



THE SUPREME COURT OF CANADA AND ITS IMPACT ON THE EXPRESSION OF BIJURALISM

By France Allard*,
General Counsel,
Legislative Services Branch,
Department of Justice Canada

Introduction

The somewhat recent interest in bijuralism is the reflection of a new receptiveness on the part of local laws and practices to the laws and practices of other cultures. The phenomenon of bijuralism exists in several countries and in several national and international relations contexts. It is difficult to say whether this interest is a result of market globalization and the increasing proliferation of international commercial agreements, but the need to know about and understand bijuralism is obvious.

Bijuralism can be approached from several angles. The simple co-existence of two legal traditions, the interaction between two traditions, the formal integration of two traditions within a given context (e.g. in an agreement or a legal text) or, on a more general level, the recognition of and respect for the cultures and identities of two legal traditions. However, beyond the factual situation that it presupposes with respect to the co-existence of traditions, bijuralism raises the issue of the interaction or relationship between different legal traditions. In general and especially in the Canadian context, it calls for an examination of the relationship between civil law and common law.

In the Canadian context, it should however be noted that the issue of aboriginal law requires a pluralist approach to understanding the relationship between traditions. Beyond bijuralism, the existence of legal pluralism in Canada should be borne in mind. The importance of the raising the issue of the relationship between common law, civil law and aboriginal law finds expression in the judgments of the Supreme Court of Canada.¹

Thus, in Canada, while the term is a rather recent invention, bijuralism itself is not a new phenomenon. A brief description of historical points of references in the development of Canadian and Quebec bijuralism will make it easier to understand the relationship between the two traditions. Considered as grounded in a factual coexistence, bijuralism is not new. The legal framework in which it is set has existed for some time.

Although the origins of Canadian bijuralism are generally thought to be found in *the Quebec Act, 1774*, the duality of legal traditions existed in New France from the moment the English and the French occupied at the same time the same territory. After the Conquest in 1760, the former French territory became English through the Treaty of Paris of 1763. No mention was made of the laws, customs or usages of the country at that time, but during this period the courts were administered by

* General Counsel—Comparative Law, Legislative Services Branch, Department of Justice, Canada. I would like to thank Ms. Nathalie Lacroix of the Legislative Services Branch, Department of Justice, for her invaluable assistance with research and Louise Lavallée, drafter, Regulations Section, Legislative Services Branch, Department of Justice, for our frequent exchange of ideas. The opinions expressed are those of the author. They do not necessarily correspond to the Department of Justice position on any of the issues.

¹ See e.g. *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *R. v. Côté*, [1996] 3 S.C.R. 139; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

militia captains whose decisions were generally based on the *Coutume de Paris*. The Treaty of Paris was followed by the Royal Proclamation of 1763, which declared the Province of Quebec an English colony and set common law as the applicable law before the courts.² However, despite the imposition of the common law system, the “French” inhabitants continued to follow the custom in their dealings between each other. French civil law survived through practice. Thus, even though the inhabitants of the Province were officially subject to English laws, the duality in traditions in fact persisted.

In response to this situation, Governor Murray issued an order on September 17, 1764, setting up the civil courts. Judgments were to be made in accordance with the laws of England, but at the same time judges of the lower courts were authorised to consider French laws and customs in cases between the inhabitants of the Province of Quebec, for those cases which were heard before October 1, 1764. This consideration of French laws was, in fact, extended to all cases between inhabitants of the Province until July 1766 when the order was amended. The new order made the administration of justice “bijural” by providing that “[...] the jury shall be comprised of British-born subjects only in cases or civil actions between British-born subjects, the jury shall be comprised of Canadians only in cases or civil actions between Canadians, and the jury shall be comprised of an equal number of each nationality if one of the parties so requests in cases between British-born subjects and Canadians [...]”.³

The Province of Quebec became officially bijural with the *Quebec Act* in 1774. Common law and civil law applied across the territory in specific areas.⁴ Civil laws were governed by the civil law whereas procedure, the administration of the government and criminal law fell under the common law. This framework for the application of the legal traditions still stands in Quebec. On the other hand, Canada became bijural only when Upper and Lower Canada were joined in the *Act of Union*, 1841. This framework was accepted and, for certain matters, redefined in the *Constitution Act, 1867* through provisions pertaining to the division of powers.⁵

The relationship between civil law and common law was developed within this framework. Depending on the area of law, this framework served as grounds for establishing various relationships between legal traditions. However, notwithstanding the framework in which bijuralism is set, what defines it is the knowledge of traditions, the rules of law applicable to each one, how they are expressed, the influence they have on one another and how they interact. In each case, bijuralism is based on a dialogue between cultures, a mutual recognition of the other, a complementary relationship between the rules specific to each one and their interpretation with respect to the other. The implementation of bijuralism is only possible where these elements are present.

The decisions of the Supreme Court of Canada, the general court of appeal for Canada, must therefore be considered in terms of this dialogue and complementarity relationship between rules and their interpretation. The purpose of this paper is to evaluate the impact the Supreme Court of

² On this period, see G. Wynn, “Aux confins de l’empire 1760-1840” in C. Brown and P.-A. Linteau, eds., *Histoire générale du Canada* (Montreal: Éditions du Boréal, 1990) 223.

³ M. Brunet, G. Frégault and M. Trudel, *Histoire du Canada par les textes* (Montreal: Fides, 1952) at 112-13 [translated by author]. The original text from the collection of texts reads: “dans toute cause ou action civile entre sujets-nés britanniques, le jury devra se composer de sujets-nés britanniques seulement; que dans toute cause ou action entre Canadiens le jury devra se composer de Canadiens seulement; et que dans toute cause ou action entre sujets-nés britanniques et Canadiens, le jury devra se composer d’un nombre égal de chaque nationalité si l’une ou l’autre partie en fait la demande [...]”

⁴ For a singular example of the co-existence of traditions in Quebec, see J.E.C. Brierley, “The Co-existence of Legal Systems in Quebec: ‘Free and Common Soccage’ in Canada’s ‘pays de droit civil’” (1979) 20 C. de D. 277.

⁵ Ss. 91 and 92, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. See especially subs. 92(13) of this Act which confers residual jurisdiction over property and civil rights on the provinces.

Canada has had on the recognition and definition of bijuralism in Canada and on the development of the autonomy or, at least, of the equal importance of each tradition in their respective areas of application.

Two periods in the history of the Supreme Court of Canada can be identified with respect to the relationship between the two traditions. The first in which civil law had to forge a path to assert its autonomy in relation to common law to prevent its assimilation thereof (I). The second in which civil law and common law became equally recognized (II).

I – The threat of assimilation of civil law by common law

The Supreme Court of Canada is often seen as a symbol of the co-existence of both common law and civil law traditions. Created in 1875 by the Parliament of Canada under the authority set out in section 101 of the *Constitution Act, 1867*⁶ and comprised of judges from Quebec and the other provinces,⁷ the Supreme Court of Canada would become the general court of appeal for Canada. However, it was not until 1949 that it could exercise this role in all matters, including civil matters⁸ and became the final court of appeal for all cases, from all of the Canadian provinces, in both civil and common law matters.

The Supreme Court of Canada was created as part of the movement to establish national institutions for Canada and its role was consistent with the movement for the unification of national laws at the end of the nineteenth century.⁹ At the time, the establishment of the court was seen as a means of developing a unified national legal system¹⁰. During its early years, this role was generally expressed by giving preference to the common law in the interpretation of the civil law (A). However, in reaction to the threat of assimilation of civil law by common law and the fact that the common law undermined the internal consistency of civil law, a movement to defend the integrity of civil law emerged. This movement would further the establishment of civil law as a system that was autonomous from the common law (B).

A – The overriding influence of common law over civil law

In 1866, shortly before the creation of the Supreme Court of Canada, the *Civil Code of Lower Canada* was adopted, thereby codifying the statutes of Lower Canada then in force in civil matters, in order to make them more accessible to the English and French inhabitants.¹¹ The laws of Lower Canada which were then in force and then codified in the *Civil Code of Lower Canada* came from a variety of sources, reflecting the co-existence of the two traditions. These included rules drawn from the *Coutume de Paris*, with the addition of rules modified by provincial statutes, or by the

⁶ S. 101 of the *Constitution Act, 1867* reads as follows: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

⁷ On the evolution of the composition of the Supreme Court of Canada, see F. Bélanger, *Les cours de justice et la magistrature du Québec* (Quebec: Direction des communications du ministère de la Justice, 1999) at 9ff. The current composition of the Court (nine judges, three of who are from Quebec) was only established in 1949 with the abolition of appeals to the Privy Council.

⁸ Appeals to the Privy Council in criminal matters were abolished in 1933.

⁹ See H.P. Glenn, "Le droit comparé et la Cour suprême du Canada" in E. Caparros *et al.*, eds., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 197 at 205.

¹⁰ This initial role of the Supreme Court of Canada is generally recognized. See e.g. P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* in Canada, *Royal Commission on Bilingualism and Biculturalism*, Document 1 (Ottawa: Queen's Printer for Canada, 1969) at 6; J.G. Snell and F. Vaughan, *The Supreme Court of Canada. History of the Institution* (Toronto: The Osgoode Society, 1985) at xii.

¹¹ On the context of codification and the work of the Codifiers, see J.E.C. Brierley, "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14 McGill L.J. 521.

introduction of portions of the Law of England in peculiar cases.¹² Given the mixed character of sources, there was a strong temptation to interpret some of the codified rules according to common law principles and English precedents. Similarly, there was a belief that there should be some uniformity in the interpretation of rules of common law origin.

One of the most frequently used examples to illustrate this belief in the universal common character of the rules of the *Civil Code* and of the common law, both in their origins and in their application, is *Canadian Pacific Railway Co. v. Robinson*.¹³ In that case, even though Taschereau J. was a civilist, he refused to award damages for *solatium doloris* pursuant to article 1056 of the *Civil Code of Lower Canada*. The idea was that article 1056 could not be interpreted to include this type of prejudice given that the solution would have been different from the rule at common law. According to some, Taschereau J.'s approach was based on more universal principles and receptive to the multiplicity of sources.¹⁴ Others were of the view that he was introducing a common law interpretation without respecting the general scheme of civil law.¹⁵

In other cases, a distinction was made with respect to the type of reasoning and the borrowing from "foreign" sources depending on whether the provision of the Code was drawn from a rule of common law or of civil law. If the provision was based on a rule of common law, it was common practice to introduce the entire common law scheme in the interpretation of the rule set out in the Code. For example, with respect to wills, it is clear that the principle of freedom of willing is borrowed from English law.¹⁶ Therefore, it was commonly believed that any issue concerning the interpretation of a will and the validity of its provisions was to be examined in accordance with English law and its rules of interpretation.¹⁷ This was the case in *Renaud v. Lamothe*¹⁸ in which Girouard J.'s remarks are indicative of this trend:

Lorsque le Code de la province de Québec est semblable au Code français, je comprends que la jurisprudence française doit être notre guide, au moins une haute autorité, qui a rarement été ignorée par cette cour, si jamais elle le fût, quelque différente qu'elle soit du droit anglais. [...] Mais si notre Code est différent, s'il décrète un principe du droit anglais, n'est-il pas raisonnable de recourir à la jurisprudence anglaise pour l'interpréter? Or, — et ceci n'est pas contesté, — la liberté pleine et entière de tester nous vient de l'Angleterre. La France ne l'a jamais connue. Peut-on alors mieux faire que de suivre les principes consacrés par le Conseil privé dans une cause analogue, celle de *King v. Tunstall*, décidée en 1874, et rapportée aux *Law Reports*.¹⁹

It is interesting to note that the decision *King v. Tunstall*²⁰ is a decision of the Privy Council rendered the year before the creation of the Supreme Court, on an issue coming from Quebec. *King v. Tunstall* was an English precedent that addressed the issue of the application of English law to Quebec civil law in matters concerning the exercise and effects of freedom of willing.

¹² See the wording of the Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure, L.C. 1857, c. 43.

¹³ (1887), 14 S.C.R. 105.

¹⁴ D. Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill L.J. 523 at 527-28.

¹⁵ J.-L. Baudouin, "L'interprétation du code civil québécois par la Cour suprême du Canada" (1975) 53 Can. Bar Rev. 715 at 732ff.

¹⁶ On the foundations of freedom of willing in Quebec, see A. Morel, *Les limites de la liberté testamentaire dans le droit civil de la province de Québec* (Paris: L.G.D.J., 1960).

¹⁷ For an overview of the evolution of freedom of willing and its scope in Quebec, see especially J.-M. Brisson, "Entre le devoir et le sentiment : la liberté testamentaire en droit québécois (1774-1990)" in *Recueils de la Société Jean Bodin*, vol. LXII, *Actes à cause de mort — Acts of Last Will* (Bruxelles: De Boeck, 1994) 277.

¹⁸ (1902), 32 S.C.R. 357.

¹⁹ *Ibid.* at 366.

²⁰ (1874), 6 R.S. 55 (P.C.).

Also interesting in *Renaud* is that the fact that the English origin of the rule was not the only reason given for the dismissal of the “heir’s” case. Since the plaintiff raise an issue of public order, Girouard J. also predicated the Court’s decision on the need for uniform application of the rule applicable to the capacity of the testator and of the heir:

[I] est de l’intérêt de la province de Québec et de toute la Puissance, que, sur un sujet comme celui que nous considérons, il y ait uniformité de jurisprudence. Singulier spectacle que serait celui où un legs, comme celui fait aux héritiers Renaud, serait valide dans toutes les provinces, à l’exception de Québec et ce pour des raisons d’ordre ou d’intérêt public.²¹

Generally, it appears that the relationship between civil and common law was not always framed in a manner that indicated a reciprocal and equal relationship between the two traditions. Critics of the early judgments of the Supreme Court of Canada have generally pointed to the predominance of common law during this period, even with respect to the interpretation of Quebec civil law. Several authors have examined the evolution of the Supreme Court of Canada in terms of the interpretation of and importance given to civil law in its judgments. While this analysis will not be repeated here,²² a few of the important developments from this period will be highlighted. These will serve to give some indication of the evolution of the relationship between civil law and common law, and favour a better understanding of the rather belated recognition of the equal place of civil law in its relationship to federal law and the common law.

In nineteenth century Canada, unification of national law could not be based on civil law even officially take it into consideration. This exclusion of civil law from the movement to unify the law is clear in judgments which, rather than allowing for the possibility of an exchange of solutions between the two systems and a certain degree of reciprocity of influence. The judgments supported a unidirectional comparative analysis of the law, from common law to civil law.²³ This then is far removed from recognition of the equal value of the traditions and the trend to recognition of civil law as a law that is distinct and autonomous from common law in the Canadian context.

Thus, it is commonly believed that Canadian common law drew very little from civil law. Yet, in the Supreme Court of Canada case law prior to repatriation of the appellate jurisdiction, there are cases in which civil law rules had an influence on common law rules. But, as H. Patrick Glenn²⁴ noted, this influence generally expressed itself indirectly through the citation of English decisions that cited French civilian sources.

*Canadian Merchant Marine Ltd. v. Canadian Trading Co.*²⁵ is the decision most frequently used to explain this bridging between common law and civil law. In this case, Duff, Anglin and Brodeur J.J. cited the English decision of *Taylor v. Caldwell*,²⁶ the reasons of which were purportedly inspired in part by the writings of Pothier on implicit conditions of a contract. Pothier was not however cited as a source in *Taylor*, but merely as an example of foreign solutions in which the principles on which

²¹ *Supra* note 18 at 365.

²² See e.g. Baudouin, *supra* note 15; R. Boulton, “Aspects des rapports entre le droit civil et la common law dans la jurisprudence de la Cour suprême du Canada” (1975) 53 Can. Bar Rev. 738; Glenn, *supra* note 9 and the texts cited thereof. See also P.-G. Jobin, “La Cour suprême et la réforme du Code civil” (2000) 79 Can. Bar Rev. 27.

²³ See the case law referred to in Baudouin, *supra* note 15 at 719ff. and the conclusion he reaches on page 722, resumed by Glenn, *supra* note 9 at 207. See also, Howes, *supra* note 14 at 526. But see T. Rinfret, “Reciprocal Influences of the French and English Laws” (1926) 4 Can. Bar Rev. 69, who saw a community of spirit between the two legal traditions and a true reciprocity of influences between both traditions, more often in the adoption of reformed laws.

²⁴ Glenn, *supra* note 9 at 207.

²⁵ (1922), 64 S.C.R. 106.

²⁶ (1863) 122 E.R. 309.

the solution is based are similar to those of English law.²⁷ Thus, this is not an example of the influence of civil law, but simply a comparative reference similar to those found in modern case law. While recognizing the *ratio* in *Taylor*, all three judges rejected any application to *Canadian Merchant Marine* because of the nature of the contract. It is therefore difficult to discern any influence of civil law on common law in this decision.

Another possible source for the influence of civil law on common law is the citation of decisions on Quebec civil law by the Privy Council, which could then have been used as precedents for matters originating in a common law jurisdiction. However, no such examples have been found.²⁸

While common law does not specifically exclude borrowing from civil law,²⁹ in the Canadian context of the day, the analysis of the relationship between civil and common law was generally done in only one direction during the first half of the Supreme Court's existence.³⁰ In fact, Jean-Louis Baudouin indicates in an article from 1975, that he found it impossible to find a single meaningful example indicating that, in its efforts to unify the law, the Supreme Court had adopted a solution from Quebec law and applied it to the laws of the other provinces.³¹

This clear lack of reciprocity between Quebec civil law and Canadian common law in the Supreme Court judgments provoked reactions both within the Court and among Quebec authors.

B – The movement for the affirmation of civil law in relation to common law

Questions about the relationship between the two traditions were most often raised in civilian doctrine which, for a long time, defended the concept of the integrity of civil law and criticised the influence of common law in the interpretation of Quebec civil law by the courts.³² However, as there was absolutely no threat to the recognition and the role of common law in a movement to unify the national law within a country of the British Empire, it is not surprising that this issue was not important to common law jurists.

Yet, the act of borrowing solutions or analytical methods from Canadian common law or other legal regimes can only enrich the receiving legal system. This was the point made by Jean-Louis Baudouin with respect to the interpretation of civil law by the Supreme Court of Canada.³³ It is, in fact, one of the strengths of comparative analysis of the law. But, at the turn of the twentieth century, the problem of borrowing rules of interpretation from common law became a serious one with respect to the *Civil Code*.

²⁷ Ibid. at 313.

²⁸ No systematic search of all of Privy Council decisions on Quebec law was done to determine whether any such decision was ever used as a precedent in a decision of the Supreme Court of Canada in a common law case.

²⁹ See H.P. Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261, on the reception of French law into English law in the nineteenth century.

³⁰ We note with interest the proposition made by David Howes on the dialogue and reciprocity between traditions during the period preceding the creation of the Supreme Court of Canada and the texts referred to in: "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929", *supra* note 14 at 557. In general, doctrinal writers however suggest that uniformity of law was an essential part of the role to be played by the Supreme Court of Canada. In this regard, the dialogue between traditions may be better described as a monologue, at least until the 1950s.

³¹ Baudouin, *supra* note 15 at 719.

³² See e.g. P.-B. Mignault, "Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" (1932) 11 R. du D. 201. For a discussion of this movement against the contamination of civil law by common law and the need to preserve the integrity of civil law, see S. Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec : La sauvegarde de l'intégrité du droit civil" (1987) 32 McGill L.J. 559. Other authors would later follow and promote the defence of civil law against common law: P. Azard, "La Cour suprême du Canada et l'application du droit civil de la province de Québec" (1965) 43 Can. Bar Rev. 553; J.-L. Baudouin, "Le Code civil du Québec : crise de croissance ou crise de vieillesse" (1966) 44 Can. Bar Rev. 391; P.-A. Crépeau, "Les lendemains de la réforme du Code civil" (1981) 59 Can. Bar Rev. 625.

³³ Baudouin, *supra* note 15 at 716-17.

In the civilian tradition, a code is not a simple statute, nor does it in any way resemble an administrative consolidation or a penal codification. Even though these all constitute a more or less organic body of explicit or implicit norms serving to regulate human behaviour,³⁴ a civil code is different in that it serves as the general body of rules applicable to all situations, barring exceptions.³⁵ It is the general law in Quebec civil law. Therefore, it plays the same role as the common law rules developed by the courts. It is a law of general rather than specific application.³⁶ The *Civil Code of Lower Canada* clearly had this status of being the general law³⁷ and this should have had a direct influence on its interpretation.³⁸

However, the Code's status as the founding text of Quebec civil law was poorly recognized by the Supreme Court.³⁹ One of the consequences of this misunderstanding of the role of a civil code was that the *Civil Code of Lower Canada* was often interpreted in light of common law rules.

One of the difficulties thus created was that the Code was interpreted by common law judges as an ordinary law, a simple statute, both at the Supreme Court and at the Privy Council. Lord Summer's statements about the interpretation of articles 1053 and 1054 of the *Civil Code of Lower Canada* in *Quebec Railway, Light, Heat and Power Co. v. Vandry*⁴⁰ are a perfect example. He relied on the English law authorities rather than those of French civil law, despite the similarity between provisions in the *Civil Code of Lower Canada* and in the *Code Napoléon*. He asserted the "statutory" character of the Code as follows:

Natural as this may be, the statutory character of the Civil Code must always be borne in mind. "The connection between Canadian Law and French Law dates from a time earlier than the compilation of the Code Napoléon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law": *McClaren v. Attorney-General for Quebec*. Thus, [...] "recent French decisions, though entitled to the highest respect [...] are not binding authority in Quebec" (*McArthur v. Dominion Cartridge Co.*) still less can they prevail to alter or control what is and always must be remembered to be the language of a Legislature established within the British Empire [emphasis added].⁴¹

The Supreme Court adopted this reasoning in *Town of Montreal West v. Hough*.⁴² The terms "père, mère et enfants" in the French text of article 1056 of the *Civil Code of Lower Canada*⁴³

³⁴ A.-J. Arnaud *et al.*, eds., *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2nd ed. (Paris: L.G.D.J., 1993) s.v. "Code", by D. Carzo, at 67. The definition reads: "corps plus ou moins organique de normes explicites ou implicites qui servent à régler la conduite humaine." For another definition see Editorial Committee, *Private Law Dictionary*, 3rd ed. [forthcoming] s.v. "code": "Corpus of fundamental provisions designed to present the different subject matters of an important branch of law in a systematic and coherent manner."

³⁵ See G. Cornu, *Vocabulaire juridique*, 8th ed. (Paris: P.U.F., 2000) s.v. "Code civil" and the proposed definition in *Private Law Dictionary*, *ibid.* s.v. "Civil Code": "Code the purpose of which is to regulate generally all matters within the purview of the civil law."

³⁶ For a general description of the specific nature of codes and their method of interpretation, see J.-L. Bergel, "Spécificités des codes et autonomie de leur interprétation" in Journées Maximilien-Caron 1992, *Le Nouveau Code civil : interprétation et application* (Montreal: Thémis, 1993) 3; A.-F. Bisson, "Effet de codification et interprétation" (1986) 17 R.G.D. 359; P.-A. Côté, *The Interpretation of Legislation*, 3rd ed. (Toronto: Carswell, 2000) at 28ff.

³⁷ See A.-F. Bisson, *ibid.* at 361; J.E.C. Brierley, "Quebec's 'Common Laws' (droits communs): How Many Are There?" in Caparros *et al.*, *supra* note 9, 109 at 122ff. and, especially, J.-M. Brisson, "Le Code civil, droit commun?" in *Le Nouveau Code civil : interprétation et application*, *supra* note 36, 293 at 296ff.

³⁸ On the difference between interpretation under a civil law system and a common law system, see A.-F. Bisson, "Nouveau Code civil et jalons pour l'interprétation : traditions et transitions" (1992) 23 R.D.U.S. 1 at 8ff. But see Côté, *supra* note 36 at 27-28.

³⁹ On how doctrinal writers reacted to the "interpretation" by courts of the *Civil Code of Lower Canada*, see Normand, *supra* note 32; S. Parent, *La doctrine et l'interprétation du Code civil* (Montreal: Thémis, 1997) at 114ff.

⁴⁰ [1920] A.C. 662.

⁴¹ *Ibid.* at 671-72.

⁴² [1931] S.C.R. 113 at 121. The finding establishing the "statutory" character of the Civil Code was not novel. See e.g. *Lamontagne v. Quebec Railway Light, Heat and Power Co.* (1915), 50 S.C.R. 423 at 427.

(“ascendant and descendant relations” in the English text) were not interpreted in accordance with the general scheme of the Code but in light of common law. Because it considered the provision to be a codification of a Canadian statute inspired by the English *Lord Campbell’s Act*, the Court held that the meaning had to be determined according to the meaning of “father, mother and child” in common law cases, given the English origins of the rule.⁴⁴ Furthermore, because the Code did not provide any specific definition applicable to the Code as a whole, the court felt bound to rely on the common law definition considered as the general law for the purpose of interpreting the provision thereof.

It is true that even when interpreted according to civil law alone, these terms would not have allowed for illegitimate children to be included in the category of descendants or children. Nevertheless, despite the similarity in scope of the terms “father, mother and child” at civil and common law in the exclusion of illegitimate children, there are insidious effects associated with reference to English law and the interpretation of the provisions of the Code as exceptions to the common law.

To take the Code as a simple law of specific application is to encourage a restrictive interpretation of its provisions, and, more importantly, the Civil Code is not seen to be the expression of the general law of Quebec civil law. Furthermore, if the Code is seen as expressing a single statutory intent, using the same language, in matters both of civil and common law, the style, expression and organisation of the civil law are then assimilated to those of the common law. Such comments negate to some extent the legal duality established by the *Quebec Act of 1774* and by the *Constitution Act, 1867* by implying that because of the relationship with the British Empire, the legislator can have only one voice, that of the common law.

Another difficulty that arises from interpreting civil law in light of common law rules is that it creates a practice of undue reliance on English precedents and legal authorities, which are not the same as those of civil law.⁴⁵ This reliance on precedents may be due to the fact that the Code was interpreted as specific legislation rather than as a law of general application. It could also be due to the fact that the rule contained in a provision of the Code was seen as borrowed from English law. In the second case, it was a common belief that if the interpretation of the provision was uncertain, it should be interpreted by reference to English authorities.⁴⁶ This is what was done in *Town of Montreal West v. Hough*⁴⁷ and in *Renaud v. Lamothe*.⁴⁸ In other cases, the similarity between the civil law and the common law rules with respect to the solutions adopted led to the introduction of

⁴³ It should be noted that the terms “père, mère et enfants” used in the French text of article 1056 C.C.L.C. were replaced in 1930 (S.Q. 1930, c. 98, s. 1) by the terms “ascendants et descendants”. These terms correspond to terms “ascendant and descendant relations” already used in the English text. It is interesting to note that this section was further amended in 1970 (S.Q. 1970, c. 62, s. 11), to add a paragraph to include natural children.

⁴⁴ Many consider that the origin of article 1056 is unclear. The introduction of English law in interpreting this article gave rise to an interpretation that fundamentally contradicted the openness of the civil law to recognize moral prejudice in circumstances of death. See the comments made by Baudouin, *supra* note 15 at 732-34. For a detailed presentation and critique of the case law and doctrine in connection with this article, see J.-S. Poirier, “Autopsie d’une disposition disparue; l’article 1056 du Code civil du Bas Canada et le solatium doloris” (1995) 29 R.J.T. 657.

⁴⁵ On the authority of precedents and the problem relating to the characterisation of authorities in respect of both traditions, see A Mayrand, “L’autorité du précédent au Québec” in J.-L. Baudouin *et al.*, eds., *Mélanges Jean Beetz* (Montreal: Thémis, 1995) 259 at 261; Parent, *supra* note 39 at 163-64.

⁴⁶ The interpretation of the Civil Code by reference to authorities used in the legal system from which a provision was derived was suggested by F.P. Walton as the twelfth rule of interpretation in *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal, Wilson & Lafleur, 1907) at 130. The rule was stated as follows: “When a provision is derived from the French law it is to be interpreted by reference to French authorities, and when it is derived from the English law by reference to English authorities.”

⁴⁷ [1931] S.C.R. 113.

⁴⁸ *Supra* note 18.

precedents in the reasons for judgment, with no consideration of confusion between the sources and methods of common law and those of civil law.⁴⁹

An examination of these various examples of the relationship between civil law and common law leads directly to the conclusion that a tradition cannot be enriched through assimilation. Local sources⁵⁰ and the recognition of the role of a given tradition in the development of cultural identity are fundamental to establishing a relationship. Respect for a tradition holds the same place in this regard as language.⁵¹ The movement for the affirmation of the autonomy of civil law developed largely as a result of the defence of this identity.

In fact, the enrichment of a tradition through contact with other traditions presupposes recognition of that tradition as, if not the other's equal, at least existing as a tradition based on a system that is complete in itself. Enrichment also requires that what is borrowed from foreign legal systems be incorporated in a manner consistent with respect for the organisation and the general principles of the receiving system. This explains in part why there was so much reaction to the Supreme Court of Canada judgments interpreting civil law using rules of common law. The fear of common law's power to assimilate civilian culture greatly contributed to the movement for the defence of the integrity of civil law.⁵² One of the pillars of this movement was Mignault, a justice of the Supreme Court.⁵³

Time and again in his judgments Mignault asserted the autonomy of the civil law as a system and the fact that each system had to be approached in accordance with the rules of that system.⁵⁴ One of the landmark decisions on this point was *Desrosiers v. The King*.⁵⁵ Mignault put forth this idea and stressed the fact that there was no reason to import a foreign rule, especially not the English precedents, simply because civil law rules were consistent with those of common law:

Il me semble respectueusement qu'il est temps de réagir contre l'habitude de recourir, dans les causes de la province de Québec, aux précédents du droit commun anglais, pour le motif que le code civil contiendrait une règle qui serait en accord avec un principe du droit anglais. Sur bien des points, et surtout en matière de mandat, le code civil et la *common law* contiennent des règles semblables. Cependant le droit civil constitue un système complet par lui-même et doit s'interpréter d'après ses propres règles. Si pour cause d'identité de principes juridiques on peut recourir au droit anglais pour interpréter le droit civil français, on pourrait avec autant de raisons citer les monuments de la jurisprudence française pour mettre en lumière les règles du droit anglais. Chaque système, je le répète, est complet par lui-même, et sauf le cas où un système prend dans l'autre un principe qui lui était auparavant étranger, on n'a pas besoin d'en sortir pour chercher la règle qu'il convient d'appliquer aux espèces bien diverses qui se présentent dans la pratique journalière.⁵⁶

⁴⁹ See e.g. the authorities cited by Strong J. in *Drysdale v. Dugas* (1895), 26 S.C.R. 20 at 21ff.; those cited by Anglin J. in *Colonial Real Estate Co. v. Communauté des Sœurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585 at 590ff. [hereinafter *Colonial Real Estate*].

⁵⁰ See Baudouin, *supra* note 15 at 726.

⁵¹ On the essential character of language in the development of the human being and the latter's relationship with the community, see *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 744.

⁵² See for a description of the main motivations and concerns that made the preservation of the integrity of the civil law a dominant issue in the doctrine of the period 1922-1939, Normand, *supra* note 32.

⁵³ See Howes, *supra* note 14, for a description of Mignault's position on the relationship between legal traditions while he was justice at the Supreme Court of Canada.

⁵⁴ See e.g. *Colonial Real Estate Co.*, *supra* note 49 at 603; *Mile End Milling Co. v. Peterborough Cereal Co.*, [1924] S.C.R. 120 at 129.

⁵⁵ (1920), 60 S.C.R. 105. It is interesting to note two of the key words under which the case is classified: *civil law cases* and *English decisions*. They give a good indication of the importance of the issue of usage of English precedents in the interpretation of Quebec civil law.

⁵⁶ *Ibid.* at 126. In giving his reasons for judgment, Mignault used civil law sources and expressly stated that common law precedents should not be introduced as authority in civil law. Anglin and Brodeur JJ. were of the same view.

Mignault previously made similar comments in *Colonial Real Estate Co. v. Communauté des Sœurs de la Charité de l'Hôpital Général de Montréal*.⁵⁷ In *Mile End Milling Co. v. Peterborough Cereal Co.*,⁵⁸ he would later assert the need to preserve the integrity of civil law, disapproving at the same time the practice of lawyers of submitting authorities drawn from common law.

Mignault has been criticised for having an inward-looking attitude in terms of the relationship that civil law should have with common law. The image of the “cloison étanche et infranchissable sépar[ant] les deux grands systèmes juridiques”,⁵⁹ drawn from one of his texts, has often been cited as an expression of this inward-looking attitude and a rejection of comparative legal analysis and of a dialogue between the traditions.⁶⁰ However, this image must be examined in context if its scope is to be understood. The image of the barrier referred to cases in which the text of the Civil Code provided for the principle applicable to a given situation. Thus, he indicated that a common law solution that cannot be reconciled with the text of the Code is condemned in advance. The door will hold fast against all assaults.⁶¹ Therefore, the image of the barrier does not reflect a rejection of comparative analysis but a form of protection against the assimilation of one tradition by another or interference or absorption of one to the benefit or detriment of the other. Mignault did not exclude the benefits of comparative analysis or the relevance of reference to foreign laws when a new solution was called for, especially in the context of the law reform process. Nevertheless, his focus remained the assertion of the intrinsic autonomy of civil law and its wholeness in relation to common law.

While he sat on the Supreme Court and in his subsequent writings, Mignault successfully promoted the idea that there was such a thing as purely civilian thinking. A contributor to the *Revue du droit*, he was not alone among Quebec legal scholars in promoting the protection of the integrity of civil law. His contribution to the development of civil law as an autonomous system of law is undeniable. In an overview of his years on the bench, J.-G. Castel stated that “sous sa direction, la Cour suprême allait dorénavant appliquer plus strictement les principes et les méthodes du droit civil dans son interprétation du Code Civil de la province de Québec.”⁶² Mignault’s mark on the interpretation of the relationship between civil and common law in a national legal context could reach its full potential only after the abolition of appeals to the Privy Council in 1949.

Until appeals to the Privy Council were abolished in civil matters, common law’s position over civil law would necessarily remain. Despite the fact that civil law was not entirely foreign to the Privy Council because it heard cases from Scotland and Scottish lords were sometimes sitting, it generally tended to favour the use of precedents, even in cases from Quebec.⁶³ In fact, until the Supreme Court became the final court of appeal for Canada, it felt bound by the precedents set by the Privy Council.⁶⁴

Even Mignault felt bound by the Privy Council’s precedents, despite his many statements asserting the completeness of the civilian system and its full autonomy with respect to its methods of

⁵⁷ *Colonial Real Estate*, *supra* note 49 at 603.

⁵⁸ *Supra* note 54 at 129.

⁵⁹ Mignault, *supra* note 32 at 206; P.-B. Mignault, “Le Code civil de la province de Québec et son interprétation” (1936) 14 R. du D. 583.

⁶⁰ See e.g. Howes, *supra* note 14 at 546ff.

⁶¹ Mignault, *supra* note 32 at 206. The original text reads as follows: “Une solution de la *common law* qui ne peut se concilier avec le texte du Code est condamnée d’avance. De ce côté, la porte est close contre toute pénétration.”

⁶² J.-G. Castel, “Le juge Mignault défenseur de l’intégrité du droit civil québécois” (1975) 53 Can. Bar Rev. 544 at 544.

⁶³ See e.g. the use of precedent in *Porteous v. Reynar* (1887), 9 A.C. 356. Even Mignault J. felt bound by the decisions of the Privy Council. See e.g. *Canadian Vickers Ltd. v. Smith*, [1923] S.C.R. 203.

⁶⁴ See Mayrand, *supra* note 45 at 264ff.

reasoning and sources. Surprisingly, in *Canadian Vickers Ltd. v. Smith*,⁶⁵ Mignault offered reasons based on the precedent established in *Quebec Railway, Light, Heat and Power Co. v. Vandry*⁶⁶ and *Watt & Scott Case*⁶⁷ which he followed. It is worthwhile to reproduce his statements:

In the *Watt & Scott Case*, their Lordships explained the meaning of their decision in the *Vandry Case*, and these two decisions should be read together. It is therefore authoritatively determined that article 1054 establishes, for damages caused by a thing which a person has under his care, a liability which is defensible only by proof of inability to prevent the damage.⁶⁸

What is surprising in Mignault J.'s reasons is that in *Quebec Railway, Light, Heat and Power Co. v. Vandry*,⁶⁹ the Civil Code was considered as a simple statute. The Privy Council adopted a style of reasoning with respect to the interpretation of a civil code that was foreign to the civilian tradition by considering it to be a law of specific application in relation to the common law rule.

However, as Albert Mayrand stated with respect to the authority of precedents set by the Privy Council during the colonial period of the Supreme Court, the Privy Council's decisions imposed themselves because of their binding nature as precedents rather than because of their persuasive authority.⁷⁰

Although the civil law rule was applied as is by the Privy Council on a few occasions, in that colonial context, courts obviously interpreted the law in light of the laws of the Empire and ensured they were consistent.⁷¹ This accordingly limited the development, within the Supreme Court of Canada, of the willingness to recognize the distinctive characters of the two traditions, including their respective methods of interpretation and the specific role of the Civil Code in Quebec's legislative corpus.

Following the abolition of appeals to the Privy Council, the Supreme Court of Canada finally became Canada's true final court of appeal⁷² and could choose its own policies. This is exactly what it did in the area of civil liberties.⁷³ Since the requirement to interpret laws consistently with the law of the metropolis no longer existed, it also became easier to become more open to the uniqueness of Quebec civil law. Following the trend towards the recognition of civil liberties by the Supreme Court, the court awarded damages for the infringement of fundamental rights, using the broadness of the rules of "delictual" civil liability in Quebec civil law through the application of article 1053 of the *Civil Code of Lower Canada*.⁷⁴

Questions about and criticism of how the relationship between civil law and common law appeared in the decisions of the Supreme Court encouraged the development of an awareness

⁶⁵ *Supra* note 63 at 211ff.

⁶⁶ *Supra* note 40.

⁶⁷ [1922] 2 A.C. 555.

⁶⁸ *Supra* note 63 at 211-12.

⁶⁹ *Supra* note 40.

⁷⁰ Mayrand, *supra* note 45 at 264.

⁷¹ On the binding authority of precedents from the Privy Council and the House of Lords on colonies applying English law, see *Robins v. National Trust Company Ltd.*, [1927] A.C. 515. See also *Trimble v. Hill* (1879), 5 A.C. 342 at 344.

⁷² S.C. 1949, c. 37, s. 3. On the abolition of appeals to the Privy Council and the circumstances that led to the empowerment of the Supreme Court of Canada, see B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038; Snell and Vaughan, *supra* note 10 at 171ff.

⁷³ See G.A. Beaudoin, "La Cour suprême et la protection des droits fondamentaux" (1975) 53 Can. Bar Rev. 675; D. Gibson, "And One Step Backwards: The Supreme Court and Constitutional Law in the Sixties" (1975) 53 Can. Bar Rev. 621; W.S. Tarnapolsky, "The Supreme Court of Canada and the Canadian Bill of Rights" (1975) 53 Can. Bar Rev. 649.

⁷⁴ See e.g. *Chaput c. Romain*, [1955] S.C.R. 834; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Lamb v. Benoit*, [1959] S.C.R. 321.

among authors and judges that civil law is a system that is different from common law. To a certain extent, the examination of the Supreme Court decision by judges and authors laid the groundwork for the establishment of the foundations of an autonomous and modern civil law. The new judicial freedom of the Supreme Court of Canada will further a better recognition of this autonomy and a more faithful expression of the relationship between the two traditions as they interact in Canada.

II – The equal recognition of civil law and common law

While some consider that civil law was recognized as an autonomous system before the Supreme Court of Canada when Mignault was on the bench at the beginning of the century, others believe that it was not until the 1950s that such autonomy was achieved.⁷⁵ In fact, the Supreme Court's new freedom and the many statements about the integrity of civil law in certain judgments and in doctrinal comments were not sufficient in themselves to guarantee the autonomy of civil law with respect to common law.

True recognition of the autonomy of civil law in relation to common law would become possible only with a developing awareness of the conceptual autonomy of civil law in relation to common law. At the Supreme Court of Canada, this awareness was evidenced by a rejection of common law and its precedents as a source of Quebec civil law (A). From that point on, with the recognition of the autonomy and distinct identity of civil law, the equal recognition of both civil law and common law traditions became possible. This equal recognition at the Supreme Court finds expression in the confirmation of the complementary relationship between civil law and federal law given the absence of a general federal common law (B).

A – The developing awareness of the conceptual autonomy of civil law in relation to common law

The problem of the confusion in the formal sources of Quebec civil law did not prevail only within the Supreme Court but also in the practice of the law as lawyers and judges of the lower courts routinely used common law precedents. In addition, the rules set out in Quebec statutes were not consistent with the main text of Quebec civil law: the Civil Code. The rules set forth in the statutes were drafted without always taking into account the rules of the Civil Code, sometimes even contradicting them. This situation made the relationship among the various rules of Quebec civil law unintelligible, leaving something to be desired both with respect terminology and interpretation.

Accordingly, the Quebec legislature proceeded to have the Civil Code revised. This occurred some ten years after Canadian courts acquired their independence from the Privy Council. In 1955, the Civil Code Revision Office was created. In contrast with the mandate given to the Codifiers for the 1866 Code, which was to consolidate the laws in applicable at that time in order to bring about greater certainty of the law, the Office's mandate was more general. No guidelines were laid down along which the spirit of the reform, the direction of the work or its scope were to be carried out.⁷⁶ However, the revision initiated in 1955 and completed in 1978 was a true revision of the law. The 1866 Code had "ceased to be a symbol of permanence, and ha[d] instead become one of rigidity, the reflection of a static, even stagnant, conception of a certain social order."⁷⁷ The revisers were guided by the desire to modernise the law in order to bring it in line with the new economic and social realities of a rapidly evolving society.

⁷⁵ See the references in Glenn, *supra* note 9 at 210.

⁷⁶ P.-A. Crépeau, "Foreword" in Civil Code Revision Office, *Report on the Quebec Civil Code*, vol. 1, *Draft Civil Code* (Quebec: Éditeur officiel du Québec, 1978) xxiii at xxiii.

⁷⁷ *Ibid.* at xxv.

In addition to the need to put an end to the static rigidity of the Code, the Office was also preoccupied in its work of keeping “the civilian system vigorous”⁷⁸ and alive. While recognizing that it was not up to the courts “to ensure a systematic and coordinated evolution of the rules of law”,⁷⁹ the revisers were nonetheless guided by the desire to right the wrongs caused by the court decisions that became accepted as authorities. In light of the assaults by the legislature and the courts on the internal coherence of civil law, the need to recreate “the organic unity of the Civil law”⁸⁰ was clearly present.

The revision work of the Office is thus characterised by the same concern for safeguarding the integrity of civil law that guided Mignault, although the Office was more open to outside solutions. Its work and the report that followed had a considerable impact on the development of a collective awareness of the conceptual autonomy of civil law in relation to the common law. They contributed to the coming to maturity of Quebec law in its relationship with other legal systems, notably common law and French civil law.⁸¹ This general context of a collective examination of Quebec civil law played an important role in the evolution of attitudes toward the place and the unique characteristics of civil law at the Supreme Court of Canada.

It was in this context of a developing collective awareness that the Supreme Court of Canada followed Mignault’s footsteps and came to recognize the sources of the civil law and set aside the idea of unifying Canadian law through the common law. H Patrick Glenn described this change as follows:

Depuis au moins le milieu du siècle, il est devenu clair que la Cour suprême a renoncé définitivement à l’idée de l’unification nationale du droit et à l’idée que la comparaison des droits doit servir à la construction de nouvelles règles, exclusives et impératives. Ce changement s’est effectué d’abord par une revalorisation des sources du droit civil, notamment de la doctrine québécoise et française, et par une reconstruction de l’impossibilité d’écarter systématiquement tout un *corpus* de règles dont la qualité et la cohérence ne souffrent en rien d’une comparaison avec la common law.⁸²

On examination of the doctrine and of the work of the Civil Code Revision Office shows the increasing importance of French doctrine and Quebec doctrine in the interpretation of Quebec civil law.⁸³ The movement toward a more widespread use of the sources of civil law to interpret civil law can also be seen in judgments. The situation had clearly changed despite the fact that the common law often served as suppletive law⁸⁴ in the interpretation of both federal and Quebec statutes and even of the *Civil Code of Lower Canada*, which was sometimes considered a mere “statute”.⁸⁵ Although at that time, common law precedents were still used in some Supreme Court judgments,⁸⁶

⁷⁸ Ibid. at xxviii.

⁷⁹ Ibid. at xxvi.

⁸⁰ Ibid. at xxxviii.

⁸¹ On the different periods of influence of common law and French doctrine on Quebec civil law, see P.-G. Jobin, “Le droit comparé dans la réforme du *Code civil du Québec* et sa première interprétation” (1997) 38 C. de D. 475.

⁸² Glenn, *supra* note 9 at 211.

⁸³ On the influence of French doctrine in Quebec, see P.-G. Jobin, “L’influence de la doctrine française sur le droit civil québécois : le rapprochement et l’éloignement de deux continents” in H.P. Glenn, ed., *Droit québécois et droit français : communauté, autonomie et concordance* (Cowansville: Yvon Blais, 1993) 91.

⁸⁴ Baudouin, *supra* note 15 at 723.

⁸⁵ See e.g. *Lamontagne v. Quebec Railway, Light, Heat and Power Co.* (1915), 50 S.C.R. 423 at 427; *Robert v. Montreal Trust Co.* (1917), 56 S.C.R. 342 at 363; *Town of Montreal West v. Hough*, [1931] S.C.R. 113 at 120-21.

⁸⁶ See e.g. *Parent v. Lapointe*, [1952] S.C.R. 376; *Chaput v. Romain*, *supra* note 74; *Griéco v. Externat Classique Ste-Croix*, [1962] S.C.R. 519.

sources of civil law were being used more and more often as the basis for decisions in the interpretation of Quebec civil law.⁸⁷

The movement dissociating the sources and methods of interpretation of civil law from those of common law was a slow one. The way in which the completeness of the Quebec civil law system and the internal coherence of the Civil Code came to be recognized can be illustrated by how *solatium doloris* in civil law was considered by the Supreme Court.

In 1887, the Supreme Court of Canada refused to grant damages for *solatium doloris* in *Canadian Pacific Railway Co. v. Robinson*.⁸⁸ Based on the argument that article 1056 of the *Civil Code of Lower Canada* was a codification of a Canadian statute modelled on the *Lord Campbell's Act*,⁸⁹ the Supreme Court denied compensation for bereavement as a result of the death of a close relative. Because the Code's provision seemed to be patterned after a Canadian statute applicable to both Lower Canada and Upper Canada that predated 1866, the Court held that the rule had to have uniform application. Because it was of English origin, it had to be interpreted according to English law. As there was no compensation for *solatium doloris* in English law, article 1056 could not be used to award such compensation.

In the appeal before the Privy Council,⁹⁰ the issue of *solatium doloris* was mentioned only in *obiter*. The Privy Council considered that the Code had to be interpreted on its own terms, without recourse to pre-existing laws. It noted that article 1056 of the *Civil Code of Lower Canada* was substantially different from the Canadian statute of 1859, which used the wording of the *Lord Campbell's Act*.⁹¹ The Privy Council also considered that the manner in which the Canadian statute applied was not uniform. Its scope of application was different in the two provinces, Upper and Lower Canada. In Lower Canada, the provision restricted the rule of civil law by limiting the category of persons who had a right of action. In Upper Canada, it created a new right of action then unknown in common law, so as to attenuate the rigidity of a judicial rule of common law. Some years later, the Privy Council restated the comments it had made in *Robinson* in *Miller v. Grand Trunk Railway Co.*⁹²

The *obiter* is interesting in a number of ways. It asserts the distinctiveness of the *Civil Code of Lower Canada* and allows for a different application of the same law in depending on whether it forms part of the corpus of rules applicable in civil law or in common law.

Quite surprisingly, subsequent decisions of the Supreme Court of Canada did not take into account the comments made by the Privy Council on the interpretation of article 1056. The Court continued to apply the rule it had established in *Robinson*.⁹³ Lower courts in Quebec however tended to support recognition of *solatium doloris* by giving a broad interpretation of the Civil Code, thereby circumventing the application of the rule established in *Robinson*.⁹⁴ Given the approach adopted by the Supreme Court, the case law was therefore divided. It was not until *Pantel v. Air*

⁸⁷ See e.g. *Eaton v. Moore*, [1951] S.C.R. 470.

⁸⁸ *Supra* note 13.

⁸⁹ *Ibid.* at 116.

⁹⁰ *Canadian Pacific Railway v. Robinson*, [1892] A.C. 481 (P.C.).

⁹¹ *Ibid.* at 487.

⁹² [1906] A.C. 187 (P.C.) at 195.

⁹³ See the cases cited by Poirier, *supra* note 44 at 670-72.

⁹⁴ See A. Mayrand, "Les chefs d'indemnité en cas d'accident mortel" (1967-68) 9 C. de D. 639 at 663-64; J.-L. Baudouin, *La responsabilité civile* 5th ed. (Cowansville (QC): Yvon Blais, 1998) no. 394 at 259.

Canada⁹⁵ that the interpretation of article 1056 from the civil law point of view was re-established at the court.

In *Pantel*, beyond tracing the origins of article 1056, Pigeon J. cites the Lords' comments in *Robinson*⁹⁶ and in *Miller*.⁹⁷ He then referred to the decisions of the Privy Council to distinguish article 1056 from the *Lord Campbell's Act*.

Art. 1056 C.C. must therefore be interpreted, not as reproducing a statute of English inspiration, but as a new provision forming part of a codification in which some fundamental principles are radically different from those of the common law, in terms of which *Lord Campbell's Act* was written. [...] What we have since 1867 is a code, and its provisions on this subject must be interpreted in keeping with the whole of which it is a part. Among the fundamental principles of that whole, which are radically different from those of the common law, is the absence of the maxim *actio personalis cum persona moritur*.⁹⁸

The decision in *Pantel* marked a new era in the interpretation of the *Civil Code of Lower Canada* with regard to the need to interpret its provisions in keeping with the internal logic of the Code and taking into account all other provisions included thereof. As one author observed concerning the incorporation of a rule from English law in a provision of the Code, this incorporation does not necessarily entail, in the case of article 1056, the incorporation into civil law of the principles of compensation of English law.⁹⁹ If the rule is of foreign origin, its incorporation does not imply the integration of the entire legal regime that applies to the rule of origin. The incorporated rule must be blend with the existing corpus of rules in the receiving legal system. In the case of article 1056 of the *Civil Code of Lower Canada*, the provision was incorporated as part of the regime of civil liability set forth in the Code. Thus, the Canadian statute based on the *Lord Campbell's Act* became part of the rules on liability applicable prior to codification in Lower Canada. These rules were of French origin.

Notwithsatnding *Pantel*, the interpretation of article 1056 was raised again before the Supreme Court in *Augustus v. Gosset*.¹⁰⁰ The recognition of *solatium doloris*, and in particular, the extent of compensation under this head of damage was finally settled. In *Gosset*, L'Heureux-Dubé J. clarified the distinctions between civil law and common law with respect to moral prejudice and emphasized the "specificity of the legal tradition of Quebec".¹⁰¹

The impact of the decision in *Gosset* was limited given that the *Civil Code of Quebec* did not include a provision similar to article 1056 of the *Civil Code of Lower Canada*. The new Code instead provides a general statement of principle with respect to civil liability. Still, the rejection of English precedent and the idea of an internal coherence of civil law were clearly established in *Gosset*. The logic of civil law was clearly distinguished from the logic of common law with respect to civil liability. There are different principles in the two traditions which, when applied to the same issues, result in different solutions because each tradition has its own specificity.

This development in the recognition of *solatium doloris* in Quebec law is an example of the belated consecration of the specificity of civil law at the Supreme Court of Canada. Even in the

⁹⁵ [1975] 1 S.C.R. 472 [hereinafter *Pantel*].

⁹⁶ *Supra* note 90.

⁹⁷ *Supra* note 92.

⁹⁸ *Pantel*, *supra* note 95 at 478.

⁹⁹ Poirier, *supra* note 44 at 666.

¹⁰⁰ [1996] 3 S.C.R. 268.

¹⁰¹ *Ibid.* at 288.

1980s, some were in fact still advocating the creation of a civil division for the Supreme Court.¹⁰² The borrowing of common law categories and precedents was not seriously questioned until the late 1970s,¹⁰³ and, even at that time, there was hesitation over the dissociation of traditions with respect to the borrowing of common law categories to interpret the civil law.

The same hesitation was apparent in the case of trespass, even though the Supreme Court did not fall into trap of assimilating traditions despite the frequent reliance of the lower courts on certain common law notions.¹⁰⁴ In Albert Mayrand's view, the confusion between the common law rule and the civil law rule was, in the early 1960s, a relatively recent feature in Quebec courts decisions.¹⁰⁵ At the Supreme Court of Canada, despite numerous references in some of its judgments to common law decisions regarding trespass,¹⁰⁶ the Court has apparently never directly applied the theory of trespass with respect to Quebec civil law. While not directly imposing the doctrine of trespass on civil law, the Court's references and comments do not, however, dissociate the common law theory of trespass from the circumstances specific to the establishment of civil liability in civil law. Where circumstances could give rise to distinctions at common law, that is to say whether the victim was an invitee, licensee or trespasser on the defendant's property, the Court did not exclude these distinctions from the civil law regime of liability.

The Supreme Court of Canada first comments on the application of these distinctions in civil law were made by Beetz J. in *Hamel v. Chartré*.¹⁰⁷ The comments made in the reasons for judgment did not however indicate a clear exclusion of the theory of trespass at civil law. Concurring in the trial court's finding—that the victim's presence on the defendant's land was justified—, Beetz J. found that it was therefore not necessary to rule on the issue of the application of trespass. He expressed some doubt, however, as to the application of the distinctions between invitee, licensee and trespasser in civil law.¹⁰⁸

It was not until 1982, in *Rubis v. Gray Rocks Inn Ltd.*,¹⁰⁹ that the Supreme Court of Canada clearly confirmed that the theory of trespass was foreign to Quebec civil law. Beetz J. observed that he was now convinced that the categories of trespass did not apply in Quebec civil law:

[I] no longer entertain any doubt, and I am of the opinion that it is an error to refer to these common law categories [invitee, licensee, trespasser] in the civil law. They detract from the generality of art. 1053, disregard the presumption of art. 1054 and the special provisions of art. 1055, and we cannot be sure that they would necessarily lead to the same result as the civil law principles.¹¹⁰

Trespass had finally passed on. However, in addition to rejecting trespass, Beetz J. reaffirmed and cited¹¹¹ Mignault J.'s comments in *Desrosiers v. King*¹¹² on the exclusion of common law

¹⁰² See Crépeau, *supra* note 32 at 633-34.

¹⁰³ Note that the decision in *Pantel*, *supra* note 95, dates back to 1975.

¹⁰⁴ See the decisions cited in A. Mayrand, "À quand le trépas du 'trespasser'?" (1961) 21 R. du B. 1.

¹⁰⁵ *Ibid.* at 17.

¹⁰⁶ The cases cited by A. Mayrand, *ibid.* at 20 are: *Verdun (City) v. Yeoman*, [1925] S.C.R. 177; *Canadian National Railways v. Lepage*, [1927] S.C.R. 575; *Ouellet v. Cloutier*, [1947] S.C.R. 521; and *Canadian National Railways v. Lancia*, [1949] S.C.R. 177.

¹⁰⁷ [1976] 2 S.C.R. 680.

¹⁰⁸ *Ibid.* at 688.

¹⁰⁹ [1982] 1 S.C.R. 452.

¹¹⁰ *Ibid.* at 468.

¹¹¹ *Ibid.* at 469.

¹¹² *Desrosiers*, *supra* note 55.

precedent in the interpretation of a Civil Code provision and on the completeness of the civil law system.

In another example, that of wills, where English law had a definite influence through the contribution of freedom of willing, the Supreme Court interpreted the provisions of the Code in accordance with English law over an extended period of time.¹¹³ As the idea and scope of freedom of willing are essentially English, lawyers and the courts generally referred to English law in matters relating to the exercise of freedom of willing, with regard to both capacity and consent. Yet, for the same reasons as those raised with respect to compensation for *solatium doloris*, it is not because a rule is imported from common law that the legal system of which it is a part automatically applies in civil law. When the receiving system has general rules that can govern ancillary matters pertaining to other legal concepts, it is these rules that should complement the borrowed principle. In *Municipal Corporation of United Districts of Stoneham and Tewkesbury v. Ouellet*,¹¹⁴ Beetz J. directly addressed the question of the relationship between civil law and common law in matters respecting wills. Having to decide on the issue of undue influence (*captation*), he rejected any reference to English precedents:

The Court was referred by both sides to a large number of English decisions or decisions in cases from other provinces, for the reason that the unfettered freedom to devise or bequeath one's property by will comes from English law, and that there are analogies between the concept of undue influence in English law and undue influence (*captation*) in the civil law. The case at bar does not concern the unfettered freedom to devise any more than it concerns a will in the form derived from the laws of England. [...] I not only hesitate to use decisions from other provinces in a civil law matter, I am not in any way bound by a decision of this Court [...] dismissing an appeal from a decision of the Court of Appeal of British Columbia. [...] In my opinion this old case comes very close to introducing into private law the rule in *Hodge's* case on reasonable doubt in the criminal law. This theory has no bearing on the provisions of the civil law as to evidence.¹¹⁵

In this decision, the difference between the concept that was borrowed from English law and the interpretation of the framework for its application was raised, as was the idea of an organic unity of the Code in its interpretation. Reference to the legal system from which the concept was derived is thus of only limited scope. In the case of the freedom of willing, Beetz J.'s comments clearly show that reference to English law might have been appropriate with respect to the nature and basis of testamentary freedom. However, the case did not concern the substance of that freedom, but the nature of consent to the legal act of making a will. Undue influence (*captation*) having an effect on the will to devise, it bears on the issue of the capacity to consent.

The rule suggested previously by Walton, who advocated an interpretation of the Code according to the legal rules at the origin of the provision of the Code,¹¹⁶ was no longer entirely appropriate. The judgments in *Pantel* and *Ouellet* are powerful examples of the rejection of complete incorporation of the law of origin and of the use of English precedent.

English law is not however completely excluded from the analysis of civil law. It must fit into the body of civil law rules and its introduction has a limited role in their interpretation. A perfect illustration of this type of relationship between concepts of English origin and their interpretation in

¹¹³ See the discussion on *Renaud v. Lamothe*, *infra* note 18.

¹¹⁴ [1979] 2 S.C.R. 172.

¹¹⁵ *Ibid.* at 204. See also *Drouin-Dalpé v. Langlois*, [1979] 1 S.C.R. 621 at 624.

¹¹⁶ Walton, *supra* note 46 at 130.

civil law is *Royal Trust Co. v. Tucker*,¹¹⁷ which raised the question of the nature of the trust and related rights. This decision, which described the origins of the Quebec trust and characterised the interest as a “*sui generis* property right”¹¹⁸ has received considerable attention. We do not intend to repeat or describe the criticism or the course of developments that followed the judgment. What is interesting, however, from the standpoint of the development of civil law with regard to a concept of English origin is the trouble the Court took to distinguish between civil law and common law trusts. The trust is the quintessential common law institution, symbolic of the distinction between “legal title” and “beneficial ownership”, which are difficult to reconcile with the civil law notions of right and property. Despite the difficulties involved in matching the concept of trust with the conventional categories of civil law property right, the Court attempted to distinguish the Quebec trust in conceptual terms from the common law trust:

It is therefore legitimate to refer to English law [...] However, the argument is not conclusive, because the entire English law of trusts was not incorporated into the civil law. [...] the enactment of arts. 981a *et seq.* did not have the effect of introducing in Quebec the English distinction between legal title and beneficial ownership, a sort of dual ownership, and a concept foreign to Quebec law under which ownership is indivisible and vested in a single individual [...] English law is relevant only in so far as it is compatible with arts. 981a *et seq.* of the *Civil Code*.¹¹⁹

While the defence and conceptual development of civil law at the Supreme Court were long in coming, these judgments reflect the progress the Court made between the Mignault period and the early 1980s. Interpretation of the Civil Code in accordance with civil law rules and reference to civil law sources were increasingly common starting in the 1970s,¹²⁰ to become the method followed by the Supreme Court in analysing civil law issues.

As noted above, the successful completion of the work of the Civil Code Revision Office in 1978 was certainly not unrelated to the growing acceptance of the conceptual autonomy of civil law at the Supreme Court. The turning point marked by Beetz J.’s judgments in civil law cases corresponds to an important period in the collective re-examination of the concepts and sources of Quebec civil law. Quebec’s civil law was no longer suffering an identity crisis.

Starting in the mid-1980s, there were fewer civil law judgments at the Supreme Court as a result of the litigation resulting from the *Canadian Charter of Rights and Freedoms*.¹²¹ The decisions on civil law thus became more visible and, at the same time, were more respectful of the civilian approach to analysing legal issues.¹²² With this more civilian approach, the Court also relied on foreign sources to shed light on the socio-economic context and how legal rules evolve.

¹¹⁷ [1982] 1 S.C.R. 250.

¹¹⁸ Arts 1260ff C.C.Q. govern the trust and relate it to the theory of patrimonies by appropriation, which was not part of the *Civil Code of Lower Canada*.

¹¹⁹ *Supra* note 117 at 261.

¹²⁰ One need only read the Supreme Court’s decision in *National Bank v. Soucisse*, [1981] 2 S.C.R. 339, to observe this trend. For a description of this period when French doctrine had a predominant place in the interpretation of Quebec civil law, see P.-G. Jobin, “Les réactions de la doctrine à la création du droit civil québécois par les juges : les débuts d’une affaire de famille” (1980) 21 C. de D. 257.

¹²¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹²² See e.g. *Zodiak International Productions Inc. v. Polish People’s Republic*, [1983] 1 S.C.R. 529 on the validity of an arbitration clause; *Lapierre v. Attorney General of Quebec*, [1985] 1 S.C.R. 531 on delictual liability in which the theory of risk was rejected; *C. (G.) v. F. (T.)*, [1987] 2 S.C.R. 244 on child custody and the exercise of parental authority; *Daigle v. Tremblay*, [1989] 1 S.C.R. 531 on the legal personality of the fetus; *Venne v. Québec (CPTA)*, [1989] 1 S.C.R. 880 on conditional obligation; *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429 on mandate; *National Bank of Canada v. Houle*, [1990] 3 S.C.R. 429 on abuse of contractual rights; *Laferrière v. Lawson*, [1991] 1 S.C.R. 541 on civil liability in which the loss of chance theory was rejected in medical liability; *García Transport Ltd. v. Royal Trust Co.*, [1992] 2 S.C.R. 499 on the extinction of obligations; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, once again on custody and the exercise of parental authority.

L'Heureux-Dubé J.'s comments in *Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*¹²³ say a great deal about the approach the Court adopted in the interpretation of civil law:

In the past, writers and courts have tended to look to foreign insurance law for answers to questions for which Quebec civil law did not seem to provide a solution. This broader view of the sources of law is partly a result of the nature of insurance law, which the codifiers noted in their Seventh Report, is a body of fundamental rules found in several countries: [...] this apparent similarity of the fundamental rules should not cause us to forget that the courts have a duty to ensure that insurance law develops in a manner consistent with the rest of Quebec civil law, of which it forms a part. Accordingly, while the judgments of foreign jurisdictions [...] may be of interest when the law there is based on similar principles, the fact remains that Quebec civil law is rooted in concepts peculiar to it, and while it may be necessary to refer to foreign law in some cases, the courts should only adopt what is consistent with the general scheme of Quebec law.¹²⁴

This passage clearly illustrates the complexity that results from implementation of the law when similar legislative language is used to regulate of situations governed by different legal traditions. The same term may thus have many meanings depending on the tradition to which it belongs because of the other rules that make up the whole of the scheme of application. Herein lies the entire complexity caused by the variety of sources of Quebec civil law and its application in a bijural context. The incorporation of rules must be considered in accordance with the framework of the receiving system, and which differs from one tradition to another. It is therefore when the specificity of a tradition is recognized that the use of comparative analysis can be used to its fullest to understand the meaning of the rule based on its origin, its incorporation and its implementation.

When the *Civil Code of Quebec* came into force in 1994, the need to interpret the new provisions in light of varied sources led to increasingly frequent recourse to comparative legal analysis,¹²⁵ while at the same time respecting the civil law.¹²⁶ Unlike the period during which Mignault J. sat on the Supreme Court, protection of the integrity of civil law was no longer an issue. The mixed nature of Quebec law and the essentially civil law nature of its categories and interpretation characterise Quebec law in relation to the common law and also to European civil law. Its coming to maturity necessarily contributed to the recognition of its integrity and distinctive features. At least with respect to the interpretation of the Civil Code, the conceptual autonomy of Quebec civil law now appears to be established.

Moreover, with the recognition of the conceptual autonomy of Quebec civil law, how it may have influenced more recent Supreme Court judgments may be interesting in looking at the relationship between civil law and common law. Although some claim that the influence of the traditions no longer goes in only one direction—from common law to civil law¹²⁷—it is an exaggeration to say that the common law has frequently drawn on civil law. There are of course several examples in which the Supreme Court has referred to civil law decisions. This was the case in *Rivtow Marine Ltd. v. Washington Iron Works*,¹²⁸ in which the Court cited *Ross v. Dunstall*¹²⁹ on manufacturer's liability. It

¹²³ [1990] 2 S.C.R. 995.

¹²⁴ *Ibid.* at 1004.

¹²⁵ On the renewed popularity of comparative legal analysis, see Jobin, *supra* note 81 at 489ff.

¹²⁶ See e.g. *Béliveau St-Jacques v. Fédération des employés et employés de services publics Inc.*, [1996] 2 S.C.R. 345; *Quebec (Public Curator) v. Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *Godbout v. City of Longueuil*, [1997] 3 S.C.R. 844; *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591.

¹²⁷ See C.D. Gonthier, "L'influence d'une cour suprême nationale sur la tradition civiliste québécoise" in *Journées Maximilien-Caron 1990, Enjeux et valeurs d'un code civil moderne* (Montreal: Thémis 1991) 3 at 8.

¹²⁸ [1974] S.C.R. 1189.

is interesting to note that, in *Ross v. Dunstall*, the Supreme Court interpreted article 1053 of the *Civil Code of Lower Canada* ensuring that its interpretation was not inconsistent with a rule established by English precedent. In *Sorochan v. Sorochan*,¹³⁰ it cited *Cie immobilière Viger Ltée v. Lauréat Giguère Inc.*,¹³¹ but only for comparison as the basis of unjust enrichment can also find basis in common law. In another case, that of *Arndt v. Smith*,¹³² McLachlin J. cited *Laferrrière v. Lawson*¹³³ in support of her reasons on the balance of probabilities test in evaluating causation. Despite the varying levels of influence of civil law in these examples, they nevertheless illustrate an increased receptivity to comparative analysis of Canadian common law with Quebec civil law.

In family law, and more particularly with regard to child custody, the Court has seen fit to consider common law decisions in its civil law judgments, and vice versa, while recognizing the conceptual differences of the concepts in both traditions. The dialogue established between the two traditions in this field with regard to questions involving children, may be explained by a common thread running between them relating to the basis for every decision concerning children: the concept of the best interest of the child. This shared principle encourages common solutions, even if the reasons expressed based on the concepts specific to each tradition differ. L'Heureux-Dubé J.'s comparison in *Gordon v. Goertz*¹³⁴ which is based on the distinctions established on the concept of custody in *C. (G.) v. V.-F. (T)*,¹³⁵ is a good example of this trend, as is the analysis in *W. (V.) v. S. (D.)*.¹³⁶

Furthermore, when the issue before the Court concerns universal values, there is a more pronounced tendency to mention the rules and solutions of either tradition. This finds expression in the decisions, for example in matters pertaining to human rights and freedoms,¹³⁷ including questions related to the protection of the fetus and the rights of the mother. The use of *Montreal Tramways Co. v. Léveillé*¹³⁸ or *Tremblay v. Daigle*¹³⁹ in *Dobson (Litigation Guardian of) v. Dobson*¹⁴⁰ and *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*¹⁴¹ reflect this bridging of the gap between the two traditions. Each of these judgments, regardless of the question to be decided, turned on the same fundamental characterisation: the legal personality of the fetus before birth.

The dialogue between the traditions in the Supreme Court's decisions is consistent with the idea that the Supreme Court is more than a court of appeal for each of the provinces. Its position forces it to avoid unique solutions whose impact would be limited to the rights of the parties before it. In its decisions, and particularly the most recent ones, the Court appears to be motivated by a desire to

¹²⁹ (1921), 62 S.C.R. 393.

¹³⁰ [1986] 2 S.C.R. 38.

¹³¹ [1977] 2 S.C.R. 67.

¹³² [1997] 2 S.C.R. 539 at 565.

¹³³ *Supra* note 122.

¹³⁴ [1996] 2 S.C.R. 27 at 69ff.

¹³⁵ *Supra* note 122 at 285.

¹³⁶ [1996] 2 S.C.R. 108 at 146ff.

¹³⁷ See e.g. *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [2000] C.S.J. No. 48, in which *Québec (Commission des droits de la personne et des droits de la jeunesse) v. City of Montreal*, [2000] 1 S.C.R. 665 is cited on the concept of handicap with respect to the protection of the right to equality.

¹³⁸ [1933] S.C.R. 456.

¹³⁹ *Supra* note 122.

¹⁴⁰ [1999] 2 S.C.R. 753.

¹⁴¹ [1997] 3 S.C.R. 925.

consider the effect of its decisions in all jurisdictions, both civil and common law, while respecting the characteristics particular to each of them.

In these new directions taken by the Court, there appears to be a more pronounced reciprocal influence between traditions as comparative analysis becomes increasingly prominent in its judgments. There is also a more marked tendency toward universalism in the basis for solutions and in the solutions themselves, while the expression of the principles varies from one tradition to the other. This kind of unification through persuasion is very different from the unification of the law as it was exercised at the turn of the twentieth century, when unification generally meant assimilation of civil law by common law. This trend is somewhat related to the internationalisation of the law, which espouses a more universal language of law. It reflects the principle that there are universal values in both systems, which transcend mere statements of specific rules.

The comparative tendency of the Court could not have come about until the conceptual autonomy of civil law with respect to common law was recognized. Comparison can only stimulate consideration of the bases and solutions of each of the traditions to the extent that they are seen as equals, neither being less good or better than the other as a whole.

However, the Supreme Court's confirmation of civil law's conceptual autonomy and full equality with common law developed in the context of the interpretation of provincial rules. The question of the respective places of the two traditions is framed in different terms when considering how the legal duality developed in the federal context and how civil law managed to play a role in the interpretation of federal law.

B – The confirmation of the complementary relationship between civil law and federal law

Although Quebec civil law has succeeded in becoming conceptually autonomous from the common law, this factor alone is not sufficient to form the basis of the existence of a legal duality at the federal level. Although this autonomy is a necessary pre-condition for establishing such a duality, the rules of civil law must also be applicable in at this level; they have to be relevant to the application of federal law.

Despite the existence of Canadian bijuralism in practice, the answer to the question of whether there exists a complementary relationship of between civil law, as provincial law, and federal law, is not obvious. Although the complementary relationship between provincial laws and federal law has been discussed by legal scholars,¹⁴² it was only after the Supreme Court formally denied the existence of a federal common law that this idea could develop to its full potential.

For a long time, the courts upheld the idea that there was a federal common law in all matters falling within the jurisdiction of the federal government.¹⁴³ At the constitutional level, it turns on the interpretation of section 101 of the *Constitution Act, 1867*. Its relevance and the judgments that contributed to the confirmation of the existence of a federal common law are related to the determination of the jurisdiction at the Federal Court that was established “for a better administration of the laws of Canada”.¹⁴⁴ For a long time, the jurisdiction of the Federal Court was thought to mirror

¹⁴² See J.-M. Brisson, “L’impact du Code civil du Québec sur le droit fédéral” (1992) 52 R. du B. 345; J.-M. Brisson and A. Morel, “Droit fédéral et droit civil : complémentarité, dissociation” (1996) 75 Can. Bar Rev. 197, revised version of the text “Federal Law and Civil Law” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism. Collection of Studies* (Ottawa: Department of Justice, 1997) 213.

¹⁴³ See P.W. Hogg, *Constitutional Law in Canada*, 4th ed. (Scarborough (Ont.): Carswell, 1997) at 181.

¹⁴⁴ Section 101, *Constitution Act, 1867*, *supra* note 5.

the areas falling under the federal government's jurisdiction pursuant to section 91 of the *Constitution Act, 1867*, whether or not federal legislation existed.

It was through the interpretation of the scope of section 101 of the *Constitution Act, 1867* that the Supreme Court opened the door to the recognition of bijuralism with respect to federal legislation. Used as the basis for the jurisdiction of the Federal Court, the expression "laws of Canada", was given a narrow interpretation.

The Supreme Court thus framed the relationship between federal law and provincial law with respect to the interpretation of federal law in a new way. The notion of an unwritten suppletive federal common law applicable throughout the country for all matters falling within the jurisdiction of the Government of Canada has been rejected. For there to be "laws of Canada", there must be, in principle, a federal statutory text. This can be drawn from *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,¹⁴⁵ *McNamara v. R.*¹⁴⁶ and *R. v. Thomas Fuller Construction Co. (1958) Ltd.*¹⁴⁷

In *Quebec North Shore*, the Supreme Court reversed the conclusions reached in the first instance and on appeal by the Federal Court, holding that the jurisdiction of the Federal Court included all matters falling within federal legislative authority. It also rejected the argument that a provincial statute applicable to a situation in respect of which the federal government could legislate would become part of federal law through referential incorporation.¹⁴⁸ The Court reframed its conclusions in *McNamara*, stressing that it was not enough for the federal government to have the power to legislate in an area for there to be "laws of Canada", but that it had to have acted.¹⁴⁹ Then, in *Fuller*, the Court stated that even if a federal law regulated part of a legal situation falling within the jurisdiction of the federal Parliament, issues related to ancillary powers in a field regulated by provincial law did not constitute federal law, unless those powers were required for the effective exercise of Parliament's authority.¹⁵⁰

However, the existence of a federal common law has not been entirely rejected since the jurisdiction of the Federal Court may found in and act, regulation or the common law.¹⁵¹ Federal common law does in fact exist but in some areas, such as maritime law¹⁵² and with respect to aboriginal title.¹⁵³ These exceptions will not be addressed here. There is also a federal common law that applies to the Crown in right of Canada.¹⁵⁴ Its scope is however limited, as established by these decisions and as recognized by legal scholars.¹⁵⁵

The decisions in *Quebec North Shore*, *McNamara* and *Fuller* have often been criticised because of the byzantine distinctions they created with respect to the jurisdiction of the Federal Court. They

¹⁴⁵ [1977] 2 S.C.R. 1054 [hereinafter *Quebec North Shore*].

¹⁴⁶ [1977] 2 S.C.R. 654 [hereinafter *McNamara*].

¹⁴⁷ [1980] 1 S.C.R. 695 [hereinafter *Fuller*].

¹⁴⁸ *Quebec North Shore*, *supra* note 145 at 1065.

¹⁴⁹ *McNamara*, *supra* note 146 at 658.

¹⁵⁰ *Ibid.* at 711.

¹⁵¹ *Quebec North Shore*, *supra* note 145 at 1066 and *McNamara*, *ibid.* at 659 and 713.

¹⁵² See e.g. *ITO—International Terminal Operators v. Miida Electronics*, [1986] 1 R.C.S. 752.

¹⁵³ See e.g. *Roberts v. Canada*, [1989] 1 R.C.S. 322.

¹⁵⁴ *McNamara*, *supra* note 146 at 662 and 663.

¹⁵⁵ See e.g. G. Faggiolo, "La Loi C-38, la nouvelle compétence de la Cour fédérale et ses relations avec la Cour supérieure" in *Développements récents en droit administratif (1990)*, Service de la formation permanente, Barreau du Québec (Cowansville (QC): Yvon Blais, 1990) 85; L.J. Townsend and H. Olson, "Les recours judiciaires exercés par et contre l'État" in *La Couronne en droit canadien* (Cowansville (QC): Ministère de la Justice / Yvon Blais, 1992) 189.

appear to produce outcomes that are not very practical at the procedural level, especially with respect to litigation involving the Crown in right of Canada in matters of civil liability.¹⁵⁶ While these decisions generate criticism at the procedural level, their effect on the recognition of a true complementary relationship between provincial law and federal law is clear. This is not generally discussed in legal commentary as the point of view put forward is related to procedural problems created by the dissociation of the rules of federal law from the institutions governed by provincial law. And yet, it is essential to the understanding and confirmation of Canadian bijuralism applied to the federal level.

Aside from their direct application to the procedural issues they resolved, the impact of these decisions is to allow for two fundamental conclusions to be drawn, that are critical to the establishment of a complementary relationship between provincial law and federal law. The first is that, since federal law is not autonomous, it must, in order to apply where federal law is silent, have a basis in provincial law rather than in a purely federal common law. The second is that, in the absence of a federal common law, provincial law must serve as the general law for federal law.

The first conclusion alone does not prove a true relationship of complementarity between provincial law and federal law. Before the decision in *Quebec North Shore*, it was generally believed that a federal common law did exist and that the expression “laws of Canada” could be broadly construed. Any rule that was applied in an area falling under authority of the Parliament of Canada pursuant to section 91 of the *Constitution Act, 1867* constituted a law of Canada. However, if there was no act or regulation of Parliament, or common law precedent applicable in that area, the courts had regard to provincial law to properly regulate situations falling within that area. Federal law was not entirely autonomous since the provincial rules formed a relationship of complementarity with the rules that were specific to federal law.

However, this relationship did not establish true complementarity. Federal law could certainly draw on concepts from provincial law in order to fill for its gaps, but once they had become part of federal law by referential incorporation, there was no longer complementarity but assimilation. Depending on the situation, the incorporation of a provincial law rule transformed it into a federal law rule. The difficulty that then arose was one of recognition. The complementary relationship was limited to an implicit reference to provincial law, the effect of which was incorporation by reference. Through incorporation, the federal law was seen as a whole, subject to its own rules of interpretation and the characteristics of the provincial law were lost.

Here lies the true problem, especially for civil law. If the idea of a federal law, made complete through incorporation of provincial rules had survived, the civil law concepts that served to fill the gaps, such as in matters of contracts, would have been interpreted on the basis of precedents of federal law. A common law unique to federal law and different from the various common laws in the provinces would have developed in its own context. Federal law precedents, applicable to all legal situations falling within federal legislative authority, would also have applied in the same way to situations created in the civil law context and to those created in a common law context.

If this were the case, the distinctive features of the civil law concepts would not have been recognized. By interpreting civil law concepts on the basis of federal common law precedents, the interpretation of both common law and civil law institutions would have been done without regard to the distinctive features of both traditions. This common basis for interpretation would have created a uniform rule for the civil law and common law. Unlike the assertion of the specific nature of the civil

¹⁵⁶ See comments by Hogg, *supra* note 143 at 182-3 as well as the references mentioned by the author.

law in the interpretation of the Code and of the civil law rules in a strictly provincial context, this specificity would have been lost in a federal context. The same concepts would no longer have been considered in an autonomous conceptual framework, but as an integral part of federal law. A different meaning would have been developed through assimilation as to meaning and reasoning to common law concepts.

The impact of the decisions in *Quebec North Shore*, *McNamara* and *Fuller* on the need to better understand the complementary relationship between federal law and Quebec law is significant. The acknowledgement of this relationship between federal law and provincial law could only have come about with the acceptance of the idea that there is no federal common law. Even simply on a symbolic level, the rejection of an autonomous federal law and a separate federal common law means that civil law, as a system, could be considered and be recognized as an equally important tradition at the federal level. This could then lead to true complementarity between Quebec civil law and federal law.

But the federal law's lack of autonomy alone is not enough to allow for the development of a relationship of complementarity. It is not complete without the idea that provincial law is the general law for federal law.

Provincial law can only have a role as the general law for federal law if there is no federal common law for all areas falling under federal legislative authority. If an unwritten federal common law did exist, when the law was silent, this common law would apply rather than provincial law that acts as a backdrop to federal law. With this kind of corpus of rules, provincial laws, whether based on civil law or common law would have no impact on the framing of the rule. The case of maritime law is a good example of how provincial law is excluded from its development and how the federal common law specific to maritime law serves as the general common law in this area.

Thus, since *Quebec North Shore*, *McNamara* and *Fuller*, that which constitutes property and civil rights under subsection 92(13) of the *Constitution Act, 1867* does not fall under federal jurisdiction simply because some of the concepts from provincial law are required to implement of a federal rule. The issue of determining which law applies where federal law is silent is fundamental to the development of bijuralism at the federal level.

Identification of the rules that apply where the law is silent is quite complex and requires a more complete analysis that goes beyond the objectives of this paper. However, it would be worthwhile to mention that the way complementarity comes into play with the background of provincial law cannot be fixed at once so as to apply to all situations. For example, when the general law is that of the common law provinces, in principle, this general law is established by the provincial common law (the principles established by court decisions). However, the complementary relationship between federal law and provincial law may also be established with common law and the specific legislation when the legal rules and framework set out in the statutes are required for the implementation of federal law.

The same is true for Quebec. Although the main source of civil law in Quebec is the Civil Code, “[t]he Civil Code does not contain the whole of civil law. It is based on principles that are not all expressed there, which it is up to case law and doctrine to develop [...]”¹⁵⁷ In principle, the Code and the general principles of law are considered to be the general law¹⁵⁸ and will be suppletive to the

¹⁵⁷ *Cie immobilière Viger Ltd. v. Lauréat Giguère Inc.*, *supra* note 131 at 76, repeated in *Vidéotron Ltd. v. Industries Microlec*, [1992] 2 S.C.R. 1065 at 1080.

¹⁵⁸ Brierley, *supra* note 37; Brisson, *supra* note 37.

federal law.¹⁵⁹ Federal law, however, can also establish a complementary relationship with the corpus of Quebec private law, including the rules set out in specific legislation, as it does with the common law provinces.

Thus, in the absence of federal statutory provisions that expressly establish a dissociation from provincial laws, federal law is interpreted as a law that acts as an exception to the rule of law set by the general laws of the provinces. It may appear in a broader relationship of complementarity with the entire legislative corpus of the provinces, including specific legislation, as in subsection 72(1) of the *Bankruptcy and Insolvency Act*.¹⁶⁰ The Supreme Court of Canada has in fact confirmed this complementarity between federal law and provincial law.¹⁶¹

Therefore, complementarity comes into play in various ways with different backdrops. But whatever form complementarity takes between provincial law and federal law, it confirms the dialogue between the two levels.

Through the complementarity of federal and provincial law and the equality of traditions, the expression of bijuralism at the federal level has become more than a simple statement about the co-existence of traditions. When they apply federal laws that do not exclude provincial laws, judges must recognize, with respect to Quebec law, the concepts that are specific to Quebec civil law when applying the law, which is superimposed in several areas against the backdrop of Quebec law. This need to refer to Quebec law, even for the application of federal law, could only exist with the recognition of the full equality of Quebec civil law with the common law of the other provinces.

Conclusion

While under assault for a long time at the Supreme Court, civil law has fully acquired a conceptual autonomy. This autonomy has allowed Quebec civil law to have equal recognition with common law. This movement of acquisition of autonomy with the rejection of a federal common law for all areas falling under federal legislative authority has contributed to a better expression of Canadian bijuralism in the current context.

Because of constant changes in the perspective on the relationships between civil law and common law, and between federal law and provincial law, the Supreme Court of Canada has promoted the growth and development of a vision of Canadian legal duality. More than a factual co-existence, this legal duality is now considered to be an essential feature of the implementation of federal law, requiring a constant dialogue between traditions.

¹⁵⁹ Brisson, *supra* note 142; Brisson and Morel, *supra* note 142.

¹⁶⁰ R.S.C. 1985, c. B-3.

¹⁶¹ See e.g. on bankruptcy and insolvency, *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753 and *(Quebec) Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35.