the cause of unworthiness. In insurance matters, only an attempt on the life of the insured by the policy holder results in cancellation of the insurance by operation of law and the payment of the surrender value; an attempt on the life of the insured by a beneficiary who is not the policy holder does not result in the disqualification of this beneficiary. Briefly put, it is clear that the Quebec legislature, when it wants to ensure that someone may not profit from his or her own crime, speaks precisely and confines itself to some very limited cases.

[108] In gifts, ingratitude is a cause of revocation— and ingratitude can most definitely result from manslaughter—but it must be pronounced by the court.

[109] In pension plans, the Quebec legislature has been more discreet, but has nevertheless made its intention clear through a disposition that is found in the chapter devoted to the contract of annuity.

[110] Article 2379 of the *Civil Code of Québec* provides that revocation of a beneficiary in a pension plan is governed by the rules respecting the contract of insurance. Here is the text of this article:

> **Art. 2379.** The designation or revocation of an annuitant, other than the person who furnished the capital of the annuity, is governed by the rules respecting stipulation for another.
>
> However, the designation or revocation of an annuitant, in respect of annuities transacted by insurers or of retirement plan annuities, is governed by those rules respecting the contract of insurance which relate to beneficiaries and subrogated holders, adapted as required.

[111] The "rules respecting the contract of insurance which relate to beneficiaries and subrogated holders" are located in articles 2445 to 2460 of the Code. Article 2453 provides:

> **Art. 2453.** Beneficiaries and subrogated policyholders are the creditors of the insurer but the insurer may set up against them the causes of nullity or forfeiture that may be invoked against the policyholder or participant.

[112] Which takes us back by ricochet to article 2443 C.C.Q., the implications of which I previously examined, and which I quote again:

> **Art. 2443.** An attempt on the life of the insured by the policyholder entails, by operation of law, cancellation of the insurance and payment of the surrender value.
>
> An attempt on the life of the insured by a person other than the policyholder entails forfeiture only in respect of that person's right to the coverage.

[113] Applying the rules respecting the contract of insurance to the superannuation plan, "adapted as required", as article 2379 C.C.Q. invites us to do, I am of the opinion that it is the second paragraph of article 2443 C.C.Q. that governs the present situation: an attempt on the life of the contributor by the beneficiary entails the forfeiture of this beneficiary.

[114] Because article 2443 C.C.Q. does not require a criminal conviction, it has been held, as I explained earlier in paragraph 81, that the rule was more flexible in insurance matters than in successions, and that in insurance matters a conviction for manslaughter could entail the forfeiture of the beneficiary by operation of law.

[115] Should the circumstances of the crime in the case at bar lead to the disqualification of the respondent? I think so. It would be too easy for anyone charged with murder to avoid the civil consequences of a conviction for murder by pleading guilty to a reduced charge of manslaughter and avoiding a trial in the course of which all of the relevant facts would be disclosed. The civil court, faced with a plea of guilty to a

charge of manslaughter, may be sceptical and conclude, from the scant evidence at its disposal, and given the balance of probabilities, that there was a sufficient intention to kill.

[116] In this case, the description of the events that is found in the judgment given at sentencing reveals a clearly settled intention to take advantage of the opportunity that was presented to “stick it to” the victim once and for all. In my opinion, this was an attempt on the life of the victim within the meaning of the law of insurance and the respondent would profit from her crime if she were allowed to receive the benefits payable to a surviving spouse.

[117] I therefore find that the respondent is forfeited from her entitlement to the benefits payable to a surviving spouse under subsection 13(3) of the Act.

[118] Given that the respondent is not entitled to any allowance under Part I of the Act, subsection 27(2) of the Act applies in this case: since there is no one to whom an allowance is payable under Part I, a minimum amount (assessed in this instance at $75,202.50) should be paid to the succession, and therefore to the respondent.

[119] I note that it is completely normal that this minimum amount, established in part in terms of the amounts paid by the deceased into his plan, should go to the succession. This is, to some degree, the equivalent of the surrender value of an insurance policy, which under the first paragraph of article 2443 would have been paid to the insured’s succession if the insurance had been cancelled owing to an attempted homicide by the policy holder.

[120] My conclusion is therefore the following: the respondent, as the surviving spouse, is not entitled to the monthly allowance contemplated under subsection 13(3) of the Act, but she is entitled in her capacity as heir, to the minimum amount of about $75,202.50 payable under subsection 27(2) of Part I of the Act and to the supplementary death benefit of about $81,750 provided by section 54 and subsection 55(1) of Part II.

[121] Since the publication of the judgment rendered at trial in this case, Parliament has enacted subsection 25(8) [as enacted by S.C. 1999, c. 34, s. 75] of the Act, which stipulates that

> **25.** …
>
> (8) A survivor is not entitled to receive any benefit under this Act with respect to the contributor when the contributor dies and the survivor is found criminally responsible for the death.

This amendment ensures that in future a reference to the private law of the province will no longer be necessary, at least in regard to what may be characterized as benefits payable to a survivor. I leave it to others to interpret this new provision when the time comes.

Part III—The common law rule

[122] Should I be mistaken as to the application of the civil law, I think it is useful to say a few words about the common law rule.

[123] The existence in the common law of a rule that no one should profit from his or her crime is beyond doubt. But it is necessary to determine the crimes and the benefits to which the rule applies.

[124] This rule of public policy (but of private law) is based on the principle that no system of jurisprudence can, without shocking public policy and the public conscience, allow someone to apply to the courts for recognition of a right to benefits resulting from a crime committed by that person. The rule was articulated in the following way by Lord Justice Fry of the English Court of Appeal, in *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, at pages 156-158:

> The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felon, or misdemeanour. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Fauntleroy's Case* appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's Case* it was held to prevent the assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a cestui que trust asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it.
>
> …
>
> Now, the trust thus created by statute, and the language of the statute creating it, must, in my opinion, be both subject to the principle of public policy which I have stated— namely, the trust is one which cannot be enforced by a murderess of her husband, and the language of the statute must be read as if it contained an exception of such a case. Consequently the trust which the statute was intended to create has either never arisen or it has, by the act of the cestui que trust, become incapable of enforcement … . that the principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to acquire as the result of her crime.

[125] In *Cleaver*, a wife had poisoned her husband. Convicted of "wilful murder", she was sentenced to death. The sentence was subsequently commuted to life imprisonment. Her husband held an insurance policy of which she was a beneficiary as his wife. A few months after the death of her husband, the wife had assigned her rights in the insurance policy to someone named Cleaver. The insurer refused to pay Cleaver. The Court had three questions to resolve: whether it was proved that the wife had intentionally poisoned her husband; what, in regard to the insurer, were (a) Cleaver's rights as an assignee of the policy, (b) Cleaver's rights as an administrator of the wife's

property within the meaning of the *Act to Abolish Forfeitures for Treason and Felony, and to otherwise amend the Law relating thereto* (U.K.) [33 & 34 Vict., c. 23], and (c) the rights of the executor of the husband's estate. The Court held that the insurer had no obligation in regard to Cleaver for reasons of public policy, but that he had to pay the executors of the estate, who would remit the money to the creditors of the estate and, where applicable, to the children of the husband in their capacity as heirs of their father.

[126] The rule as articulated by Lord Justice Fry was endorsed by Chief Justice Strong of the Supreme Court of Canada in *Lundy v. Lundy* (1895), 24 S.C.R. 650, at page 652, a case in which the testatrice had been killed by her husband, who had then been convicted of manslaughter:

> The Court of Appeal drew a distinction between murder and manslaughter, and held that whilst the devisee would forfeit any gift under the will of the person whose death he had caused by an act which amounted to the crime of murder, he still might take in the case of manslaughter.
>
> I cannot agree in the conclusion of the Court of Appeal, nor in the reasoning by which that conclusion was arrived at. The reasoning of the court would seem to me rather to apply to a case of justifiable or excusable homicide than to a case of manslaughter. The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong. Then surely an act for which a man is convicted of manslaughter and sentenced to a long term of imprisonment was a wrongful, illegal and formerly (when felonies were recognized as forming a particular class of offences) a felonious act. I can see no principle on which to rest the decision of the Court of Appeal, and I can find no authority in support of it.

[127] In *Nordstrom v. Baumann*, [1962] S.C.R. 147, an estates case, it was held that the widow who had set fire to the family residence could claim her share in the inheritance of her husband, who had died in the fire, but only because she was mentally incompetent. Ritchie J. said, at page 156:

> The rule of public policy which precludes a person from benefiting from his or her own crime is an integral part of our system of law, and although some doubts have been raised as to whether this rule overrides the statute law as to the distribution of the estate of an intestate (see *In re Houghton, Houghton v. Houghton*), the better view appears to me to be that it applies to such cases (see *In re Pitts, Cox v. Kilsby, Whitelaw v. Wilson*, and *Re Estate of Maud Mason*). As Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Association, supra*, at p. 156 said:
>
> > It appears to me that no system of jurisprudence can with reasons include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.
>
> As has been indicated the civil courts of this country have repeatedly determined the question of whether or not the conduct of an individual amounts to a crime for the purpose of invoking this rule.

[128] In *Brissette Estate v. Westbury Life Insurance Co.; Brissette Estate v. Crown Life Insurance Co.*, [1992] 3 S.C.R. 87, the Supreme Court of Canada held, in a majority decision, that a husband who had killed his wife (it was murder, apparently) and who

had designated himself the beneficiary of an insurance policy he had taken out on the life of his wife, could not claim from the insurer either as beneficiary or as executor. The Court held that under the very terms of the policy the money was to be paid to the survivor (and not the estate) and that public policy prohibited the payment of the money under the express terms of the contract to a survivor who had acquired this capacity by killing the other party. In refusing to recognize the right of either the survivor or the estate to claim, the Court relied on the fact that

> … a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds. [Sopinka J., at p. 94.]

[129] Commenting on the *Cleaver* case (*supra*, at paragraph 124), Sopinka J. (at page 95) said that in his opinion if the beneficiary who killed the insured was not a party to the contract

> Public policy stepped in to deny payment to the wife-beneficiary leaving the insurance moneys in the estate. Public policy was not allowed to abrogate a right that the estate had by virtue of the statute.

[130] The rule, up to now, has been examined primarily in the context of intestate and testamentary succession and insurance law. The decisions cited by the Attorney General were all rendered in that context, with the exception of two cases to which I shall return. Another area has more recently been opened up to the rule, that of joint tenants. According to a study published by Mr. Norman M. Tarnow, “Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates” (1980), 58 *Can. Bar Rev.* 582, it appears that these were generally, as of 1980, the fields covered by the rule.

[131] Mr. Tarnow’s article is interesting because it testifies to a considerable diversity in the common law cases and because it concludes by urging that some reserve be shown in the use of the rule in future. The article is also interesting because after quoting Lord Justice Fry’s *dictum*, which over the years has become the classic formulation of the rule (*Cleaver*, *supra*, at page 156):

> It appears to me that no system of jurisprudence can with reason include amongst the right which it enforces, rights directly resulting to the person asserting them from the crime of that person.

he reports many decisions in the Anglo-Saxon common law, but especially in the American common law, that have limited the application of the rule. So the rule is not as absolute as it *prima facie* appears to be, and there are some questions as to the nature of the crimes to which it applies and the presence of a guilty mind, particularly in cases of insanity.

[132] In *Ontario Municipal Employees Retirement Board and Young et al., Re* (1985), 49 O.R. (2d) 78 (H.C.), a wife who had pleaded guilty to a charge of criminal negligence causing the death of her husband claimed as the widow the pension provided by the *Ontario Municipal Employees Retirement System Act* [R.S.O. 1980, c. 348]. Rosenberg J. of the Ontario High Court of Justice held, albeit somewhat reluctantly, that while the

crime was not intentional in the circumstances, the wife, in receiving the pension, would profit from her crime, and this would conflict with the common law rule [at pages 81-82]:

> These cases have been consistently followed by the Canadian courts with one exception, in the case of a careless driving conviction to which I will be referring. There appear to be numerous American decisions that state that the rule of public policy prohibiting a person from benefiting from his own criminal act is only applicable if the killing is intentional. Were I am not bound by the English and Canadian decisions I would, in this case, have favoured following the American decisions and found in favour of Therese Vezina Young. She did not intend to kill her husband. He would have died shortly in any event and she would have had the benefit of the pension. However, in my view, the law is clear and she is not entitled to benefit.
>
> In the case of *Shaw v. Gillian* (1982), 40 O.R. (2d) 146, 143 D.L.R. (3d) 232, [1983] I.L.R. par. 1-1604, Hughes J. was dealing with a case where the beneficiary of a life insurance policy had pleaded guilty to careless driving in relation to the accident in which the insured was killed. After a thorough review of the authorities the learned justice found that the public policy did not apply to a criminal offence unless it was an indictable offence. In his review of the cases, however, Hughes J. made it abundantly clear that, had he been dealing with an indictable offence such as criminal negligence causing death, he would have held the rule of public policy to apply.
>
> Under the circumstances, I would find on the evidence as it is before me that Therese Vezina Young is disentitled to the benefits arising on the death of Edward Charles Young.

[133] In *R. v. National Insurance Comr, ex parte Connor*, [1981] 1 All E.R. 769 (hereinafter *Connor*), a three-judge panel of the Queen's Bench Division had occasion to review the question in somewhat greater depth. A wife had stabbed her husband during a domestic quarrel. She was charged with murder but was convicted by a jury of manslaughter. She claimed the widow's pension under the *Social Security Act 1975* [(U.K.), 1975, c. 14], for which she met all of the eligibility requirements. The Chief National Insurance Commissioner rejected the claim, relying on the rule that no one may profit from his or her own crime. The wife then applied to the Court by way of an application for judicial review. Chief Justice Lane likewise dismissed the application. Here are some extensive excerpts from his reasons [at pages 773-775]:

> One turns to the two problems which counsel has placed before us. The first submission made is that because this particular Act with which we are concerned, the Social Security Act 1975, is, as he puts it, a self-contained modern Act the rules of public policy do not apply and that whatever may have happened, I think he is driven to submitting that nothing that the applicant did can alter the plain entitlement under the words of s 24 which I have read.
>
> I do not accept that submission. The fact that there is no specific mention in the Act of disentitlement so far as a widow is concerned if she were to commit this sort of offence and so become a widow is merely an indication, as I see it, that the draftsman realised perfectly well that he was drawing this Act against the background of the law as it stood at the time.
>
> The second proposition is that it is not every type of crime which operates so as to cause public policy to make the courts reject a claim.
>
> I, for my part, would agree with that. Indeed there are dicta, particularly in *Gray v Barr*

[1971] 2 All ER 954, [1971] 2 QB 554, which support that proposition, and in particular the judgment of Salmon LJ which reads ([1971] 2 All ER 954 at 964, [1971] 2 QB 554 at 581):

> Although public policy is rightly regarded as an unruly steed which should be cautiously ridden, I am confident that public policy undoubtedly requires that no one who threatens unlawful violence with a loaded gun [that was the case in *Gray v Barr*] should be allowed to enforce a claim for indemnity against any liability he may incur as a result of having so acted. I do not intend to lay down any wider proposition. In particular, I am not deciding that a man who has committed manslaughter would, in any circumstances, be prevented from enforcing a contract of indemnity in respect of any liability he may have incurred for causing death or from inheriting under a will or on the intestacy of anyone whom he has killed. Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convicts.

I would respectfully agree with that dictum, and I would agree that in each case it is not the label which the law applies to the crime which has been committed but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice. Where that line is to be drawn may be a difficult matter to decide, but what this court has to determine is whether in the present case what this applicant did was sufficient to disentitle her to her remedy.

The judgment of Lord Denning MR in the same case does provide some assistance in determining where to draw the line. He says this ([1971] 2 All ER 954 at 956, [1971] 2 QB 554 at 568):

> Does this manslaughter mean that, as a matter of public policy, Mr Barr is not to be allowed to recover on the policy? In the category of manslaughter which is called “motor manslaughter”, it is settled beyond question that the insured is entitled to recover: see *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311, [1927] All ER Rep 442. But, in the category which is here in question, it is different. If his conduct is wilful and culpable, he is not entitled to recover: see *Hardy v Motor Insurers’ Bureau* [1964] 2 All ER 742, [1964] 2 QB 745. I agree with [Geoffrey Lane J] when he said ([1970] 2 All ER 702 at 710, [1970] 2 QB 626 at 640): “The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence, or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain the claim for indemnity”.

One turns then to see what it was that happened here. On the verdict of the jury it is plain that the applicant’s act was a deliberate, conscious and intentional act. She was holding the knife in her hand and she deliberately thrust it into her husband’s chest. It is not the same as discharging two barrels of a shotgun; no two situations will ever be the same. But, speaking for myself, I can see no distinction in principle between the situation in *Gray v Barr*, which was sufficient to disentitle the plaintiff to recover, and the situation here, which also to my mind disentitles the applicant to recover.

[134] This decision was the subject of a comment by St. John Robilliard entitled “Public Policy and the Widow” (1981), 44 *Mod. L. Rev.* 718, at page 720. The author discusses a certain confusion in the cases and criticizes Chief Justice Lane—while not suggesting that his decision was wrong—for not asking himself the following questions:

> Despite this authority Lord Lane preferred (*obiter*) the approach in *Gray v. Barr*: that is the nature of the crime determines whether the rule applies. Perhaps his object was to avoid the application of what sometimes appears an arbitrary and harsh rule. The critics have a point, for if *Gray v. Barr* is wrong then in a case like *Connor* any widow who has criminally caused the death of her husband is denied her pension as a matter of law. If this is right a clearer consideration of the issues of public policy involved is called for. These include the questions whether a civil court is justified in adding to the penalties imposed by the criminal law; whether the penalty produced is appropriate, and whether the public interest behind the statute (*e.g.* that a class of persons should be given a pension) is advanced by not allowing the wrongdoer to recover.

[135] On the point that interests us at this stage, the reasons of the Chief Justice come down to the following two paragraphs, at pages 773 and 774:

> One turns to the two problems which counsel has placed before us. The first submission made is that because this particular Act with which we are concerned, the Social Security Act 1975, is, as he puts it, a self-contained modern Act the rules of public policy do not apply and that whatever may have happened, I think he is driven to submitting that nothing that the applicant did can alter her plain entitlement under the words of s 24 which I have read.
>
> I do not accept that submission. The fact that there is no specific mention in the Act of disentitlement so far as a widow is concerned if she were to commit this sort of offence and so become a widow is merely an indication, as I see it, that the draftsman realised perfectly well that he was drawing this Act against the background of the law as it stood at the time.

[136] The question of whether public policy was better served by the disentitlement of the widow than by the payment of the benefits was not actually examined, therefore, and I suppose that in the eyes of Lord Lane the case was sufficiently analogous with the cases hitherto decided by the courts to allow him to find that Parliament could presume that the rule would apply to this type of case. It should be kept in mind that in his reasons, since endorsed by a galaxy of judges, Lord Justice Fry, in *Cleaver*, had said in *obiter* (*supra*, at paragraph 124):

> This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion … and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it.

[137] I am inclined to regret, with Robilliard, that Chief Justice Lane did not put his mind to the purpose of the law in question. I am not persuaded that receiving from the state a pension established by a general enactment of social policy is to profit from one's crime within the meaning of the common law rule. Whatever the case, the Act of concern to us is not of the same nature. Here, although it is the state that pays, it does so primarily out of contributions accumulated by the deceased and the *Public Service Superannuation Act* could not be characterized as social legislation.

[138] I have engaged in this rapid overview of the common law cases in order to illustrate to what degree the solution may not be as simple as might appear at first sight.

Finally, I note this nuance by Iacobucci J. in *65302 British Columbia*, *supra*, at paragraph 64 of his reasons:

> This line of reasoning is often traced to the statement of Lord Atkin in *Beresford v. Royal Insurance Co.*, [1938] 2 All E.R. 602 (H.L.), at p. 607:" the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime". However, as several commentators note, *Beresford* involved a payment under an insurance policy where the insured had committed suicide, at a time when suicide was characterized as a heinous crime.

Conclusion

[139] I would accordingly allow the appeal in part and amend the order rendered by the Trial Judge to read that the Treasury Board of Canada is no longer obliged to pay the applicant in her capacity as surviving spouse the benefit in the form of a monthly allowance prescribed in subsection 13(3) of the *Public Service Superannuation Act*.

[140] Since each of the parties has partially succeeded, I would award no costs.

* * *

The following is the English version of the reasons for judgment rendered by

[141] LÉTOURNEAU J.A.: I have had the benefit of reading the reasons prepared by my colleague Mr. Justice Décary. I agree with the remarkable and persuasive analysis he makes of the complementarity of the Quebec civil law with federal law where the latter is silent. I share his conclusion that, in the case at bar, the civil law of Quebec applies. As he states so well, this Court has on many occasions recognized the suppletive nature of the civil law in relation to federal law. It has also endeavoured, to the degree possible, to harmonize the effects of federal statutes in order to avoid possible inequities as a result of disparities while acknowledging a right to be different where harmonization proves impossible. Unfortunately, I am unable to subscribe to his conclusion that manslaughter, whatever it be and whatever the circumstances, cannot support unworthiness to inherit by operation of law under article 620 of the *Civil Code of Québec*. To illustrate more clearly the reasons underlying my decision, I reproduce articles 620 to 623 of the Code. I also add articles 610 and 611 of the *Civil Code of Lower Canada*, which are the precursors of the articles in the new Code and which the reform of the civil law of Quebec is not supposed to have altered in their essence:

Civil Code of Québec

QUALITIES FOR SUCCESSION

Art. 620. The following persons are unworthy of inheriting by operation of law:

(1) a person convicted of making an attempt on the life of the deceased;

(2) a person deprived of parental authority over his child while his child is exempted from the obligation of providing support, in respect of that child's succession.

Art. 621. The following persons may be declared unworthy of inheriting:

(1) a person guilty of cruelty towards the deceased or having otherwise behaved towards him in a seriously reprehensible manner;

(2) a person who has concealed, altered or destroyed in bad faith the will of the deceased;

(3) a person who had hindered the testator in the writing, amendment or revocation of his will.

Art. 622. An heir is not unworthy of inheriting nor subject to being declared so if the deceased knew the cause of unworthiness and yet conferred a benefit on him or did not modify the liberality when he could have done so.

Art. 623. Any successor may, within one year after the opening of the succession or becoming aware of a cause of unworthiness, apply to the court to declare an heir unworthy if that heir is not unworthy by operation of law.

Civil Code of Lower Canada

610 The following persons are unworthy of inheriting and, as such, are excluded from successions:

1. He who has been convicted of killing or attempting to kill the deceased;

2. He who has brought against the deceased a capital charge, adjudged to be calumnious;

3. The heir of full age, who, being cognizant of the murder of the deceased, has failed to give judicial information of it.

611 The failure to inform cannot however be set up against the ascendants or descendants, or the husband or wife of the murderer, nor against the brothers or sisters, uncles or aunts, nephews or nieces of the murderer, nor against persons allied to him in the same degrees. [Emphasis added.]

Ambiguity of language in subsection 620(1) of the *Civil Code of Québec*

[142] The unworthiness to inherit under subsection 620(1) of the *Civil Code of Québec* attaches to the person convicted of making an attempt on the life of the deceased. It is obvious by virtue of this clause that the person, in order to be unworthy, must have been convicted of an offence by a court of criminal jurisdiction. The difficulty with the wording of the article, and it is substantial, is that there is no offence in Canadian criminal law of making an attempt on the life of the deceased. We do have attempted murder in the criminal law, but it is a much narrower and more specific concept than that of making an attempt on the life of the deceased.

[143] Indeed, in its usual common meaning, to make an attempt on the life of a person means to try seriously to take the life of that person or attempt to kill him: *Le Petit Larousse Illustré*, 1998, page 96; *Le Nouveau Petit Robert: Dictionnaire alphabétique et*

analogique de la langue française, 1993, page 150. Needless to say, the conditions of unworthiness are also satisfied if the attack was successful and proved mortal. It is sufficient, therefore, to intentionally try to take a person's life, whether or not death results.

[144] In the criminal law, however, this kind of aggravated intentional attack may, if the victim dies, be characterized or labelled in different ways depending on the circumstances, for reasons that have nothing to do with unworthiness to inherit and that may pertain to the administration of criminal justice, to Parliament's desire to make a stronger, more open statement of social disapproval of the act in terms of the particular circumstances, or to the laudable objective of having a system of penalties that illustrates this social disapproval.

[145] The Canadian *Criminal Code* differentiates, in the first place, between non-culpable homicide for which the perpetrator is exonerated of criminal liability and culpable homicide, which constitutes an offence for which the perpetrator may be prosecuted. Secondly, it recognizes the existence of three kinds of culpable homicide: murder, manslaughter and infanticide (subsections 222(2), (3) and (4) of the *Criminal Code*). It also distinguishes between first degree murder and second degree murder, to which it assigns differing penalties (subsection 231(1) and sections 235, 745 [as am. by S.C. 1995, c. 22, s. 6] and 745.1 [as enacted *idem*] of the *Criminal Code* in relation to eligibility for parole).

[146] In our criminal law, manslaughter is something special: it is a residual category the vague content of which is defined by exclusion or by elimination. Indeed, under section 234, culpable homicide that is not murder or infanticide is manslaughter. This category encompasses, therefore, whatever is not otherwise assigned to murder and infanticide. It covers a considerable array of possible violations of human life resulting from illegal acts or criminal negligence (subsection 223(5) of the *Criminal Code*).

[147] Furthermore, notwithstanding its nomenclature, manslaughter (in French, *homicide involontaire coupable*) is not always involuntary. The best example of this is found in section 232 of the *Criminal Code*, where the defence of provocation may serve to reduce from murder to manslaughter the criminal liability of an individual who voluntarily, intentionally, deliberately and unlawfully caused the death of his victim. I will come back to this aspect of the question later on, when I analyse the approach recommended for the Quebec civil law by legal doctrine.

[148] I have been required to engage in this summary nomenclature of the criminal law concepts in relation to life-threatening attacks in order, on the one hand, to illustrate the lack of harmonization between the Quebec civil law, present or past, and Canadian criminal law and, on the other hand, to illustrate the danger there is in considering in abstraction, that is, independently of the circumstances surrounding their perpetration, the three categories of offences in the *Criminal Code* penalizing a successful attack on human life. I will add, and this is well known, that the three categories are far from being mutually watertight and it would be an error to hide behind the label "manslaughter" and

conclude that each and every attack on life that falls within this category cannot be a source of unworthiness to inherit by operation of law.

The scope of subsection 620(1) of the *Civil Code of Québec*

[149] Certain textual arguments were raised to remove manslaughter from the scope of article 620 of the *Civil Code of Québec*. I will begin with a discussion of these submissions.

[150] The first is based on the use of the word "murder" in subsection 610(3) of the *Civil Code of Lower Canada*. The use of this word in the third paragraph, it is argued, suggests that in the first paragraph of the article the legislature was thinking of murder when it used the words "*avoir donné … la mort*" (killing). With respect, I think it is the contrary inference that must be drawn. For if the legislature had intended to limit the application of the first paragraph to cases of murder alone, it would have used the word "murder" in the first paragraph as it did not hesitate to do in the third. Nor would it have used words as broad as "killing" (*donné … la mort*). Furthermore, the third paragraph, which uses the word "murder", covers a reality quite different from the first and, in view of that, it is normal that the legislature limited its application solely to cases of murder.

[151] In fact, while in the first paragraph of article 610 the unworthiness attaches to the person who causes the death and is liable for the death of the deceased, it extends in the third paragraph to a person who is in no way implicated in this death. It affects the person who has failed to report a murder, the existence of which that person is merely aware of without even necessarily being a witness thereto. When we know that in the criminal law there is no obligation on a citizen to report a crime he has actually witnessed, and consequently no criminal penalty therefor, it is not surprising that the Quebec legislature wished, in the case of a mere failure to report a crime, to limit the scope of the civil penalty of unworthiness to inherit; accordingly, only the heir of full age will be liable for such omission and only if it involves a murder. Furthermore, he is even released from this obligation to inform if the perpetrator is a close relative of or related by marriage to the murderer: article 611. It is clear and comprehensible, then, from a reading of subsection 610(3) and article 611, that the legislature intended to limit the civil penalty for a failure to inform to some very limited and very specific circumstances. No such intention is found in subsection 610(1) in regard to the perpetrators of the death.

[152] The second textual submission has to do with the use of the word "*donner*" in the *Civil Code of Québec* rather than the word "*causer*" that is used in the *Criminal Code*. I do not think the word "*causer*" is more general than "*donner*" and that a meaningful argument can be drawn from the choice of one word rather than another. He who puts a person to death causes the death of that person. Moreover, "*donner*" in the sense of "*donner la mort*" means to cause, to be the cause of or to procure (*Le Nouveau Petit Robert*, page 676) or to be the source of or produce (*Le Petit Larousse Illustré*, page 345). Just as an individual may cause death without a primary intention to cause it, he may also put someone to death without a primary intention to do so. Neither word in itself requires or excludes the intention or desire to kill.

[153] Finally, I do not think one can generally infer from the presence of the word "*involontaire*" (unintentional) in the concept of "*homicide involontaire coupable*" (manslaughter) a lack of intention to kill or to produce the death. A person blinded by rage shouts out his desire to kill the person who has insulted him and, on the spot, in the presence of numerous witnesses who can attest to the fact that he voluntarily, intentionally and deliberately killed the victim, hammered him to death, while continuing to shout about his intention to kill him. Yet, following a defence of provocation accepted by the court, the murder will be reduced to "manslaughter" (*homicide "involontaire" coupable*) although death was inflicted as intentionally as can be (section 232 of the *Criminal Code*). As I was saying earlier, the crime of manslaughter encompasses a number of disparate situations that must be assessed in terms of the circumstances, which leads me to examine the position of the Quebec doctrine on the matter.

[154] Apparently, it is said, the legal scholars are divided into two hermetic camps: those who think subsection 610(1) covers manslaughter as a cause of unworthiness by operation of law (the Mignault, Langelier and Baudouin school) and those who exclude it from the scope of that paragraph (the Faribault and Mayrand school). See the references to the writings of these scholars provided by my colleague. But analysis reveals that the supporters of the Faribault school do not exclude all cases of manslaughter from the ambit of subsection 610(1). The following extract from the *Traité de droit civil du Québec* by Léon Faribault, volume IV (Wilson et Lafleur, 1954), at pages 161-162, is a clear illustration:

> [TRANSLATION]
>
> Manslaughter occurs when one causes someone's death without a prior intent, or without having placed himself in a situation such that there was reason to apprehend that death might ensue. Such is the case of someone who kills in a fit of anger or in a state of drunkenness, or who causes the death of another person through his gross negligence. Article 610 is inapplicable to this kind of homicide.
>
> Provocation may excuse a wilful homicide, but, from the standpoint of the unworthiness of the heir, this excuse is valid only if the jury accepted it in acquitting him. [Emphasis added.]

[155] First, the author excludes from his concept of manslaughter, for the purposes of unworthiness to inherit under subsection 610(1), a person who placed himself in a situation in which there was reason to apprehend that he could cause the death. A person clearly places himself in such a situation if, knowingly and deliberately, he stabs his victim to death.

[156] Second, according to this author and the school of thought he represents, a person who acted under the effect of provocation will avoid the penalty of unworthiness only if he was acquitted, which is to say that he will be unworthy if he is convicted of manslaughter. There is nothing surprising in that, since the intention or desire to kill were present even if, in the last analysis, the mortal blow was dignified as "manslaughter".

The common law approach

[157] The situation does not differ in the common law, where, as is demonstrated by the extracts from decisions cited by my colleague, the principle that a person cannot profit from his or her own crime is not blindly applied once that person's act is characterized as "manslaughter". I will repeat two passages, one by Salmon L.J. and the other by Lord Denning M.R., that adequately summarize my thinking and the approach that must be taken in the matter.

[158] In *Gray v. Barr (Prudential Assurance Co Ltd, third party)*, [1971] 2 All ER 949 (C.A.), at page 964, Salmon L.J. writes:

> Although public policy is rightly regarded as an unruly steed which should be cautiously ridden, I am confident that public policy undoubtedly requires that no one who threatens unlawful violence with a loaded gun should be allowed to enforce a claim for indemnity against any liability he may incur as a result of having so acted. I do not intend to lay down any wider proposition. In particular, I am not deciding that a man who has committed manslaughter would, in any circumstances, be prevented from enforcing a contract of indemnity in respect of any liability he may have incurred for causing death or from inheriting under a will or on the intestacy of anyone whom he has killed. Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convicts. [Emphasis added.]

Lord Denning's judgment follows the same reasoning. At page 956, he writes:

> Does this manslaughter mean that, as a matter of public policy, Mr Barr is not to be allowed to recover on the policy? In the category of manslaughter which is called "motor manslaughter", it is settled beyond question that the insured is entitled to recover: see *Tinline v White Cross Insurance Association Ltd*, [1921] 3 KB 327; *James v British General Insurance Co Ltd*, [1927] 2 KB 311, [1927] All ER Rep 442. But, in the category which is here in question, it is different. If his conduct is wilful and culpable, he is not entitled to recover: see *Hardy v Motor Insurers' Bureau*, [1964] 2 All ER 742, [1964] 2 QB 745. I agree with [Geoffrey Lane J] when he said ([1970] 2 All ER 702 at 710, [1970] 2 QB 626 at 640):
>
> > The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence, or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain the claim for indemnity. [Emphasis added.]

[159] As my colleague pointed out, this approach was followed in 1981 in *R. v. National Insurance Comr, ex parte Connor*, [1981] 1 All E.R. 769 (Q.B.). The Chief Justice, who said he was in agreement with Salmon L.J., wrote [at page 774]:

> I would respectfully agree with that dictum, and I would agree that in each case it is not the label which the law applies to the crime which has been committed but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice. Where that line is to be drawn may be a difficult matter to decide, but what this court has to determine is whether in the present case what this applicant did was sufficient to disentitle her to her remedy. [Emphasis added.]

[160] The facts of that case bear a close resemblance to ours. The Chief Justice holds that the unlawful act by which the death was caused—the infliction of serious bodily harm using a knife—was conscious and deliberate [at page 774]:

> One turns then to see what it was that happened here. On the verdict of the jury it is plain that the applicant's act was a deliberate, conscious and intentional act. She was holding the knife in her hand and she deliberately thrust it into her husband's chest. [Emphasis added.]

He concludes that this kind of manslaughter disqualified the perpetrator of the crime from the benefit of the widow's pension she was claiming.

[161] I agree with this approach and I think that subsection 620(1) of the *Civil Code of Québec* does not exclude from its purview all cases of manslaughter. Where, as in the case at bar, a person commits aggravated assault or inflicts serious bodily harm likely to cause death, knowing that death may result but being indifferent as to whether or not it results, that person is by operation of law unworthy of inheriting from his or her victim. This act fulfills all of the conditions of murder prescribed in paragraph 229(*a*)(ii) of the *Criminal Code* and constitutes a murder. The fact that its perpetrator could benefit from the largesse of the criminal justice system, obtaining a technical acquittal on the charge of murder and being convicted of manslaughter, a reduced charge in exchange for a plea of guilty or a conviction on an offence included in the murder charge as a result of a defence of provocation, in no way alters the nature of the act itself: an unlawful act consisting of aggravated assaults likely to cause death, in the knowledge that death might result.

[162] There is no doubt that in the case at bar Ms. St-Hilaire wanted, if not to kill her husband, to at least cause serious bodily harm to him likely to cause his death. She had even announced her intentions during a previous quarrel, saying:" Some day I'm going to stick it to him, the bastard." She consciously and deliberately made an attempt on the life of the deceased within the meaning of subsection 620(1) of the *Civil Code of Québec*.

The French civil law approach

[163] My colleague referred to the French civil law, and concluded that in France as well manslaughter is not a cause of unworthiness by operation of law. One must venture carefully in comparing criminal law concepts in such different systems of criminal law. At the bottom step of the offence severity scale, French criminal law punishes homicide by mistake, carelessness or heedlessness:

> [TRANSLATION]
>
> Art. 221-6 "Causing the death of another in the conditions and according to the distinctions set forth in article 121-3", by mistake, carelessness, heedlessness, negligence or breach of a duty of security or care imposed by law "or regulation", constitutes an unintentional homicide punishable by three years of imprisonment and a fine of 300,000 Francs.
>
> "In the case of a clearly deliberate violation of a special duty of security or care imposed by law or regulation", the penalties incurred shall be raised to five years of imprisonment

> and a fine of 500,000 Francs.

[164] We do not have this kind of manslaughter in Canadian criminal law as there must at least be criminal negligence if the perpetrator of the act is to be held criminally liable. The definitions and the content of the respective concepts of homicides differ. I note that the new article 726 of the French *Code civil* will avoid the labelling (murder, manslaughter) that we have in our law in identifying the specific act that will entail the penalty of unworthiness by operation of law.

> [TRANSLATION] **Art. 726.** Unworthy of inheriting and, as such, barred from succession are: 1. He who is convicted in a criminal proceeding, as a perpetrator or accomplice, of deliberately killing or attempting to kill the deceased; 2. he who is convicted in a criminal proceeding, as a perpetrator or accomplice, of deliberately striking or committing violent acts or assaults resulting in the death of the deceased without the intention to kill.

This specific act in question is precisely striking or committing violent acts or assault resulting in the death of the deceased without the intention to kill. It is also this act that the English courts have punished with unworthiness in ruling that a person cannot profit from his or her own crime. It is this act that the Parliament of Canada has characterized as murder when committed intentionally and with the knowledge that death may result. And it is this act, and not its nomenclature, that must be considered in the construction of subsection 620(1) of the *Civil Code of Québec*. For this act, committed intentionally and knowingly, consisted in the case at bar of mortally threatening the life of the deceased, in short, of making an attempt on the life of her victim within the meaning of the Quebec civil law as it is expressed in article 620(1) of the *Civil Code of Québec*.

[165] For these reasons, I would conclude that the respondent, Constance St-Hilaire, is unworthy by operation of law of inheriting from her husband under subsection 620(1) of the *Civil Code of Québec*. I would further conclude, as did my colleague and for the reasons he expresses, that she may not receive the surviving spouse annuity. I would allow the appeal, overturn the decision of the Trial Judge, and, proceeding to render the judgment that he should have rendered, I would dismiss the respondent’s application for declaratory judgment. In the very special circumstances of this case, I would not award any costs.