



BIJURALISM IN SUPREME COURT OF CANADA JUDGMENTS SINCE THE ENACTMENT OF THE *CIVIL CODE OF QUEBEC*

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Introduction

Although the term bijuralism came into usage only rather recently, it is acknowledged that the foundations of its existence date back to the early days of colonization in Canada. Since then, the legal landscapes of the common law and civil law have succeeded each other, and then been superimposed on each other, in such a way as to lay the groundwork for a distinctive legal framework.

It was with the creation of the Supreme Court in 1875, which coincided with the establishment of major national institutions, that the federal parliament took control of the development of law at the federal level. At that time, the federal character of the Supreme Court initially affirmed itself by a desire to create a uniform legal system based on a fusion of the legal sources emerging from the country's two major legal traditions. In the Court's view, the obligation to take into account the effect of its decisions on all provincial jurisdictions was justification for adopting such an approach. The comments of professor Glenn on page 205 of his article "Le droit comparé et la Cour suprême du Canada" (in *Mélanges Louis-Philippe Pigeon*, Ouvrages collectifs, Wilson Lafleur, Montreal, 1989, pp. 200 to 214) attest to the optimism of the time in relation to the unifying and constructive mission the Court had taken on:

[translation] The Supreme Court, a national institution with a national mission of unification, would naturally turn to the new science of comparative law to eliminate the artificial barriers between civil law and common law in Canada in order to establish a new Canadian common law.

Unfortunately, for various reasons, and often simply as a matter of political will, the concept of standardization developed largely in a unilateral rather than a reciprocal manner. As it happened, the concepts of common law were widely applied and very few instances of borrowing from civil law were noted. Professor Baudoin makes note of this fact in his article entitled "*L'interprétation du code civil québécois par la Cour suprême du Canada*", (1975) 53 *Can. Bar Rev.* 715, on page 75: [translation] "Unification during these periods took place essentially in one direction only. Although it would have been eminently advantageous to have been so, it was in no way a true exchange between the two systems."

In the middle of the twentieth century, however, with the appointment of new justices from Quebec in particular, a certain equilibrium was restored, thereby controlling the massive infusion of

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common law concepts into matters of civil law. The Court abandoned its objective of unification and officially renounced the idea of the existence of a general federal common law. It gradually confirmed that, in matters of Canadian private law, common law and civil law were two legal systems that were complete in themselves, each with its own legal autonomy. Professor Glenn offers the following explanation on page 211 of his above-mentioned article:

[translation] Since at least the middle of the century, it has become clear that the Supreme Court has definitively renounced that idea of national unification of the law and the idea that comparative law must serve to establish new rules that are exclusive and imperative. This change came about initially through a new recognition of the sources of civil law, notably Quebec and French doctrine, and by an acknowledgment of the impossibility of systematically discounting an entire corpus of rules of which the quality and coherence does not suffer in any way from a comparison with the common law.

From that moment on, the Court focused on establishing the boundaries that were to limit public law and private law because, although the common law makes no distinction between these two notions, in Quebec civil law applies exclusively to matters of property and civil rights and common law to all other areas (unless otherwise prescribed by statute).

The Court is still defining the limits of those boundaries today. Recent judgments reiterate the fact that administrative law, such as municipal law, derives from public law and that the resulting conflicts must be resolved in light of the principles that govern the common law.

When it is a question of private law, in matters relating to property and civil rights, notably civil liability, labour law, insurance law and family law, the Court has come out in favour of applying each legal tradition according to the province in question.

From this perspective, we found it interesting to take stock of the recent Supreme Court judgments that deal with some aspect of the principles governing each of Canada's legal systems. We decided to limit this review to judgments dating from the enactment of the *Civil Code of Quebec* to today, that is, from 1994 to 2000, which at the same time will shed light on the short-term impact of this new legislative enactment on the Court's decisions.

The objective of this paper is to discuss decisions that mention the terms "civil law" and "common law", whether it was to establish the difference or similarity between concepts in the two systems, to compare notions in order to favour one approach rather than the other, or to create a new standard based on the systems that currently exist.

We grouped those judgments relating to rights of the individual first, in light of their general application, and then grouped cases relating to civil liability, followed by those on family law, and finally by those dealing with contract law.

1. Rights of the individual

Canadian society is animated by a number of values that bind its citizens together, regardless of whether they live in a common law or civil law jurisdiction. These values are set out partly in the Constitution and partly in provincial legislation, civil law and common law.

On a number of occasions during the period surveyed, the Supreme Court has noted certain fundamental principles that guide the application of the laws relating to respect for the individual in Canada. These principles are a testimony to our society's deeply held convictions in this regard and it is recognized that in some sense they have no boundaries. In general, the Court holds that both the *Canadian Charter of Rights and Freedoms* and the *Civil Code of Quebec*, as well as the *Quebec Charter of Human Rights and Freedoms*, the various provincial human rights acts and the common law constitute a uniform reflection of this. The Court notes, however, through the comments of Wilson J. in *Morgentaler* [1988] 1 S.C.R. 30 that, despite our common respect for certain values, provincial law must nonetheless take the constitutional situation into account:

With the advent of the Charter, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. (pp. 53-54)

In matters of public law, that is, in everything that does not relate to property or civil rights, the Court notes that the common law constitutes the basic law applicable to citizens in all jurisdictions. Thus, on all matters of municipal law, education law or administrative law in general, there must be an analysis based on the common law, including in Quebec. The Court also favours recourse to public law rather than to the *Canadian Charter of Rights and Freedoms* in cases where the principles of procedural fairness and natural justice have been violated.

The cases chosen as representing rights of the individual deal with the two legal traditions in the context of human rights and freedoms as well as administrative law.

1.1 Human rights and freedoms

The Court has examined a few notions relating to fundamental freedoms from a comparative perspective in recent years, notably in the context of the rights recognized for pregnant women and the fetus. The Court has striven for a degree of consistency in the decisions it has rendered on this matter in situations that apply in different jurisdictions in Canada. Furthermore, the protection of "privacy", as well as the question of "dignity", have been raised in the context of the rights of patients in the event of illegal strikes by hospital employees, and in matters involving the disclosure of the private records of sexual assault victims. In the latter case, the Court has dealt with the privileges generally granted in relation to respect for privacy not only in Canada but elsewhere in the world as well.

1.1.1 Rights of pregnant women and the fetus

If there is one area in which individual rights have been widely discussed, it is that of the rights of a pregnant woman and the fetus she is carrying. As far back as *Morgentaler* [1988] 1 S.C.R. 30, which recognized a woman's right to abortion, it has been asserted that granting a fetus the "right to life" provided under s. 7 of the *Canadian Charter of Rights and Freedoms* from the moment of conception creates a potential conflict with the woman's rights to personal dignity, bodily integrity and autonomy. In *Tremblay v. Daigle* [1989] 2 S.C.R. 530, it was determined that a woman could not be forced to complete her pregnancy since neither the *Quebec Charter of Human Rights and Freedoms* nor the Civil Code granted the fetus juridical personality.

- *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 S.C.R. 753

More recently, in *Dobson (Litigation Guardian of) v. Dobson*, which originated in New Brunswick, the Court rejected the argument that a child could take legal action against his mother for damages for the injuries he suffered before his birth as a result of an automobile accident caused by his mother's negligent driving. The Court recalled the civil law case *Montreal Tramways Co. v. Léveillé* [1933] S.C.R. 456, which established the legal fiction "borrowed from civil law" that the child who suffers injury is "deemed to have been born at the time of the accident to the mother", once the child is born alive. The Court nonetheless drew a distinction between this case and *Dobson*, because *Montreal Tramways* involved a case in which a child was taking legal action against a third party for negligence committed before its birth. In *Dobson*, despite the fact the child was born alive, the Court refused to apply the rules of tortious liability under the common law to the mother.

McLachlin J. made the following comments on the question of the rights of the pregnant woman:

In my view, to apply common law liability for negligence generally to pregnant women in relation to the unborn is to trench unacceptably on the liberty and equality interests of pregnant women. The common law must reflect the values enshrined in the Canadian Charter of Rights and Freedoms. Liability for fetal injury by pregnant women would run contrary to two of the most fundamental of these values—liberty and equality. (par. 84)

Again recently, the Court reiterated its refusal to amend the rules of common law with regard to tortious liability or to extend the State's *parens patriæ* responsibility to protect the fetus or to recognize its rights. It drew a comparison with the principles of civil law, in which the legal status of the fetus is the same as that at common law.

- *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* [1997] 3 S.C.R. 925

In *Winnipeg Child and Family Services v. D.F.G.*, Child and Family Services applied to the Court for an order enabling it to hold a pregnant woman in a health care centre until the birth of the child on the ground that the health of the fetus was in jeopardy because of the mother's addiction to intoxicating substances.

McLachlin J., who rendered the decision for a majority of seven judges, reviewed the general principles that apply and examined the rules of law regarding tortious liability as well as the *parens patriæ* jurisdiction of the courts. She asserted that the Court was not being called upon to resolve an issue of biological or spiritual status but of legal status, as previously set out in *Tremblay v. Daigle* [1989] 2 S.C.R. 530, a case in which the issues were similar since the father of the unborn child had been asking for an injunction to prevent the mother from terminating her pregnancy.

A number of principles had already been established in that case, including the fact that neither the Quebec civil law nor the common law of England and Canada recognize the fetus as a legal person. The principle was that, while injury to a fetus due to the negligence of third parties is actionable, the right to sue does not arise until the infant is born.

McLachlin J. stated that, in *Tremblay*, the Court concluded that the *Quebec Charter* confers no rights on the unborn child, and cited this passage, which summarizes the applicable law:

The treatment of a fetus in tort law, property law and family law reveals a similar situation as found under the *Civil Code*, namely, that the fetus has no rights in private law. (par. 70, *Tremblay c. Daigle* p. 564)

With regard to tort law, *Montreal Tramways Co. v. Léveillé* [1933] S.C.R. 456, often cited in the case law outside Quebec, established as early as 1933 that the fetus had no legal personality. With regard to property law, Anglo-Canadian as well as Quebec law recognized that the fetus has the right to receive a bequest or gift, but its interests are not protected unless it is born live and viable. In the area of family law, although the fetus enjoys protection, its rights do not take effect until birth. In conclusion, the Court was clear in stating that neither the common law nor Quebec civil law recognizes the legal personality of the unborn child.

Once the principles were established, McLachlin J., addressing the appropriateness of extending tortious liability in such a way as to amend the applicable principles of the common law, wrote that this would be a major reform that would have complex ramifications entailing moral choices and creating conflict between fundamental rights and interests that are not within the purview of the Supreme Court to resolve. She noted that such reform would have:

[...] an immediate and drastic impact on the lives of women as well as men who might find themselves incarcerated and treated against their will for conduct alleged to harm others. (par. 20)

She was also of the view that the Court could not exercise its *parens patriæ* jurisdiction with regard to the protection of children in a manner that would change the legal status of the unborn child. She indicated that the extension of such jurisdiction would raise the same social, political, moral and even economic problems in the broad sense as would extending the rules governing tort. She added that the situation was dealt with in the same way in the European Community, in Great Britain and in Canada in general. In law, birth is a necessary condition for the acquisition of legal personality. This cannot be otherwise since there is a fundamental incompatibility between the protection of the unborn child and the liberty of the pregnant woman.

The Court refused to interfere with the privacy of the pregnant woman, to jeopardize her right to liberty and autonomy and to thereby enter into a moral and social debate that, in its view, would fall more appropriately to the elected legislature than to the courts. The Court affirmed that it is not up to the courts to amend the law in order to grant the unborn child rights or to protect it, but to Parliament to take a position on the matter through legislation, with respect for the fundamental rights set out in the Constitution.

The question of respect for “privacy” has given rise to two conflicting decisions with regard to the production of confidential records in the possession of third parties. The Court noted the similar recognition granted to this right by each system and addressed the class privileges attributed to certain types of private communication under the two legal traditions.

1.1.2 Disclosure of private records of sexual assault victims

- *L.L.A. v. A.B.* [1995] 4 S.C.R. 536

In addition to raising a jurisdictional question, *L.L.A. v. A.B.* deals with the nature and scope of the production to the defence of records relating to social and psychological care following a sexual assault that are in the possession of third parties. The Court noted that these confidential records, which give rise to a reasonable expectation of respect for their private nature, include medical and therapeutic records (such as those involved in this case), school records, private journals, and social workers' activity logs.

The Court refused to recognize a class privilege with respect to the protection of the privacy of such records but favoured looking at each case individually, as it was doing with this one. At the constitutional level, it then became a matter of striking a balance between the values that justify recognizing a privilege in the particular case in question and those that support the production of records. The constitutional values at play in this context are the right to make full answer and defence, the right to the protection of privacy and the right to equality without discrimination, which are studied in depth in *O'Connor* [1995] 4 S.C.R. 411. The Court noted simply that respect for privacy is an interest protected by the Canadian *Charter* as well as by the common law, and that the right to such protection is also recognized in Quebec by the *Civil Code* and the *Charter of Human Rights and Freedoms*.

L'Heureux-Dubé J. reviewed the privileges that have been granted in Canada, the United States and the Commonwealth countries.

She noted that in Canada, very few communications are recognized as privileged either at common law or under statutory law. At common law, the solicitor-client privilege as well as the informer privilege are recognized, but are not absolute, the accused's right to make full answer and defence taking precedence in certain cases. By statute, communications between spouses are regarded as privileged in criminal and civil matters as well as under provincial legislation. Religious communications privilege has been recognized in the provincial legislation of Quebec and Newfoundland, and Quebec has recognized a statutory privilege in civil matters with regard to doctor-patient relationships.

Communications between counsellors and sexual assault complainants have not been recognized as privileged in Canada, either at common law or by statute.

In the other common law jurisdictions, in criminal matters, no generic privilege has been recognized for communications between a sexual assault complainant and their counsellor. In the United States this privilege does not exist at common law, and although some states have established a generic privilege for such communications, a number of them have been declared unconstitutional by the courts in those states because they interfered with the rights guaranteed to defendants by the Sixth and Fourteenth Amendments.

In the Commonwealth countries, such as England, Scotland, Ireland, New Zealand and Australia, privileges are classified according to whether the case is one of private law or whether the privilege is one of public interest immunity. In private law, no privilege applies to the professional relationship between a counsellor and a complainant who has been the victim of sexual assault, either at common law or by statute. As for communications between physician and patient, legislation grants them privilege only with regard to certain civil actions and it has not been extended to communications arising from consultations concerning sexual assault. In public law, public

interest immunity is granted on a case by case basis based on the facts, depending on whether the tests developed for it in the case law are satisfied.

- *R. v. O'Connor* [1995] 4 S.C.R. 411

The issues raised in *R. v. O'Connor* relate mainly, as in *L.L.A. v. A.B.*, above, to the production of therapeutic and medical records in the possession of persons other than the Crown prosecutor. At issue was an appeal from a decision of the British Columbia Court of Appeal, in the context of which the Court examined notably the notion of “right to privacy” from the standpoint of the common law, civil law and comparative law.

While the Court established that there was no such right in the case of confidential records held by the Crown prosecutor, since their confidential nature had been waived in order to prosecute the accused, it considered that the question arose when records in the possession of third parties were involved, and had to be appreciated in light of the balance to be achieved between the reasonable expectation of the privacy of such records and the accused’s right to make full answer and defence.

L’Heureux-Dubé J. noted that the Supreme Court had emphasized on a number of occasions the strong value placed on the protection of privacy in Canadian society. She highlighted this principle in the context of sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, and also emphasized its importance in the common law.

L’Heureux-Dubé J. cited Wilson J., who, she indicated, thoroughly examined in *R. v. Morgentaler* [1988] 1 S.C.R. 30 the connection between “liberty” and “security of the person” under the *Charter* on the one hand, and human “dignity” on the other. Wilson J. affirmed that “liberty” and “security of the person” mean a number of things but that an objective assessment of the provisions of the *Charter* demands that the “right to liberty” set out in section 7 be considered as “guarantee[ing] to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life.” (par. 111, *Morgentaler*, above, par. 171)

L’Heureux-Dubé J. affirmed that, while it was stated in *Reference re Motor Vehicle Act (British Columbia) S 94(2)* [1985] 2 S.C.R. 486 that “principles of fundamental justice” set out in section 7 of the *Canadian Charter* flow from the fundamental doctrines of the system of common law and sections 8 to 14 of the *Charter*, “[...] the terms ‘liberty’ and ‘security of the person’ must, as essential aspects of a free and democratic society, be animated by the rights and values embodied in the common law, the civil law and the *Charter*.” (par. 113)

The Court indicated that respect for privacy is also recognized in the *Civil Code of Quebec* at art. 35 and 36 as well as in the *Quebec Charter of Human Rights and Freedoms*, which states in section 5 that “Every person has a right to respect for his private life.”

Moreover, the common law has traditionally protected privacy through causes of action such as trespass and defamation. By way of example, in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, Cory J. observed that “reputation is intimately related to the right to privacy which has been accorded constitutional protection.” (par. 121)

The Court mentioned that this right has also been recognized in the United States, notably in the famous case of *Roe v. Wade* 410 U.S. 113 (1973), which states that the protection of privacy is a right expressly included in the term “liberty” as it appears in the Fourteenth Amendment, as well as in international documents such as the *International Covenant on Civil and Political Rights*, the

Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Among the rights and freedoms guaranteed, the concept of “dignity” is also a fundamental right that is expressed in both the *Canadian Charter of Rights and Freedoms* and in the *Quebec Charter of Human Rights and Freedoms*. The notion of “dignity” was raised in a recent civil liability case in the context of illegal strikes by employees of a hospital for the mentally disabled.

1.1.3 Rights of patients in the event of illegal strikes by hospital employees

- *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 S.C.R. 211

Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, which will be examined in greater detail in the section on civil liability, served as an opportunity for the Court to emphasize that the notion of “dignity” contained in section 4 of the *Quebec Charter* has the same scope as it is given in decisions based on the *Canadian Charter of Rights and Freedoms* that refer to “human dignity”. L’Heureux-Dubé J. indicated that the concept of “human dignity” had already been interpreted under the *Canadian Charter*, notably by Wilson J. in *R. v. Morgentaler* [1988] 1 S.C.R. 30, in which she had maintained that the *Charter* and the right to individual liberty guaranteed in it are inextricably linked to the notion of “human dignity”. She noted that this notion finds its expression in almost all of the rights and freedoms that the *Charter* guarantees.

Furthermore, the *Quebec Charter*, in addition to expressly enshrining the right to the safeguard of the dignity of the person in section 4, makes the notion of “dignity” a value that underlies the rights and freedoms that it in turn guarantees by stating in its preamble that “[...] all human beings are equal in worth and dignity, and are entitled to equal protection of the law”. The Court observed that section 4 seems to be cited mainly in defamation cases and that its application has been largely unexplored in Quebec in contexts such as the present case. The judge relied on the definitions given of the concept of “dignity” and on principles of large and liberal interpretation of human rights legislation to conclude that in this case, the safeguard of the dignity of patients was interfered with.

While fundamental freedoms are reflected at the constitutional level as well as in the various Canadian jurisdictions, the Supreme Court is of the view that not everything can be resolved through human rights legislation. On matters of procedural fairness and natural justice in particular it confirms that administrative law, based on public law, offers other avenues of redress. The common law thus constitutes throughout Canada the backdrop for seeking a legal solution, unless the legislation in question provides otherwise.

1.2 Administrative law

In *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988), Pigeon J. states at page 66: “In everything not related to property and civil rights, then, common law is the fundamental law in the Province of Quebec.”

However, while it is true that in Canada, in matters of public law—in criminal law as well as in administrative law—the common law applies as modified from time to time by legislation and case law, it is not always easy to establish the boundary between public law and private law. Beetz J. took note of this fact in the key administrative law case *Laurentide Motels Ltd. v. Beauport (Ville)* [1989] 1 S.C.R. 705 at pp. 721 and 726:

Because the common law makes, in principle, no distinction between public and private law, the identification of the “public” common law can be a difficult task. Nonetheless, because Quebec is a jurisdiction of two juridical regimes, the civil law and the common law, the identification must be made.

In any event, with regard to unjustified delays in proceedings before an administrative tribunal or questions of partiality and independence on the part of an administrative body, the Court refers to the rules of common law exclusively.

- *Blencoe v. British Columbia (Human Rights Commission)* [2000] S.C.R. 44

Accordingly, in *Blencoe v. British Columbia (Human Rights Commission)*, which dealt with unjustified delays in proceedings before an administrative tribunal in British Columbia, Bastarache J. noted that Parliament and the provincial legislatures were subject to the *Canadian Charter of Rights and Freedoms*. He cited *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624, confirming that the *Charter* applies just as much to entities that, although independent of government, exercise an authority conferred by legislation, as in the Commission’s case.

However, he maintained that in the present case the state-caused delay in the human rights proceedings initiated against the respondent did not interfere with the rights to liberty and the security of the person guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. He considered that it was administrative law that offered the appropriate remedy, since the time that had elapsed in the case constituted a denial of natural justice, even through the respondent’s ability to obtain a fair hearing was not compromised.

The Court affirmed that not all legal problems can be resolved by the Charter alone, since doing so would block the natural and necessary evolution of the common law and civil law in this country, and might suggest that possibly neither the Civil Code nor the *Quebec Charter* would apply in a similar situation in which the facts took place in Quebec.

- *2747-3174 Québec Inc v. Quebec (Régie des permis d’alcool)* [1996] 3 S.C.R. 919

2747-3174 Québec Inc v. Quebec (Régie des permis d’alcool) concerned a motion to have a decision of the *Régie des permis d’alcool* quashed for reason of a lack of impartiality and independence. The majority of the Court held that the *Quebec Charter* took precedence but L’Heureux-Dubé J. was of the view that the analysis had to be carried out on the basis of the rules of administrative law.

Gonthier J., who spoke on behalf of the majority of the Court, found that art. 23 of the *Quebec Charter of Human Rights and Freedoms* was applicable and quashed the *Régie’s* decision without invalidating that body’s incorporating act. He noted that art. 23 of the Charter establishes the right of any citizen to “[...] a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.” (art. 23)

Subsection 56(1) states that a “tribunal” includes “any person or agency exercising quasi judicial functions.”

The Court was of the view that the decision to revoke a permit on the ground of disturbance of public peace constituted the culmination of a quasi judicial process and that article 23 related to both penal and civil matters, the expression “rights and obligations” being common to civil matters even

though it could extend beyond them, and the expression “the merits of any charge brought against him” being a concept from the penal sphere.

L’Heureux-Dubé J., like the majority of the judges, found that the *Régie*’s decision should be quashed without invalidating its act of incorporation. However, she maintained that the case was a matter of administrative law and therefore had to be examined, not according to the methodology of civil law, but according to that of the common law since “administrative law, which is part of public law, is based on the common law in all Canadian provinces, including Quebec” (par. 76). She emphasized that this principle is very well established by the case law of Quebec and of the Supreme Court.

She referred to *Laurentide Motels Ltd. v. Beauport (Ville)* [1989] 1 S.C.R. 705, where the issue was the municipality’s negligence in providing fire protection services, and reiterated the opinion she issued on that occasion:

The *Quebec Act of 1774* sealed the fate of the two major legal systems that would govern the law applicable in Quebec: French civil law as it stood before 1760 with its subsequent amendments in Quebec for everything relating to property and civil rights, and the common law as it stood in England at that time, and as subsequently amended, for what related to public law. (*Laurentide Motels*, par. 82, p. 737)

She cites M^e Louis Philippe Pigeon (*Drafting and Interpreting Legislation* (1988) at pp. 65-66), also mentioned in that judgment:

[...] English law is the basis of municipal and school law, and of administrative law generally. Our Court of Appeal rendered a very important decision on this point: *Langelier v. Giroux*, 52 B.R. 113 (Que.).

[...]

The judgment lays down an extremely important principle: in matters of public law in the Province of Quebec, the basic law is English law. Why? Because in keeping with the rule that general law is not derogated from beyond what is expressed, application of common law extends to all that is not formally excluded. (*Laurentide Motels*, par. 81-82, p. 738)

She goes on to indicate, repeating the words she used in that judgment:

[...] the common law which applies in Canada in the area of public law, in criminal as in administrative law, in the absence of legislation excluding it, is the common law as subsequently amended by statute and case-law. (*Laurentide Motels*, par. 82, pp. 739-740)

According to the approach advocated by L’Heureux-Dubé J. in this case, it is necessary to analyze, identify and set out the applicable common law, and then specify the effect of quasi-constitutional statute law (the *Quebec Charter*) on the common law. She noted, however, that when the common law is codified the resulting legislation takes precedence, in Quebec as well as elsewhere in Canada.

Agencies that perform quasi judicial or administrative acts, such as the *Régie*, are subject to the duty of impartiality that is part of the common law rule *nemo iudex in propria sua causa debet esse*. According to L’Heureux-Dubé J., the *Régie* violated this rule by demonstrating that it was “biased on an institutional, organizational level”.

She concluded that the *Quebec Charter* had pre-eminence over the common law because of its quasi-constitutional status, but that section 23 and subsection 56(1), which are relevant to the case at bar, were not applicable. L'Heureux-Dubé J. indicated that a “modern” interpretation approach must be adopted and that the method based on the “ordinary meaning of words”, which is more suited to technical fields such as tax law, must be abandoned. The modern approach is to consider the text, the context, the other provisions of the Act, the provisions of other Acts *in pari materia* and the legislative history in order to determine the legislator’s intention.

According to this approach, the intention of the legislator that emerges when section 23 and subsection 56(1) of the *Quebec Charter* are read together is to limit the scope of the expression “quasi judicial” to “matters of penal significance”. The *Régie*’s decision to revoke a liquor permit did not fall into the category of “matters of penal significance”, which meant that the *Quebec Charter* did not apply in the case. According to l'Heureux-Dubé J., the case was a matter of administrative law, and thus common law, and consequently the motion in evocation (art. 846 *Code of Civil Procedure*) was justified and must be allowed in the circumstances, and the *Régie*’s decision quashed.

While the Court affirmed that the common law is applicable to all persons when matters of public law are involved, in matters of property and civil rights—such as civil liability, family law and contracts—it confirmed that every province has an exclusive right to legislate under the terms of the Constitution itself, and sets out the principles that apply according to the jurisdiction.

In Quebec, the Civil Code prevails in constituting the basic law, applicable to all persons, and thus serves to complement specific statutes relating to the various matters it covers. Elsewhere in Canada, it is the common law that complements provincial statutory law.

2. Civil liability

Civil liability is a broad area that has been addressed a number of times by the Supreme Court. In terms of the application of private law, it is the exclusive jurisdiction of the provinces. On a number of occasions, the Court has taken the opportunity to compare the concepts of each legal system according to the specific situations it was dealing with, regardless of the jurisdiction in which the case originated. It tries to draw parallels between the specific concepts in the different legal systems and it occasionally relies on the principles of one to support its position in resolving problems in the context of the other.

The decisions made in the seven years under review with respect to civil liability have essentially dealt with limitation periods, negligence and damages.

2.1 Limitation Periods

The following two decisions address the issue of limitation periods in completely different areas. The first decision gives force of law to the fact that the *Civil Code of Quebec* applies to all persons in matters falling under private law, including legal persons established in the public interest such as municipalities. The second constitutes a determination of principle, which raises the issue of the “choice of law rule” in matters of private international law and the common law rule whereby limitation periods are a matter of procedure focused on enforceability of rights, rather than substantive rules that extinguish rights, as in the case of civil law.

- *Doré v. Verdun (City)* [1997] 2 S.C.R. 862

In *Doré v. Verdun (City)* the facts of which took place in Quebec, the *Civil Code of Quebec* prevailed over the *Cities and Towns Act* (section 585 C.T.A.), which imposed a requirement that a notice be sent within fifteen days of the date of an accident in order to bring an action seeking damages for personal injury against a municipality. Art. 2930 of the *Civil Code of Quebec* provides that the limitation period in personal injury cases is three years.

Gonthier J. quoted Baudouin J.A., emphasizing that the *Civil Code of Quebec* is applicable to all persons in matters of private law, even to municipalities, and that its mandatory, public policy nature means that it takes precedence over their specific incorporating statutes as well as those that apply to them:

Thus, the *Civil Code of Quebec*, like the *Charter of rights and freedoms*, is a fundamental law. It is the *jus commune* applicable to everyone, even legal persons established in the public interest. (par. 6)

Gonthier J. indicated that, unlike statute law in common law jurisdictions, the Civil Code is not a law of exception and this fact must be taken into account in its interpretation. It is the *jus commune* of Quebec, and thus the foundation of the other statutes dealing with matters that it relates to and, in this respect, it must be interpreted broadly so as to favour its spirit over its letter and enable its purposes to be achieved. The Court indicated that a provision in the Code can thereby limit the application of the provisions of particular Acts, even when they apply to municipalities.

Thus, it concluded that “(p)rescription is essentially a matter of private law” (par. 29) and that the Quebec legislature expressed its clear and specific intention, through art. 2930 C.C.Q., to make this provision mandatory and a matter of public policy.

- *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon* [1994] 3 S.C.R. 1022

The decision in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon* deals with the matter of automobile accidents involving residents of different provinces.

La Forest J. was of the view that the rule of private international law that should apply in matters of tort liability should no longer be the “choice of law rule” but rather the law of the place where the incident occurred (*lex loci delicti*). He indicated that, following European tradition, Quebec adopted the *lex loci delicti* approach in its *Automobile Insurance Act* and in the Civil Code (art. 6 *Civil Code of Lower Canada*, now art. 1356 C.C.Q) whereas the common law tradition does not support the territoriality principle, but rather the one whereby courts apply their own laws to wrongs committed in another country (*lex fori*). He maintained that a strict rule is justified over an optional one given Canada’s constitutional situation, and, furthermore, that applying the law of the place where the incident occurred (*lex loci delicti*) would ensure that an act committed in one place would have the same legal consequences throughout the country, thereby discouraging forum shopping and preserving Canadians’ mobility.

On the subject of limitation periods, the judge maintained that they constitute a substantive rule that effectively extinguishes a right, rather than a rule of procedure aimed only at enforceability of the right. Consequently, based on the *lex loci delicti* rule, limitation periods must be consistent with the law of the place where the tort occurred rather than the law of the place where the court is sitting.

Common law has always considered limitation periods as procedural rules, whereas most civil law countries regard them as substantive. The judge was of the view that the common law doctrine

has no place in a modern context, and that the courts have already started to put an end to the myth that they are procedural, and to reduce the application of the common law rule not only in the field of private international law, but in other fields as well.

While limitation periods in matters of civil liability fall under the substantive law of each province, the evidentiary rules governing liability for negligence also vary according to jurisdiction, with some exceptions set by the Supreme Court in the interest of symmetry.

2.2 Negligence

With respect to negligence, the Court briefly emphasized the analogy between the legal systems regarding of certain elements of proof required to determine liability. In particular, it addressed the standard of care and causation. In both of the following cases, which came from common law courts, the Court drew similarities with the principles of civil law that are applicable in the context of decisions made on appeal from Quebec courts.

- *Ryan v. Victoria (City)* [1999] 1 S.C.R. 201

In *Ryan v. Victoria (City)* the Court established the principle that railway companies would be bound by the rules governing the *jus commune* in question of the jurisdiction in the matter of accidents that raised issues of their liability. It specified that these rules were similar and that these companies fell under the jurisdiction of one of the other of the legal systems.

For more than 90 years, railway companies had benefited from a “special rule” at common law which limited the “duty of care” they owed to the public. In other words, as long as they complied with the obligations set out in applicable statutes, regulations and administrative orders, they had the duty only to act in a reasonable manner. But the Court stated that this rule can no longer be justified in principle and that meeting a statutory standard of care can no longer abrogate or supersede the duty to comply with the common law standard of care.

Major J. relied on the decision by Pratte J. in a similar matter applicable in Quebec, *Canadian National Railway Co. v. Vincent* [1979] 1 S.C.R. 364. He indicated that “Although Vincent arose in the context of Quebec civil law, the reasoning of Pratte J. in that case is instructive, particularly since the common law standard of care is analogous to the requirement of reasonable prudence under the Civil Code.” (par. 37)

Pratte J. wrote in that case that, although the railway company had complied with the special statutory and regulatory provisions to which it was subject, this did not exempt it from the ordinary law of civil liability, which is to say it could be found guilty of negligence under the Civil Code.

Major J., who delivered the judgment for the majority in the case at bar, came to the same conclusion. He stated that compliance with a statutory standard of care does not abrogate or supersede the duties of railway companies to comply with, here, the common law standard of care for negligence. The railway company had to prove that it had acted as a reasonable and prudent person would have under similar circumstances.

- *Arndt v. Smith* [1997] 2 S.C.R. 539

Arndt v. Smith is the case of a medical malpractice suit in which there was a failure to properly inform a pregnant patient who had contracted chicken pox while pregnant of the risks to her fetus. This case was an appeal of a judgment by the British Columbia Court of Appeal. The majority of

judges found that, in order to establish negligence, it was necessary to apply a combination of objective and subjective factors in order to determine whether the failure to inform had actually caused the harm. They relied on a modified objective test set out in *Reibl v. Hugues* [1980] 2 S.C.R. 880. This test requires that the court consider what a reasonable patient under circumstances similar to those of the plaintiff would have done if faced with the same situation.

McLachlin J. was of the view that the issue of causation had to be resolved in light of the patient's "subjective" belief as to the course she would have followed if she had been informed, which includes objective elements such as her situation and her attitude at the time when she made her decision and the medical advice she was given at that time.

She cited Gonthier J. in *Laferrière v. Lawson* [1991] 1 S.C.R. 541, an appeal from Quebec, and specified that although this ruling arose in the context of civil law, Gonthier J., writing for the majority, made extensive reference to the common law, suggesting that the principles discussed may be equally applicable in other provinces. Gonthier J. indicated that, in civil law, causation "must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume" (par. 43, *Laferrière v. Lawson*, at 609).

However, even if establishment of the elements of liability for negligence is an area where comparisons between the two legal systems can easily be made, the same cannot be said about damages for economic and non-economic losses, where there are some difficulties of principle.

2.3 Damages

The common law courts have always been somewhat reluctant to recognize compensation for economic loss arising from negligence by a third party, or compensation for non-economic losses that arise to the victims of negligence indirectly. On the one hand, the courts have been of the view that economic interests did not warrant the same protection as did the human body or property, and on the other hand, non-economic losses were simply not recoverable under traditional common law principles. In civil law jurisdictions, in France as well as in Quebec, there is no such distinction of principle linked to compensation, since compensation *in integrum* is the rule. Thus, the law does not make a distinction between the types of damages and compensation depends only on proof of the existence of fault, loss, and a causal link between these two elements.

In terms of exemplary damages, it is the civil law that has historically been resistant towards them, since the punitive and deterrent effect of this compensation more properly falls under criminal liability. However, Quebec civil law has recently opened the door to this type of compensation, albeit in a more limited manner. The common law has no reluctance to award exemplary damages.

The following decisions examine these principles in different contexts, specifically in maritime law, and show how they are applied, depending on the jurisdiction. The Court also discussed other rules, which were subsidiary to the main issue, and analyzed them according to the different legal systems.

The decisions listed are grouped into two categories, that of economic loss suffered as a result of damage to the property of a third party (contractual relational economic loss) and that of non-economic and exemplary damages.

2.3.1 Damages for economic loss suffered as a result of damage to the property of a third party (contractual relational economic loss)

- *Bow Valley Husky (Bermuda) LTD. v. Saint John Shipbuilding* [1997] 3 S.C.R. 1210

Bow Valley Husky (Bermuda) LTD. v. Saint John Shipbuilding deals with a claim for damages for economic loss suffered as a result of the shutdown of a rig for repairs required after a fire that was caused by third parties. The appeal also raised the issue of principles applicable to contributory negligence in maritime law as well as to the rules of joint and several liability and contribution in terms of recovery.

McLachlin J. stated that economic loss suffered as a result of damage to the property of a third party, frequently referred to in common law as contractual relational economic loss, has traditionally been considered as generally not giving rise to compensation.

She proceeded to do a comparative review of the different legal systems. In England, such compensation can never be awarded, whereas:

In the civil law jurisdictions of Quebec and France, by contrast, the law does not distinguish between loss arising from damage of one's own property and loss arising from damage to the property of another. If civil law judges restrict recovery, it is not as a matter of law, but on the basis of the facts and causal connection. (par. 44)

She indicated that the law in the common law provinces of Canada falls somewhere between these two extremes. While treating recovery in tort of contractual relational economic loss as exceptional, there are cases in Canadian jurisprudence where it has been accepted that it may be recovered. The leading case on this point is *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021, which recognizes that if the person claiming the damages was in a joint venture with the person whose property was damaged, the plaintiff may claim consequential economic loss flowing from that damage.

The Court applied the tests established by the case law. It concluded that a duty of care arose between the parties because the link between them was close enough that the defendants could anticipate that the plaintiffs would suffer loss if the rig ceased to operate. Consequently, the defendants had the duty to warn the claimants about the use of the product that caused the fire. However, the Court held the defendants not liable since, if they had the duty to warn of the risk, they would be faced with a deluge of lawsuits, which could be initiated by an unlimited number of persons. The Supreme Court has always viewed the impossibility of delimiting the number of potential plaintiffs as a bar to the finding of liability in tort cases.

On the question of whether contributory negligence is a bar to recovery, the Court was of the view that this issue fell under maritime law and so should be settled in accordance with maritime law rules under the exclusive jurisdiction of Parliament, since that area of law is not within the jurisdiction of the provinces.

The Court specified that, in the absence of federal legislation concerning contributory negligence in matters of maritime torts, as in the case at bar, the common law principles embodied in Canadian maritime law remained applicable. This was an appropriate case for making incremental change to the common law in compliance with the requirements of justice and fairness, in order to "keep the maritime common law in step with the dynamic and evolving fabric of our society." Thus, the Court concluded that there was no reason to maintain the principle of contributory negligence as

a bar to recovery. The common law provinces of Canada as well as Quebec (art. 1478 C.C.Q.) have abolished this rule in respect of non-maritime torts and have replaced it with a rule of apportionment. In England, Australia and the United States apportionment is the rule in matters of maritime tort.

The Court also introduced a change in the common law for maritime torts in connection with apportionment of damages. It pointed to the rules of joint and several liability applicable to the defendants, subject to the rights of each of them to seek contribution from the other in the case of payment of an amount greater than that corresponding to its degree of fault. These principles are also consistent with legislation in most of the provinces and with the *Civil Code of Quebec* (art. 1523 and 1526 C.C.Q. for joint and several liability and art. 1536 C.C.Q. for contribution).

The following decisions deal with compensation for non-economic losses, in particular compensation for loss of guidance, care and companionship, in maritime law and other contexts. The Court's willingness to recognize certain non-economic losses in common law should be noted, since this is more consistent with the civil law tradition than with English law.

The issues raised in these decisions are the powers of testamentary executors in the case of maritime accidents resulting in death, losses flowing from loss of life or life expectancy, the rights of parents and the evidentiary principles applicable to class actions for civil liability. They also constitute leading cases in the area of exemplary damages, which are now recognized in Quebec.

2.3.2 Damages for Non-Economic Loss and Exemplary Damages

- *Ordon Estate v. Grail* [1998] 3 S.C.R. 437

At issue in *Ordon Estate v. Grail* were damage claims stemming from injuries and death suffered by pleasure boat occupants in boating accidents.

The Court observed that maritime law constitutes an autonomous body of federal law based on English admiralty law of 1934 as subsequently amended by Parliament and Canadian case law. That law applies uniformly to all provinces and it is not constitutionally acceptable to refer to provincial statutes in maritime negligence actions. The Court held that maritime law must nevertheless follow the evolution of society as the civil law and common law have done.

The Court found that English maritime law (incorporated into Canadian maritime law in 1934, as noted) was an amalgam of principles deriving in large part from both the common law and civil law traditions and that, although most of the rules of maritime law, including those of tort, are founded upon English common law, it is advantageous to take into account the experience of other countries, in particular those of civil law jurisdiction.

Thus the Court held that although, historically in common law, damages awarded for fatal accidents were for pecuniary losses only and non-pecuniary losses were not recoverable, the courts should change these rules to permit this type of action. The Court found that the non-statutory rules should be amended to keep maritime law in step with modern understandings of fairness and justice so that dependants may be compensated for loss of guidance, care and companionship of a spouse, father or mother, child or other person who has been killed or injured in a boating accident.

It was also the Court's view that Canadian maritime law should be reformed to allow an executor to bring an action in the name of the deceased that the deceased could have brought had he or she lived. It noted that this change was readily justified since all common law provinces had adopted statutory measures to this effect, the *Civil Code of Quebec* had long since made such

provision (articles 596 and 607 C.C.L.C., now article 625 C.C.Q.), and the practice is common in common law and civil law countries around the world.

- *Augustus v. Gosset* [1996] 3 S.C.R. 268

Augustus v. Gosset [1996] 3 S.C.R. 268 had its origins in Quebec in the death of a 19-year old black youth who was shot by a police officer. The victim's mother claimed compensatory damages for *solatium doloris* (consolation of mental anguish) under articles 1053 and 1056 C.C.L.C. and damages for loss of life expectancy under sections 1 and 49 of the *Quebec Charter of Human Rights and Freedoms*. The Court alternatively considered whether it was appropriate in this case to award exemplary damages in accordance with the principles enunciated in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 S.C.R. 211 (discussed below).

L'Heureux-Dubé J., writing for the Court, described the origins of *solatium doloris* in Quebec civil law and emphasized that the concept was no longer disputed before the Supreme Court. She confirmed that, with respect to non-economic losses in Quebec, reference must be made to French law, not English law, and that, unlike the common law, the civil law grants compensation to an indirect victim for non-economic losses resulting from a person's death. The Court noted that, in civil law, any loss, whether pecuniary or not, is compensable if it is proven that an injury was suffered by the victim and there was fault on the part of the tortfeasor.

The Court specifically states that *solatium doloris* is a type of compensable non-economic loss and that it includes all losses that at civil law are considered "extrapatrimonial", both immediate grief and the loss of future companionship, resulting from the death of a loved one.

To date, the Quebec courts, believing themselves bound by the rule that *solatium doloris* did not constitute a compensable loss (following the historic judgment in *Canadian Pacific Railway Co. v. Robinson* (1887) 14 S.C.R. 105), have not been inclined to award compensation for all losses suffered. The Court noted the striking differences that exist between the non-pecuniary damages awarded in certain situations and the usual award to parents of a child who loses his or her life owing to the fault of a third person.

The Court's judgment in *Robinson* concerned the uniform application in Canada of the non-recovery for *solatium doloris* rule and reflected the traditional common law reluctance to recognize non-pecuniary losses. This decision, which has been characterized as a historical error, but one that is no longer relevant today given the absence of a provision equivalent to article 1056 C.C.L.C. in the *Civil Code of Quebec*, has nevertheless left its mark on most of Quebec jurisprudence. Despite the prior and contemporaneous Quebec judgments that had held that damages could be awarded for *solatium doloris*, most Quebec courts have long refused to acknowledge this as a ground for compensation, instead making awards for the pecuniary consequences of grief such as loss of companionship or deterioration of health due to a person's death.

And yet the Court emphasized that French law has always recognized that non-economic losses resulting from the death of a relative were compensable. Belgium and Scotland have also adopted the principle as well as a number of common law jurisdictions, including certain states in Australia and the United States.

Elsewhere in Canada, in the common law jurisdictions, the right to claim damages for the death of a third party is provided for by specific statutes, which are interpreted as covering only pecuniary

damages. Compensation for non-pecuniary losses is provided for in certain statutes, in particular in Alberta and New Brunswick.

However, the Court emphasized that Quebec courts, like those of the other provinces of Canada, have always refused to recognize the losses suffered as a result of loss of life or life expectancy as granting entitlement to compensatory damages. Since the “right to life” has been interpreted as ending at death, it is inalienable.

Compensation for violation of parental rights, that is to say the right to maintain and continue a parent-child relationship, was also rejected by the Court since this right is recognized in neither the *Canadian Charter of Rights and Freedoms* nor the *Quebec Charter of Human Rights and Freedoms*.

As for exemplary damages, the Court concurred with the Court of Appeal's judgment refusing to award such damages on the ground that unlawful interference with the right to life, protected by the *Quebec Charter*, had not been committed intentionally within the meaning of the second paragraph of section 49 of the Charter. The Court of Appeal had held that the only interpretation of the term “intentional” that could be accepted, in view of the historical context and specificity of the civil law, is that the interference was actually intentional, which does not encompass reckless or negligent interference.

The notions of “unlawful and intentional” interference are interpreted in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* (above), which the Court considered in this case. For the interference to be characterized as unlawful and intentional, the person who commits the unlawful interference must have “a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or [...] acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause”. (par. 77, *St-Ferdinand*, par. 121)

In this case, the Court held that the interference was not intentional and that using a weapon to keep a suspect under control at a distance was standard police practice, the consequences of which in this case could not be characterized as “immediate and natural” or even as “extremely probable”.

- *Béliveau St-Jacques v. Fédération des employées et employés de services publics Inc.* [1996] 2 S.C.R. 345

In *Béliveau St-Jacques v. Fédération des employées et employés de services publics Inc.*, the Court had to determine whether a victim of harassment in the work place who had received compensation under the *Act respecting industrial accidents and occupational diseases* (section 438 *AIAOD*) for having suffered an employment injury related to the events could also bring an additional civil liability action based on the *Quebec Charter of Human Rights and Freedoms* (section 49). The Court considered the case of compensatory damages and exemplary damages.

Gonthier J., writing for the majority, found that a civil liability action under section 49 of the Charter did not deviate from the *jus commune* in this matter. He held that the Charter does not afford a new remedy, either compensatory or exemplary; it constitutes an overlap with the *jus commune* and, in that sense, does not allow double compensation for the same fact situation. The *AIAOD* provides for an exclusive compensation scheme similar to that of British Columbia and other Canadian provinces. It is a statutory insurance scheme of no-fault collective liability, which replaces the former systems of individual civil liability based on fault. Its main purpose is compensation and thus final settlement of claims.

L'Heureux-Dubé J., dissenting in part, agreed that the no-fault compensation scheme constituted by the *AIAOD* shares the same compensatory purpose as the first paragraph of section 49, even if the *AIAOD* compensates the victim only partially (*inter alia* because compensation for non-economic losses does not appear possible under the act). She concluded, as did her colleague on this point, that the *AIAOD* does not permit the existence of a parallel compensation scheme. In her view, however, there is no overlap between the exemplary damages provided for in the second paragraph of section 49 and the *AIAOD* and the general legal framework. The punitive, deterrent damages under section 49 would thus be available to the victim, in L'Heureux-Dubé J.'s view, if there were proof of the elements of liability stemming from the general principles of civil law liability (under article 1053 *C.C.L.C.*, today article 1457 *C.C.Q.*)—that is, fault, loss, and causation—as well as the “unlawful and intentional” nature of the interference with the right contemplated by the second paragraph of section 49.

The Supreme Court bench agreed that the concept of exemplary damages has always been foreign to the civil law. Under the *Civil Code of Lower Canada*, now the *Civil Code of Quebec*, the system of delictual liability is confined to the compensatory aspect of liability, and compensation is based on the loss suffered and the earnings lost. Punishment and deterrents fall within the domain of criminal liability.

However, like the common law jurisdictions, the Quebec legislature has recently permitted exemplary damages to be awarded in certain cases. According to article 1621 *C.C.Q.*, exemplary damages may be awarded, on certain conditions, under certain specific social statutes. However, this type of remedy has not been raised to the level of general principle and remains an exception in Quebec civil law. France has categorically rejected the notion of exemplary damages since the seventeenth century. Compensation for loss is still the only recognized goal of damages in that country.

- *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 S.C.R. 211

In *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, the Court found that the inconvenience caused by the illegal strikes by employees of the Hôpital St-Ferdinand in Quebec constituted a moral prejudice under the general rules of civil liability, but also interfered with the patient's “dignity”, a right recognized by the *Quebec Charter of Human Rights and Freedoms* (*R.S.Q.*, c. C-12, article 4). More particularly, the Court considered the rules of evidence applicable to class actions, the evaluation of non-economic loss and the award of exemplary damages under the *Quebec Charter*.

L'Heureux-Dubé J., writing for the Court, held that the basic principles of evidence in civil matters are applicable to every civil law action in Quebec, including class actions. Fault, loss and causation must be proved on the balance of probabilities for all the members of the group bringing the action. The Court emphasized that the *Code of Civil Procedure* provided no exception to these principles, as Book Nine merely adapts to class actions the ordinary rules of bringing an action.

The Court held that proof by presumption, that is to say indirect or circumstantial proof, is completely recognized in the civil law tradition and applies to class actions as it does to any other civil action. It found that, in Quebec, as in France, two types of presumption are recognized: legal presumptions, which are established by the legislator, and presumptions of fact, which are left to the

discretion of the court (article 1238 C.C.L.C., now article 2846 C.C.Q.). In Quebec, however, the courts have required that presumptions of fact be significant, precise and corroboratory.

With respect to non-economic loss, the Court referred to the trilogy *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229, *Arnold v. Teno* [1978] 2 S.C.R. 287, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* [1978] 2 S.C.R. 267, and to its decision in *Lindal v. Lindal* [1981] 2 S.C.R. 629, which was added subsequently. These cases established the principles of compensation for non-economic loss and the method for computing damages.

In *Andrews*, Dickson J. described three methods for analyzing non-pecuniary losses. First was the “conceptual” approach, which treats each human faculty “as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it”. French law favours this evaluation method in practice and Quebec jurisprudence is replete with examples of this kind.

Second, the “personal” approach values the injury in terms of the loss suffered, and compensation is based on a subjective evaluation of the pain and inconvenience caused by the injuries suffered by the victim. In Quebec, this approach is sometimes used to determine the extent of moderate and minor losses.

Lastly, the Court's “functional” approach assesses the compensation required to provide the injured person “with reasonable solace for his misfortune”. This approach was adopted in the specific circumstances of each of the cases of the trilogy cited above as well as in *Lindal*. In Quebec, writers do not agree as to whether this approach should be applied and the courts are not inclined to use this method of calculation which the common law jurisdictions appear to favour.

In the case at bar, L'Heureux-Dubé J. chose to divide the question in order to consider it first from the standpoint of justification for the right to compensation for non-economic loss, then from that of evaluation of that loss. With respect to justification for the right to compensation, L'Heureux-Dubé J. held that the objective conception of loss should be adopted in civil law since it is much more consistent with the fundamental principles of Quebec civil law. The purpose of the system of civil liability in Quebec is to compensate loss fully (*restitutio in integrum*), which means that there will be compensation for loss suffered on account of wrongful conduct, regardless of whether the victim is able to derive any enjoyment from it, or is even aware of it (compensation for non-economic loss is expressly provided for in article 1457 C.C.Q.). The subjective conception of compensation for moral prejudice has no place in civil law since it is conditional on the victim's ability to benefit from pecuniary compensation. L'Heureux-Dubé J. held that, on this point, the applicable rule in civil law might be different from that prevailing in common law, but she found there was no reason to decide the matter in this case.

As to evaluation, L'Heureux-Dubé J. contended that the three approaches complemented each other and should apply jointly and thereby encourage a personalized evaluation of the non-economic loss. Although Quebec courts had not uniformly adopted the “functional” method, in her view, it was apparent from Quebec case law and doctrine that there was an interaction among the three evaluation methods. She concluded that the “functional” approach, as defined in the trilogy and *Lindal*, should be used to determine the quantum of damages for non-economic loss. In support of this conclusion, she cited Dickson J. in *Andrews*, supra, at 262, indicating that this method seeks to calculate the “physical arrangements that can make the victim's life more endurable [...] accepting that what has been lost is incapable of being replaced in any direct way.”

Considering exemplary damages, L'Heureux-Dubé J. found that the inconvenience caused by the employees' illegal strikes constituted not only non-economic loss under the general rules of civil liability (article 1053 *C.C.L.C.*, now article 1457 *C.C.Q.*), but also “unlawful and intentional” interference with the hospital patients' right to dignity within the meaning of the second paragraph of section 49 of the *Quebec Charter*, a right protected by section 4 of the Charter.

The interference was “unlawful” because the losses suffered by the patients resulted from wrongful conduct under article 1053 *C.C.L.C.* A person's conduct is characterized as wrongful if he or she violates a standard of conduct considered reasonable in the circumstances or a standard set out in the Charter. The same reasoning was followed by Gonthier J. in *Béliveau St-Jacques v. Fédération des employées et employés de services publics Inc.* (above, par. 120).

Interference is “intentional” when the person who commits it knows and desires its result. This is not a traditional civil law notion of “gross negligence” which encompasses the simple negligence or recklessness of the person who commits it. Like Gonthier J. in *Béliveau St-Jacques v. Fédération des employées et employés de services publics Inc.*, above, par. 126, L'Heureux-Dubé J. explained that this is so because exemplary damages under the Charter are, as in common law, intended to punish and deter certain conduct rather than compensate as the new article 1621 *C.C.Q.* moreover provides.

Canadian courts recognize that compensation in civil liability actions must adapt to the necessities of modern life. Family law is also subject to this imperative, in addition to the significant changes under way in marital life and the increasing mobility of individuals. The international conventions to which Canada is a party already reflect this reality.

3. Family law

Family law is a field in which there is extensive litigation, although mostly at levels lower than the country's highest court. The Supreme Court does however hear cases when the issue is the interpretation of concepts in international documents that Canada is a party to, or to discuss general principles such as the intervention of the state in matters of private law. In the judgments discussed below, the principles governing child protection, custody and support are considered in specific contexts.

3.1 Right of Custody

The first two cases discussed in this section involve the principles governing the concept of “child custody” where the facts involve more than one country.

The Court has observed that the right of custody has evolved in the same direction in both systems of law. The principle is that the custodial parent, under both systems, has the right of custody, which includes the right to choose the child's place of residence, although this question arises in the context of material change in the child's situation.

The third decision raises the question of the *parens patriæ* authority of the state and of the common law courts with respect to the protection of children.

- *Gordon v. Goertz* [1996] 2 S.C.R. 27

In *Gordon v. Goertz*, the Supreme Court analyzed the concept of child custody in the context of the custodial parent's change of residence. In that case, the Court held by a majority decision that the mother would retain custody of the child despite her intention to move to Australia and that the father would be able to exercise his visiting rights not only in Australia but also in Canada.

McLachlin J., writing for the majority, held that it must first be proven that a child's situation has undergone a material change for a judge to be able to render a decision based on the best interests of the child in light of the new situation.

While subscribing to McLachlin J.'s decision, L'Heureux-Dubé J. emphasized that the notion of custody was no longer a controversial issue in Canadian law, relying on a certain number of uncontroversial basic premises to justify her analysis. She concluded that the decision as to the child's place of residence was within the custodial parent's powers and, on this point, disagreed with McLachlin J.'s view that evidence of the existence of a material change could undermine this right.

L'Heureux-Dubé J. briefly reviewed the concept of custody at common law, in the *Divorce Act* and in provincial statutes, as well as under the *Civil Code of Quebec*, and also considered the relevant international instruments and the principles applicable in other jurisdictions.

After reviewing the common law, she concluded:

Thus, custody at common law has been historically recognized as a wide and inclusive concept which grants the person entrusted with it, *inter alia*, the power to choose where the child shall live, subject to the right of the non-custodial parent to oppose such choice by seeking a variation order of the custody or access terms and such other limitations as may be warranted on the facts of the case.

With respect to the *Divorce Act*, she contended that the notion of custody is well established in case law and among Canadian writers and that the act gives no reason to doubt that Parliament had any intention but to attribute to the notion of custody the definition recognized at common law. She held that jurisprudence in Quebec and other jurisdictions recognizes that the right to decide on a child's place of residence is included in the powers of the custodial parent as an accessory to custody.

The definitions of custody given in provincial statutes are also consistent with the notion of custody accepted in common law and under the *Divorce Act*.

The *Civil Code of Quebec* does not define the notion of custody, although it is generally recognized that the parental authority includes the right to decide on the child's place of residence. The person who has custody of the child in a case of divorce or separation has exclusive decision-making power in this matter and with respect to all matters relating to the child. L'Heureux-Dubé J. referred to *W. (V.) v. S. (D.)* [1996] 2 S.C.R. 108, in which she conducted a detailed analysis of the notion of custody. She wrote:

That is not to say, however, that the non-custodial parent is deprived of all exercise of parental authority: so far as it is not incompatible with the rights of the custodial parent, the non-custodial parent must exercise his duties of supervision and education towards the child by means of the right to access [...]; (article 605 C.C.Q. (previously article 570)), as well as the right to refer any litigious matter relating to the exercise of the parental authority to the Court (article 604 C.C.Q. (previously article 653)).

She observed that, with respect to the right to choose a child's place of residence, custody is interpreted similarly in civil law, under international instruments and in other common law and civil law jurisdictions.

L'Heureux-Dubé J. emphasized that, in view of this exclusive power of the custodial parent, the onus is thus on the non-custodial parent to show that the move is not in the best interests of the child and that custody and visiting rights must therefore be changed.

- *V.W. v. D.S.* [1996] 2 S.C.R. 108

In *V.W. v. D.S.*, the Court considered the right of custody in relation to the Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983 No. 35. As the Convention's object is to give effect to the right of custody, the relocation of or failure to return a child in contravention of this right automatically triggers the mandatory return mechanism provided for by the Convention. Although what the Convention means by "rights of custody" must be determined independently of the domestic law of the jurisdictions to which it applies, the question of who holds the "rights relating to the care of the person of the child" or the "right to determine the child's place of residence" within the meaning of the Convention is determined in accordance with the law of the state of the child's habitual place of residence.

In Canada, all the provinces with the exception of Quebec have incorporated the Convention in a domestic statute. Quebec has enacted the *Act respecting the civil aspects of international and interprovincial child abduction*, R.S.Q., c. A-23.01, the purpose of which is to give effect to the Convention.

The notion of custody within the meaning of the *Civil Code of Quebec*, at common law (according to McIntyre J., in *King v. Low* [1985] 1 S.C.R. 87, at 93, the right of custody has evolved along similar lines in the two systems), and in the *Divorce Act* does not differ from the notion of custody as it is meant in the Convention and in the Quebec *Act respecting the civil aspects of international and interprovincial child abduction*. Under these various systems, the notion is given a broad meaning, independent of visiting rights, which encompasses, in particular, the right to decide on the child's place of residence.

In Quebec, the applicable test in custody matters, apart from cases of divorce and physical separation, is stated in article 30 *C.C.L.C.* (now article 33 *C.C.Q.*): "the child's interest and the respect of his rights". In cases of physical separation, the Court has a duty under article 569 *C.C.L.C.* (now article 514 *C.C.Q.*) to rule on custody of the children "in their interest and in the respect of their rights".

The Court held that it follows from this broad notion of custody that deciding on the child's place of residence is within the powers of the custodial parent, subject to the non-custodial parent's right to apply to the Court to vary the terms and conditions of custody and access after the child is removed.

It was held in this case that, since the child was domiciled or resided in Quebec with the father, under art. 70 of the Quebec *Code of Civil Procedure* and Quebec conflicts rules, the Superior Court had jurisdiction to hear the motion for custody of the child. The judge of first instance relied on the act (which incorporates the Convention) rather than on the *Civil Code of Quebec*, but this difference is of no consequence as the tests are the same in both.

The Court briefly considered the origins of the general powers of the Superior Court of Quebec which do not derive from the *parens patriæ* of the superior courts of the provinces as recognized at common law, but rather from article 46 *C.C.P.* Absent a specific statutory provision, this authority, for historical reasons, would fall exclusively to the Queen's representative, the lieutenant-governor.

- *Winnipeg Child and Family Services v. K.L.W.* [2000] S.C.J. No. 48

The *parens patriæ* authority of the state was also at issue in the Supreme Court's recent decision in *Winnipeg Child and Family Services v. K.L.W.*, which concerned child protection.

L'Heureux-Dubé J. emphasized that the state has assumed both the power and the duty to intervene to protect children's welfare because children are vulnerable and are unable to exercise their rights independently. This responsibility finds expression in the *parens patriæ* jurisdiction of the common law courts, and is also found in Book 1 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, and in every provincial and territorial child protection statute.

In this case, the appellant contested the constitutionality of a provision of the *Child and Family Services Act* which enabled Winnipeg Child and Family Services to apprehend a child without a warrant, even in the absence of an emergency, where it is satisfied that there are "reasonable and probable grounds for believing there is a child who is in need of protection".

Arbour J., in dissent, found that, even if the Court and child protection agencies exercise *parens patriæ* authority over children, the interest of society requires that government players not remove children from the custody of their parents without legal grounds. Arbour and McLachlin JJ., dissenting, concluded that the impugned provision of the *Child and Family Services Act* is incompatible with section 7 of the *Canadian Charter of Rights and Freedoms* since it interferes with the right to security of the person contrary to the principles of fundamental justice and is not justified, under section 1, in a free and democratic society.

L'Heureux-Dubé J., writing for the majority, held that, in view of the fact that the *Child and Family Services Act* provides for the removal of a child from that child's parents, it interferes with the right to security of the person. However, in the social and legislative contexts in issue in this case, this interference is in accordance with the principles of fundamental justice and does not violate section 7 of the Charter. The provision is therefore constitutional, and in the case at bar the intervention by the state was justified to protect the child.

3.2 Obligation of Support

- *Bracklow v. Bracklow* [1999] 1 S.C.R. 420

In *Bracklow v. Bracklow*, McLachlin J. held that a spouse has an obligation to support a sick or disabled ex-spouse in addition to the compensation to which the ex-spouse is entitled for losses resulting from the marriage.

The obligation of support in Canada is governed by the provisions of the *Divorce Act*. The civil and common law applied before that act came into force and still form the backdrop to it.

There are two competing theories regarding support. The first, which more resembles the common law and civil law conceptions that existed prior to the *Divorce Act*, and is based on a mutual obligation of support, emphasizes the interdependence created by marriage. The second, the clean-

break model, which is more consistent with the modern vision of the *Divorce Act*, emphasizes the independence of each party to the union.

Parliament and the provinces have recognized both models in their statutes. It is well-settled case law that compensation is the main reason for awarding support, but McLachlin J. found that the obligation to provide support can also be said to exist in certain circumstances where fairness requires it, as was the case in this instance.

In family law, certain principles have developed analogously in each of the traditions in Canada. In the law of contracts, the Court has held that, although this branch of the law must be interpreted under each of the legal systems, certain notions have been applied in a similar way in both. The court may therefore compare judgments from another jurisdiction in the search for a fair solution as a matter of interest.

4. Contracts

The law of contracts affords significant distinctions for comparison purposes. As the civil law is the *jus commune* of Quebec, certain public law provisions enacted by the civil code form a barrier to the freedom of contract that is generally the rule in the common law tradition.

Employment and insurance contracts are two specific forms of contract, and adhere to the general rules but are subject to their own conventions. The following judgments address the principles governing each and the specific rules of application in both civil and common law.

4.1 Contracts of Employment

- *Farber v. Royal Trust Co.* [1997] 1 S.C.R. 846

Farber v. Royal Trust Co. originated in Quebec and concerned constructive dismissal and resulting damages.

Gonthier J., writing for the Court, held that the doctrine of constructive dismissal is not a common law concept incorporated in the civil law. He recalled that the Supreme Court had repeated on many occasions, “The civil law is a complete system in itself; care must be taken not to adopt principles from other legal systems.” (par. 31)

He emphasized that, for a legal principle to be applicable in the civil law, it must above all be justified within the system itself. It may of course be interesting in some cases, such as the one at bar concerning constructive dismissal, to consider solutions applied to a problem in another legal system, but only from a comparative standpoint.

To support the contention that the principle of constructive dismissal had long been widely applied, he chose to cite a 1985 constructive dismissal case (*Lavigne v. Sidbec-Dosco Inc.* [1985] C.S. 26, p. 28) in which Hassan J. of the Superior Court of Quebec summed up the state of the law on the question:

Caution must be exercised in adopting unreservedly common-law concepts of contract in two cases arising under the Civil law, except where there is useful necessity and authoritative precedent. However, in the case of lease and hire of personal services, in Quebec, the doctrine of constructive dismissal has been recognized. (p. 28)

Gonthier J. then briefly reviewed the principles of constructive dismissal applicable in civil law and common law.

In Quebec, the contract of employment is governed by the civil law, in particular the Civil Code. Although the facts of the case occurred before the new code came into force, the Court emphasized that the *Civil Code of Quebec* did not appear to have amended the law applicable in this field.

The Civil Code provides that the general rules of contract apply to the contract of employment (article 1670 *C.C.L.C.*). A contract is binding between the parties as they are required to comply with their undertaking (article 1022 *C.C.L.C.*). The parties may not unilaterally amend the obligations which they have undertaken in the contract.

In the case of a contract of indeterminate duration, a party may terminate the contract unilaterally. If an employer terminates a contract, that action constitutes dismissal and the employee is entitled to reasonable notice of the breach of contract or to compensation in lieu of notice (article 1688 *C.C.L.C.*). Where an employer unilaterally and materially amends the essential conditions of an employee's contract of employment and the employee leaves his employment because he does not accept those amendments, the result is a "constructive dismissal" in view of the fact that there has been no formal dismissal.

Courts in the common law provinces have established that unilaterally imposing a fundamental or substantial amendment to an employee's contract of employment in contravention of the conditions of the contract constitutes a fundamental breach of that contract. That breach results in the termination of the contract and permits the employee to seek damages in lieu of reasonable notice for constructive dismissal.

Gonthier J. concluded, on the principle which he had previously established, that, in view of the similarity between the rules respecting constructive dismissal in the two systems of law, it is appropriate to consider the decisions of the courts in common law and civil law jurisdictions to determine what has been characterized as fundamental changes to a contract of employment resulting in its termination.

The courts in both Quebec and the common law provinces have characterized demotion, unilateral change in the method of computing remuneration and significant reduction of an employee's income imposed by the employer as constructive dismissal. The Court held in this instance that these three aspects were present and amounted to substantial changes to essential conditions to the contract of employment.

4.2 Contracts of Insurance

- *Chablis Textiles Inc. (Trustee of) v. London Life Insurance Co.* [1996] 1 S.C.R. 160

In *Chablis Textiles Inc. (Trustee of) v. London Life Insurance Co.*, the Court considered the temporal scope of suicide exclusion clauses in life insurance contracts. The case originated in Quebec.

Gonthier J. emphasized that, since the reform of insurance law in Quebec, suicide was no longer a legal basis for exclusion of risk. The insurer thus now had to exclude coverage in cases of suicide by agreement, but the scope in time of the exclusion clause was limited to two years, after which it could no longer have effect under article 2532 *C.C.L.C.* The common law imposes no such limit, as the will of the parties expressed in the agreement is the reference point.

Gonthier J. cited L'Heureux-Dubé J.'s remarks in *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, at page 667, to recall certain considerations which must guide the interpretation of insurance contracts in general:

In construing the terms of an insurance contract, it is now well recognized that the principles of construction which apply are the same as those generally applicable to commercial contracts. Indeed, some of these principles have been codified in the *Civil Code* in articles 1013 to 1021. Thus, should a contract need interpretation, the cardinal rule is that the intention of the parties must prevail, subject of course to the public order provisions of the *Civil Code*.

Gonthier J. observed that article 2476 C.C.L.C. provides for the formation of an insurance contract in civil law and that such a contract is formed “upon the insurer's acceptance of the policyholder's application”. This provision is the specific codification of the general civil law rule that a contract is formed as a result of the meeting of minds.

Lastly, the Court emphasized that it is clear that “insurance law must develop in harmony with the rest of Quebec civil law, of which it forms a part, although North American insurance practices, such as backdating, cannot be ignored.” (par. 30) The Court found that certain common law decisions, such as *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada* [1981] 2 S.C.R. 6, an appeal from an Ontario decision, are of interest for comparative purposes even though they do not have a decisive influence on the outcome of appeals originating in Quebec. The Court contended that the point at issue in this case, as in *McClelland*, in order to determine the starting date of the exclusion period, was to identify the parties' intentions as to the effective date of the contract regardless of the fact that that date had been determined by agreement between the parties or by the provisions of the Civil Code. The Court concluded that the parties in both cases had resorted to backdating.

- *Perron-Malenfant v. Malenfant* [1999] 3 S.C.R. 375

Perron-Malenfant v. Malenfant concerns the seizability of the cash surrender value of a life insurance policy in case of bankruptcy.

In bankruptcy, Parliament has exercised its jurisdiction by enacting the *Bankruptcy and Insolvency Act*. The provisions of Quebec statutes exempting life insurance policies from seizure and those contained in the *Uniform Life Insurance Act* of the common law provinces are incorporated in it by reference. Thus, under the act, the rule is that all rights conferred by a seizable insurance policy may be seized, in particular the right to the cash surrender value of the policy, except where otherwise provided by provincial statute.

Gonthier J. explained that Quebec insurance law underwent a thorough reform as part of the broader movement to revise the Civil Code. The legislator's intention had been to create a “comprehensive unseizability code” for life insurance contracts within the *Civil Code of Quebec* itself, as may be seen from articles 2552 and 2554. These articles supplanted the established civil law principle, the basis of which however still exists in common law, that the right to surrender a policy is a “personal right” that may not be exercised by the insured's creditors (article 1031 C.C.Q. and earlier case law on the subject).

Articles 2552 and 2554 C.C.Q. entrench the unseizability of two classes of policies, those in which the beneficiary is the spouse, descendant or ascendant of the policyholder, and those in which the policyholder designates himself as irrevocable beneficiary of his own policy. These

classes do not include the type of policy involved in this case since the beneficiary was the spouse of “the insured” and the policyholder spouse designated herself a “revocable beneficiary” of the insured. The general provisions of the *Bankruptcy and Insolvency Act* were thus applicable in this case and rendered the policy seizable by the trustee for the purposes of allocating the cash surrender value among the creditors of the insured.

The Court noted that the Quebec legislature defined the class of unseizable family life insurance policies on the basis of the beneficiary's relationship to the policyholder, not to the insured, as provided by the *Uniform Life Insurance Act* of the common law provinces. On this point he cited a passage from David Norwood's treatise, *Norwood on Life Insurance Law in Canada*, at pages 249 and 250, explaining the historical reason for the difference between the two legal systems:

The distinction between the common law provinces and Quebec is historical in that the original *Uniform Act* statutory trust extended to all policies, so that the common denominator was the life insured, whereas Quebec's *Husbands' and Parents' Life Insurance Act* was applicable only to personal policies owned by the insured on the insured's own life, so that the protection rested upon the relationship between the policyholder and the beneficiary.

Conclusion

This review of Supreme Court decisions from a bijural standpoint underscores the importance the Court attaches to the distinction that has to be made between public and private, but it also shows in particular the primacy that the Court accords to the provinces in the various fields affecting property and civil rights. It also gives rise to a number of observations.

The Supreme Court does not hesitate to give full effect to statutes of common law provinces enacted in the areas of property and civil rights when they codify, replace or repeal the common law. Similarly, it holds that in these areas, the *Civil Code of Quebec* represents the *jus commune* of civil law in Quebec and is the law that serves as the reference point for Quebec statutes.

As for Quebec, the Court has resolutely chosen to enhance the position and emphasize the autonomy of the civil law. Several times in the judgments examined here, it has upheld the notion that the civil law is a complete system in itself, that the Civil Code represents the *jus commune* of the province of Quebec, and that it is not a law of exception as is statute law under the common law. Finally, it often refers to French doctrine in interpreting Quebec civil law.

The Court certainly relies on its own precedents as well in considering private law cases brought before it. In so doing, it hears cases that originated in one province or another without regard to which legal system was involved. In hearing cases on appeal from Quebec, it generally makes clear that it looks at common law cases for purposes of comparison only, and notes that an outside legal principle must first be justified under the civil law system for it to be applicable. When it hears cases from provinces other than Quebec, it often cites civil law judgments for the purpose of comparing legal concepts of the two traditions, as well as comparing how they are interpreted.

In general, if it is noteworthy that the Court would rather leave things to the provinces in questions of private law, it does try to ensure that its decisions on these questions, while respecting each legal tradition, do not produce results too inconsistent with each other from one province to another, in order that a given act has similar legal consequences throughout the country.

In its private law decisions, however, the Court also appears to refer frequently to the law of jurisdictions other than the Canadian provinces, perhaps because of the bijural nature of its own country. It cites doctrine from both the civil law of France and the common law of England, and refers to English law and to law of civil tradition in other countries as well as to international instruments, which are becoming increasingly numerous. This tendency reveals a definite inclination on the part of the Supreme Court to attune itself to globalization, and in general to respond to the needs of modern society by seeking out models that will do the most good for those Canadians who become part of the legal process.

In view of this openness to the many available sources of law, the question arises as to whether this attitude can lead to a standardization of the law. In Canada, the law is evolving and will continue to do so, and Canadian common law has distanced itself from English law, just as Quebec law has developed differently from French civil law. The civil law runs a greater risk of being assimilated than the common law, given the predominance of the common law in North America.

Professor Jobin draws a quite accurate picture of the situation of civil law at page 116 of his article, "L'Influence de la doctrine française sur le droit civil québécois : le rapprochement et l'éloignement des deux continents" (in *Droit québécois et droit français : communauté, autonomie, concordance*, éd. H. Patrick Glenn Cowansville, Qc, Les Éditions Yvon Blais, 1993, pp. 91-117):

[translation] To a certain degree, of course, the law of Quebec is a mixed law. It is applied in the framework of a legal system of British inspiration. It lives in close proximity to the other major Western legal tradition—the common law governs the private law of all the other Canadian provinces, virtually all the American states and Quebec's public law, and forms the basis of the federal private law applicable in Quebec. But these are not reasons to resign ourselves to a "laissez-faire" legal stance.

The solution undoubtedly lies in the optimistic view of the future that Professor Glenn describes at page 213 of his article, "Le droit comparé et la Cour suprême du Canada", (in *Mélanges Louis-Philippe Pigeon*, Collection Bleue, Ouvrages collectifs, Mtl, Wilson Lafleur Ltée, 1989, pp. 197-214) and which he shares in this matter with Mr. Justice Pigeon:

[translation] This old tradition of comparative law is simply an attempt to find a better solution, the discovery of which can never stop the further search for an even better solution. In this search, no source can be ruled out, as the Supreme Court did to a certain extent in the first half-century of its existence. And since sources cannot be excluded in creating a new law, they cannot be excluded any more in the continuation of one's own law. Sources must be judged on their merits. This was one of the leitmotifs of Mr. Justice Pigeon, who constantly showed in his work how the civil law and common law traditions need each other, while respecting each other's integrity.

In short, Canadian bijuralism will probably continue to be an original and internationally envied feature of this country, if it can count on the support of the Supreme Court and the legal community in general, but also on the support of politicians.