

# Quebec Civil Law and Canadian Federalism

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## I. INTRODUCTION

Had Pierre Elliott Trudeau foreseen but a fraction of the constitutional turmoil that has plagued Canadian politics since he patriated the country's constitution,<sup>1</sup> he would perhaps have reconsidered. Patriation did more than

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1. CAN. CONST. (Constitution Act, 1982) (enacted as Schedule B to the Canada Act, 1982, ch. 11 (Eng.)). Hogg defines "patriation" of the Constitution as the act of "bringing [the Constitution] home to Canada." PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 53 (3d ed. 1992).

just sever Canada's last colonial ties to the United Kingdom.<sup>2</sup> Its principal effect was to reactivate the perennial debate over "the French-Canadian question," that is, the question of Canada's ability to protect its French speaking minority from cultural assimilation amidst Anglo-Saxon dominance in North America.<sup>3</sup>

This debate, a persistent feature of Canadian politics throughout the nation's history,<sup>4</sup> has assumed unprecedented drama since 1982. Home to most French-speaking Canadians,<sup>5</sup> Quebec has persistently refused to ratify the new constitution<sup>6</sup> unless it is amended to include a clause consecrating Quebec as a "distinct society."<sup>7</sup> This amendment presumably would limit Quebec's constitutional accountability in cultural matters.<sup>8</sup> Quebec's proposal for a constitutional amendment fueled two rounds of interprovincial

2. Most of these ties had already been severed by the passage of the Statute of Westminster, 1931, 22 Geo. 5, ch. 4 (Eng.); see A CONSOLIDATION OF THE BRITISH NORTH AMERICA ACTS 1867 TO 1976, at 37 (Elmer A. Drieger ed., 1976); *British Coal Corp. v. The King*, 1935 App. Cas. 500, 520 (P.C.) (appeal taken from Que.).

3. See generally PIERRE ELLIOTT TRUDEAU, *FEDERALISM AND THE FRENCH CANADIANS* (1968) (arguing that French culture can best be preserved within united Canada); ELIZABETH H. ARMSTRONG, *THE CRISIS OF QUEBEC, 1914-1918* (1934) (tracing growth of French Canadian nationalism); J. PÉPIN & J. ROBERTS, *TASK FORCE ON CANADIAN UNITY* 108 (1979) (recommending partitioned Supreme Court structure to accommodate civil law appeals); KENNETH MCROBERTS, *QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS* (3d ed. 1988) (tracing growth of Quebec *indépendantiste* movement).

4. One scholar calls it "the most permanent theme in Canadian history." RAMSEY COOK, *CANADA AND THE FRENCH-CANADIAN QUESTION* 169 (1966).

5. Over 90% of all French-speaking Canadians live in Quebec. See STATISTICS CANADA, *MOTHER TONGUE* 8-9, tbl. 1 (1992). For this reason, Quebec traditionally has considered itself French Canada's representative: "For the Tremblay Commissioners the issue of Quebec in the federation and the issue of the French in the nation are one and the same." Alexander Brady, *Quebec and Canadian Federalism*, 25 CAN. J. ECON. & POL. SCI. 259, 259 (1959).

6. While ratification by the Canadian provinces is important as a matter of political convention, see HOGG, *supra* note 1, at 17-26, it is not required for the new constitution to be legally binding upon them. See *In re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 755.

7. The Schedule to the Constitution Amendment, 1987, proposing to amend the Constitution Act of 1867 § 2, reads in relevant part:

2. (1) The Constitution of Canada shall be interpreted in a manner consistent with  
 . . .  
 (b) the recognition that Quebec constitutes within Canada a distinct society.  
 . . .

- (3) The role of the Legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

Schedule to the Constitution Amendment, 1987, reprinted in PETER W. HOGG, *THE MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED* app. IV (1988).

8. Currently, provincial statutes that would violate certain provisions of the Canadian Charter of Rights and Freedoms, CAN. CONST. (Constitution Act, 1982) pt. I, are invalid unless they contain a § 33(1) "Notwithstanding Clause" excluding them from the Charter's application: "The legislature of a province may expressly declare in an Act of . . . the legislature . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." *Id.* § 33(1). Section 2 guarantees to "[e]veryone" "(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, . . . ; (c) freedom of peaceful assembly; and (d) freedom of association." *Id.* § 2. Sections 7 through 15 concern life, liberty, and security of the person (§ 7), searches and seizures (§ 8), detention and imprisonment (§ 9), arrest and detention (§ 10), procedural guarantees in criminal and penal matters (§ 11), cruel and unusual punishment (§ 12), self-incrimination (§ 13), right to an interpreter (§ 14), and equality under the law and equal protection and benefit of law (§ 15). Quebec used the § 33(1) "Notwithstanding" clause to justify the enactment of language laws, the most notorious of which was the Charter of the French Language, R.S.Q. ch. C-11 (1977), amended by ch. 54, 1988 S.Q. 849. For more details on the Charter of the French Language (enacted as Bill 101), see EDWARD McWHINNEY, *QUEBEC AND THE CONSTITUTION, 1960-1978*, at 68-77 (1979).

negotiations<sup>9</sup> before being resoundingly defeated by a national referendum in 1992.<sup>10</sup> The Parti Québécois won the Quebec provincial elections a year later and proposed to settle Canada's constitutional crisis once and for all through Quebec's secession.<sup>11</sup> This proposal was rejected by a minuscule margin in a provincial referendum in October 1995.<sup>12</sup> The Parti Québécois has been supported in its secessionist venture by the current federal party of opposition, the Bloc Québécois, whose members have pledged to withdraw from the federal political scene once their mission of mediating Quebec's separation from Canada is completed.<sup>13</sup>

At the heart of Canada's constitutional conundrum, then, lies the issue of Quebec's difference from the English-speaking provinces. This difference obviously is cultural and linguistic, but it is also juridical. Unlike the other

9. The first of these two rounds, the Meech Lake negotiations of 1987, ended in deadlock. *See generally* HOGG, *supra* note 7; Richard Johnston & André Blais, *Meech Lake and Mass Politics: The 'Distinct Society' Clause*, 14 CANADIAN PUB. POL'Y: ANALYSE DE POLITIQUES S7-24 (1988); BRYAN SCHWARTZ, *FATHOMING MEECH LAKE* (1988) (analyzing 1987 Meech Lake Constitutional Accord). The second round of constitutional negotiations gave rise to the Charlottetown Accord of 1992, whose revised "distinct society" clause stated, "Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition . . ." Charlottetown Accord (Draft Legal Text, Oct. 9, 1992), *reprinted in* THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA app. 2 at 315 (Kenneth McRoberts & Patrick J. Monahan eds., 1993) [hereinafter CHARLOTTETOWN ACCORD]. The Accord also stated, "The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed. *Id.* at 316 (Charlottetown Accord § 1).

10. Fifty-four percent of Canadians, including 57% of Quebecers, voted against the proposed amendment contained in the 1992 Charlottetown Accord. *See* CHIEF ELECTORAL OFFICER OF CAN., REFERENDUM 1992—OFFICIAL VOTING RESULTS 4, tbl. 2 (1992); Quebecers rejected the Accord on the grounds that it gave them too little power to rule themselves; voters in the West rejected it just as resolutely for the reason that they believed it gave Quebec too much power. Winners and losers alike were baffled by the outcome of the referendum, which the Accord's authors had viewed as little more than a formality.

11. The idea of Quebec's secession is not new, *see generally* MAURICE SÉGUIN, *L'IDÉE D'INDÉPENDANCE AU QUÉBEC—GENÈSE ET HISTOIRE* (1968) (tracing idea's roots to 1950s), nor is the attempt to implement it by political means. A first referendum on Quebec's independence was conducted by the Parti Québécois in 1980 under the leadership of René Lévesque. The nearly unanimous negative vote of Quebec's English community denied the Parti the majority it needed to proceed "to negotiate a new agreement with the rest of Canada . . . [that] would enable Quebec to acquire the exclusive power to make its laws, administer its taxes and establish relations abroad, in other words, sovereignty, and at the same time, to maintain with Canada an economic association including a common currency." HOGG, *supra* note 1, at 125 n.111 (quoting English text of 1980 referendum).

12. The turnout for the vote was an astounding 92% of eligible voters. 49.7% of Quebecers voted against separation; 48.5% voted in favor; 1.8% of the ballots were rejected. The Parti Québécois's leader, Jacques Parizeau, attributed the Parti's defeat to "money and ethnic votes." André Picard, *Parizeau Promises to 'Exact Revenge' for Sovereignist Loss*, GLOBE & MAIL, Oct. 31, 1995, at A1.

13. Over the last fifty years, Canadian federal politics have been dominated by the center-right Progressive Conservative Party, the center Liberal Party, and, to a lesser extent, the center-left New Democratic Party. This allocation of power changed dramatically with the 1993 federal elections, which left the New Democrats with a handful of seats and left the Progressive Conservatives, the party in power throughout this constitutional epic, with a feeble two seats and an insufficient number of votes overall even to retain their status as an official political party. The Liberals took over the federal House of Commons in reluctant collaboration with two new parties, the Bloc Québécois, elected by Quebec voters, and the Reform Party, elected by voters from the Western provinces. Almost farcically, the Bloc Québécois's one seat advantage over the Reform Party earned it the title of "Her Majesty's Loyal Opposition," which accrues (along with a few minor financial and protocol benefits) to the party with the second highest number of seats in the House.

nine provinces, Quebec is governed by a civil law system in its "private law,"<sup>14</sup> roughly delineated as areas of the law that govern relations among individuals, such as family law, wills and estates, and contractual and delictual obligations. This is in contrast with "public law," including constitutional, tax, administrative, and criminal law, which instead deals with direct relations between individuals and public entities, or among public entities. Indeed, the last version of the "distinct society" amendment proposal listed "a French-speaking majority, a unique culture and a civil law tradition"<sup>15</sup> among the features distinguishing Quebec from the rest of Canada.

Political and scholarly discussions, however, have focused almost exclusively upon Quebec's cultural and linguistic differences,<sup>16</sup> while its juridical difference has been largely ignored.<sup>17</sup> This is curious since, unlike French language and culture, civil private law is unique to Quebec<sup>18</sup> and thus is a significant element of Quebec's distinctiveness. What is more, public pride regarding the civil law system ran high in Quebec over the long period of anticipation that preceded the recent adoption of a new Civil Code,<sup>19</sup> and

14. Quebec was entirely governed by English law following the conquest of 1759. The Royal Proclamation, 1763, R.S.C., app. II, No. 1 (1985). The Quebec Act of 1774 reinstated French civil law as the law of Quebec in private matters. The Quebec Act, 1774, R.S.C. app. II, No. 2, § 8 (1985). For a detailed study of the Act, see HILDA NEATBY, *THE QUEBEC ACT (1972)* and HILDA NEATBY, *THE ADMINISTRATION OF JUSTICE UNDER THE QUEBEC ACT (1937)*. In matters of public law, however, Quebec is ruled by Canadian Anglo-Saxon law. The Quebec Act, 1774, R.S.C. app. II, No. 2, § 11 (1985). Like Louisiana and Puerto Rico, therefore, Quebec is a "mixed jurisdiction". See, e.g., J.E.C. Brierley, *Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities*, 10 DALHOUSIE L.J. 5, 17-18 (1986) (explaining that Quebec has "mixed" legal system). Obviously, many "private" matters have "public" dimensions, and vice versa, with the result that the line between the "private" and the "public" is at times hard to sustain. The discussion in Part III suggests that this indeed has been the source of constitutional problems in the Canadian system.

15. CHARLOTTETOWN ACCORD, *supra* note 9, at 315 (Charlottetown Accord § 1) (emphasis added).

16. See, e.g., William Dodge, *Preface to BOUNDARIES OF IDENTITY: A QUEBEC READER* xi, xi-xii (William Dodge ed., 1992) (discussing dual language and culture in Quebec); Jean-Charles Bonenfant & Jean-Charles Falardeau, *Cultural and Political Implications of French-Canadian Nationalism*, in *FRENCH-CANADIAN NATIONALISM: AN ANTHOLOGY* 18 (Ramsey Cook ed., 1969) (also discussing dual language and culture in Quebec). Indeed, Trudeau's main argument in favor of a united bicultural Canada was linguistic: "[I]f Quebec were part of a Canadian federation grouping two linguistic communities as I am advocating, French Canadians would be supported by a country of more than eighteen million inhabitants, with the second or third highest standard of living in the world, and with a degree of industrial maturity that promises to give it the most brilliant futures." Trudeau, *supra* note 3, at 31. He further argues that "it is obvious that most of Canada's constitutional crises . . . arise from ethnic problems, and more precisely from the question of the rights pertaining to the French language." *Id.* at 46. Finally, of the proposed Meech Lake Accord, Trudeau said: "Those Canadians who fought for a single Canada, bilingual and multicultural, can say goodbye to their dreams: We are henceforth to have two Canadas, each defined in terms of its language . . ." Pierre Elliott Trudeau, *P.E. Trudeau: 'Say Goodbye to the Dream' of One Canada*, *TORONTO STAR*, May 27, 1987, at A1, A12.

17. Although the issue of juridical difference has been discussed within Quebec, it has never been brought directly to bear on the constitutional debate. See generally FREDERICK PARKER WALTON, *THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA* (1980) (explaining composition and reach of Code but not analyzing constitutional issue); John E.C. Brierley, *Bijuralism in Canada*, in *CONTEMPORARY LAW: CANADIAN REPORTS TO THE 1990 INTERNATIONAL CONGRESS OF COMPARATIVE LAW*, MONTREAL, 1990, at 22 (1992).

18. The "Manitoba school question" of 1895, which involved the province's power to disregard minority educational rights, is one example of a major linguistic controversy involving French speaking Canadians living outside Quebec. See D.A. SCHMEISER, *CIVIL LIBERTIES IN CANADA* 158-69 (1964).

19. In 1955, Quebec's National Assembly appointed a jurist to review all four books of Quebec's first civil code, the 1866 Civil Code of Lower Canada. See An Act Respecting the Revision of the Civil Code, ch. 47, S.Q. (1955), *modified by* An Act to Amend the Act Respecting the Revision of the Civil

one accordingly would have expected this renewed pride to reach over to the constitutional debate. Nonetheless, Quebec's juridical difference has been largely neglected in the debate over Canadian biculturalism.<sup>20</sup>

The present Article is the first part of a larger project in which I attempt to redress this neglect through an analysis of the status and problems of the civil legal method in Quebec.<sup>21</sup> Some of the obstacles to the survival of the civil legal method are rooted within Quebec and are the subjects of the other two installments of this project.<sup>22</sup> Problems stemming from Quebec's interaction with its federal partners are the subject of this Article.

The present Article thus outlines the difficulties involved in transplanting the method of one legal culture into the institutional structure of another. I argue that in the Canadian context, the consequences of such transplantation for the civil law have been both adverse and significant. The difference between legal method at common law and at civil law is the key to understanding these difficulties. Accordingly, Part II of this Article offers a description of the civil legal method. This description is reconstituted from what I believe are the fundamentals of the "pure" civil law tradition. Because all actual civil law jurisdictions are to some degree "impure," in the sense that they have been influenced by other legal systems, the model drawn here should not be associated with any one jurisdiction. Rather, it is derived from features apparently present in all civil law systems, taking into account the historical role of judges and the civil conception of the nature of law.

Parts III and IV examine the two institutional dimensions of Canadian federalism that have most significantly affected legal method in Quebec:<sup>23</sup> the extent of provincial legislative power under the Canadian constitution and the

Code, ch. 97, S.Q. (1960) [hereinafter C.C.L.C.]. Portions of the final *Rapport sur le Code Civil* presented by the Civil Code Reform Commission 23 years later were enacted after modifications in 1980, see An Act to Establish a New Civil Code and to Reform Family Law, ch. 39, S.Q. (1980), and in 1987. See An Act to Add the Reformed Law of Persons, Successions and Property to the Civil Code of Quebec, ch. 18, S.Q. (1987). Bill 125, which revises the Code of 1867 in its entirety, came into force on January 1, 1994. See Code Civil du Québec, ch. 64, S.Q. (1991) [hereinafter C.C.Q.].

20. Pierre Elliott Trudeau fathered Canada's policy of "biculturalism." See generally PIERRE ELLIOTT TRUDEAU, *APPROACHES TO POLITICS* (1970) (arguing for official bilingualism in Canada).

21. The second part is *Legal Education in a "Mixed Jurisdiction": The Quebec Experience*, 10 TUL. EUR. & CIV. L.F. (forthcoming Jan. 1996) [hereinafter Valcke, *Legal Education in a "Mixed Jurisdiction"*]; the third part is *The Clash of the Titans: When the Civil Law Tradition Meets the Welfare State*, U. TORONTO L.J. (forthcoming spring 1996) [hereinafter Valcke, *Clash of the Titans*].

22. Problems internal to Quebec are of two kinds. The first concerns Quebec's system of legal education. I argue in Valcke, *Legal Education in a "Mixed Jurisdiction"*, *supra* note 21, that economic, administrative, and psychological factors have caused Quebec law faculties to model their educational agenda, scholarship profile, and teaching styles after those typically adopted in schools of common law, thus providing unsuitable instruction for lawyers intending to practice in a civil law system. In contrast, the second kind of problem is more immediately political in nature. Quebec is a modern welfare state, and as such its Civil Code attempts to embody not only corrective but also distributive justice. As I argue in Valcke, *Clash of the Titans*, *supra* note 21, such a synthesis is fundamentally incompatible with the values at the heart of the civil law tradition. The decline of the civil law tradition in Quebec is thus the logical consequence of its transformation into a welfare state.

23. There are many more institutional problems than the ones I discuss here. One author even suggests that institutional problems are so numerous and complex that their adequate treatment would warrant an entire new field of law, something akin to "conflicts of law" theory but within national boundaries. Evelyn Kölich, *The Impact of the Change in Legal Metropolis on the Development of Lower Canada's Legal System: Judicial Chaos and Legislative Paralysis in the Civil Law, 1791-1838*, 3 CAN. J.L. & SOC'Y 1 (1988).

enforcement of provincial law by Canadian judicial institutions. Part III outlines some salient facts in Canada's constitutional history. The provinces' limited share of legislative powers under the Act that formed the Canadian federation, the British North America Act of 1867,<sup>24</sup> was further reduced by subsequent judicial and constitutional developments. As a result, Quebec in fact has had little legislative power to establish and properly sustain a civil legal method. Part IV describes some features of Canadian judicial institutions that are particularly problematic from the perspective of preserving the civil legal method in Quebec.<sup>25</sup> These include the provinces' limited legislative powers over the administration of justice in their territories, the general jurisdiction of provincial courts, and the jurisdiction of the Supreme Court of Canada as the national court of last resort in all provincial matters.

In Part V, I assess the impact that these institutional dimensions of Canadian federalism have had upon the legal method in Quebec. I show that the legal method in Quebec bears little resemblance to the civil model presented in Part II. This analysis will likely disappoint Canadian nationalists seeking either "harmonious coexistence,"<sup>26</sup> wherein "[e]ach of our two great legal systems [is] useful to the other,"<sup>27</sup> or merely the maintenance of two distinct traditions wherein Quebec might at least "preserve its own [civil law] identity."<sup>28</sup> Indeed, I conclude that Quebec's legal method in matters of private law has lost much of its civil character due to the influence of Canadian legislative and judicial institutions.

It is worth emphasizing that this conclusion is purely descriptive. It is not part of this Article's purpose to consider the practical and theoretical desirability of civil law as a legal system<sup>29</sup> or even to advocate its preservation within Canada. Nor is it part of the present purpose to recommend solutions to the institutional problems outlined. The present

24. CAN. CONST. (Constitution Act, 1867) (formerly British North America Act, 1867) [hereinafter B.N.A. Act].

25. Naturally, other kinds of problems have obstructed the proper functioning of the administration of justice in Quebec. Jonathan Swainger, for example, maintains that the main problem was one of intrigue, manipulation, obstruction, and opportunism in the post confederation relations between the Quebec judiciary and the federal Department of Justice. See Jonathan Swainger, *A Bench in Disarray: The Quebec Judiciary and The Federal Department of Justice, 1867-1878*, 34 *CAHIERS DE DROIT [C. DE D.]* 59 (1993). Only the problems relating specifically to the furtherance of the civil law tradition in Quebec, however, are discussed in this Article.

26. HOGG, *supra* note 1, at 53. Garson argues:

Each of our two great legal systems was useful to the other. Nonetheless, throughout years and decades, each preserved its own identity. Neither common law, nor civil law was, to any serious extent, infiltrated by the other legal system, and such infiltration is not to be forecasted. The harmonious coexistence of the two legal systems provided Canada with laws which, in the whole, are well balanced and practical. For these reasons . . . it is true respect rather than mere tolerance which qualifies the attitude of adherents of one group towards the laws of the other.

Justice Minister of Canada Stuart S. Garson, *Harmonieuse coexistence du droit civil et du common law au Canada*, Address at the Meeting of the Inter-American Bar Association (Apr. 16, 1956), *reprinted in* 17 *R. DU B.* 4, 5 (1957) [hereinafter Garson] (my translation).

27. Garson, *supra* note 26, at 5.

28. *Id.*

29. For writings suggesting that civil legal method rests upon flawed epistemological and/or deontological assumptions, see David Fraser, *The Day the Music Died: The Civil Law Tradition from a Critical Legal Perspective*, 32 *LOY. L. REV.* 861 (1987); Pierre Legrand, *Antiqui Juris Civilis Fabulas*, 45 *U. TORONTO L.J.* 311 (1995).

discussion constitutes an insufficient basis upon which to reach conclusions about, in particular, the desirability of Quebec's seceding from Canada. Such conclusions should be withheld at least until all of Quebec's juridical (and nonjuridical) problems have been properly examined. For, while Quebec's secession from Canada might remedy some of the problems discussed here, it would be unlikely to resolve other problems that are unrelated to Quebec's membership in the Canadian federation. If the conclusion reached in this Article is unlikely to please Canadian nationalists, therefore, it is also no feather in the secessionist cap.

## II. CIVIL LEGAL METHOD

Civil legal method differs fundamentally from the legal method of common law. This is largely due to the historical disagreement of civil and common law lawyers over the nature of law, a disagreement rooted in their divergent views regarding the ideal separation of political powers, and particularly regarding the proper scope of judicial power. The civil law conception of the scope of judicial power is examined in Section A; civil codes and codal reasoning are described in Sections B and C respectively.

### A. *The Civil Law Conception of the Proper Scope of Judicial Power*

Scholars generally agree that modern civil law was born with the *Code Napoléon* of 1804,<sup>30</sup> enacted partly to proclaim French unification against the rest of Europe<sup>31</sup> and primarily to seal the fall of feudalism within France.<sup>32</sup> A primary item on the antifederalist agenda had been to curb judicial power, for all judges at that time were landed aristocrats whose judicial activism violated France's new aspirations to the rule of law.<sup>33</sup> Only a few decades earlier, Montesquieu had prospectively argued: "[T]he national judges are no more than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigor."<sup>34</sup>

The French codifiers could have proceeded in at least two ways to ensure that judges did no more than "speak for" the law. The first and potentially

30. On the influence of the Napoleonic Code on other civil law jurisdictions, see Jean-Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1075 (1988).

31. In contrast with parliamentary England, where in general the same laws ruled everyone throughout the country, in *ancien régime* France, different laws applied to different social groups and to different territories. See 1 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL § 35, at 64 (1967); Peter Stein, *Historical Development of Civil Codes*, in CAMBRIDGE LECTURES 1983, at 280, 281-82 (Elizabeth G. Baldwin ed., 1985); George W. Keeton, *Codification and Social Change*, 1 H.K. L.J. 245, 254 (1971).

32. F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 37 (1953); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 17 (1969).

33. Francis Deak & Max Rheinstein, *The Development of French and German Law*, 24 GEO. L.J. 551, 554-55 (1936); R.C. van Caenegem, *Judges, Legislators, and Professors*, in GOODHART LECTURE SERIES, 1984-1985, at 108, 115 (1987); MERRYMAN, *supra* note 32, at 21-22. The Roman *Iudex* aroused the same distrust in his fellow Roman citizens for similar reasons. The post was usually obtained through imperial favor and sometimes even bought by its holder for money. See Roberto G. MacLean, *Judicial Discretion in the Civil Law*, 43 LA. L. REV. 45, 46 (1982).

34. CHARLES LOUIS DE MONTESQUIEU, THE SPIRIT OF THE LAWS 209 (David Wallace Carrithers ed., 1977) (1750).

more effective way would have been to provide judges with a code that explicitly ruled every detail of social life. But the monumental failure of similar endeavors in Prussia had recently testified to the absurdity of such an enterprise.<sup>35</sup> The second best way to limit judicial discretion was to codify first principles and to commit judges to rational deduction from these principles.<sup>36</sup> This is precisely what the codifiers undertook.

True to the revolutionary spirit of the time,<sup>37</sup> the codifiers selected most<sup>38</sup> of the requisite first principles from tenets of the "Law of Nature."<sup>39</sup> It was indeed in the name of natural law that the *ancien régime* had been subverted.<sup>40</sup> Merryman explains:

One of the principal driving forces of the revolution was what has since come to be called secular natural law. It was based on certain ideas about man's nature . . . . All men, so the reasoning goes, are created equal. They have certain natural rights to property, to liberty, to life. The proper function of government is to recognize and secure these rights and to ensure equality among men. . . .

The surviving institutions of feudalism, which conferred social status and public office on the basis of land ownership, were clearly inconsistent with these ideas. . . .

. . . The emphasis on the right of a man to own property and on the

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35. JOHN MAURICE KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 263 (1992). Frederick the Great's *Allgemeines Landrecht für die Preussischen Staaten* of 1794 contained thousands of articles, many of which dealt with matters so unlikely ever to occur that their regulation was plainly foolish. Stein, *supra* note 31, at 280. For example, Stein reports that there were no fewer than five articles on how to determine the sex of hermaphrodites! *Id.*

36. RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* § 21 (8th ed. 1982). Similarly, Portalis suggested that the best that could be hoped for was that judges apply rules to facts while remaining "imbued with the general spirit of the laws (*pénétrés de l'esprit général des lois*)." Stein, *supra* note 31, at 284.

37. For an interesting account of this spirit, see Pierre Issalys, *La loi dans le droit: tradition, critique et transformation*, 33 C. DE D. 663, 675-82 (1992).

38. Some principles of local customary law were also included. The question of how much customary law should inform the new code was in fact the object of considerable debate among French codifiers. While customary law was viewed as the embodiment of French identity as against the rest of Europe, it also tied revolutionary France to a past it was determined to forget. See H.C. GUTTERIDGE, *COMPARATIVE LAW* 77-81 (1946). To be sure, that which is common to all civil systems is obviously more interesting for the comparativist than that which differentiates them. To the extent that longevity is any indication of historical significance, however, the local elements of civil codes proved to be less important than the common elements; unlike the latter elements, very few of the former provisions survive to this day.

39. "[T]he legislative process becomes the means to decipher and to interpret [the natural] law. It is a *reading* process. The law has no other purpose than to posit the natural law; it delimits and fixes the concrete modalities of the natural law's application . . ." Jean-Marc Trigeaud, *Le processus législatif: éléments de philosophie du droit*, 30 ARCHIVES DE PHILOSOPHIE DU DROIT [ARCH. PHIL. D.] 245, 246 (1985) (my translation). On the naturalistic foundations of civil law generally, see 2 FRANÇOIS GÉNY, *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF: L'IRRÉDUCTIBLE DROIT NATUREL* (2d ed. 1927). Villey suggests that the fact that code provisions are written in the indicative rather than the imperative is evidence that they originate in a deontological framework that transcends the codifiers. See Michel Villey et al., *Indicatif et impératif juridiques: Dialogue à trois voix*, 19 ARCH. PHIL. D. 33, 36-39 (1974).

40. As the coauthors of a volume on French legal philosophy argue:

In the golden hours of the history of France, the object of the national will has been confounded with the object of reason itself, for it is on behalf of general and universal ideas that it has been most passionately aroused. In [France], [Frenchmen] do not want merely the liberty and the rights of Frenchmen, but "rights of man"; our reason always tends to generalize the object towards which our will is directed.

7 A. FOUILLÉE ET AL., *MODERN LEGAL PHILOSOPHY SERIES: MODERN FRENCH LEGAL PHILOSOPHY SERIES* 16 (Franklin W. Scott & Joseph Chamberlain trans., 1916).

obligation of the law to protect his ownership was in part a reaction against dependent tenure under feudalism. The emphasis on a man's right to conduct his own affairs and to move laterally and vertically in society was a reaction against the tendency under feudalism to fix a man in a place and status. The revolution became, to use Sir Henry Maine's famous phrase, an instrument for the transition "from status to contract."<sup>41</sup>

Individual autonomy, formal equality, and the right of private property,<sup>42</sup> along with the political ideals of economic liberalism and limited government that these principles entail, thus provided the bedrock for French codification.<sup>43</sup>

It is therefore no surprise that the great civil law jurists of the mid-nineteenth century saw themselves as having inherited the goal of capturing within the Code the dictates of the Law of Nature from the Scholastics of the late Middle Ages and the natural law thinkers of the seventeenth and eighteenth centuries.<sup>44</sup>

The potency of the Law of Nature as a constraint upon judicial reasoning was more or less taken for granted at that time.<sup>45</sup> Aquinas had written that the Law of Nature is God's law of reason and that it is human beings' equal and exclusive capacity to access this Law — their capacity for reason — that make them essentially human.<sup>46</sup> Natural law thinkers had secularized the Law of Nature but not without retaining and even buttressing its rational character,<sup>47</sup> a feat that earned them their title of Rationalists.

Reason, the Rationalists contended, is by definition unencumbered by an individual's subjectivity, and is thus the natural conduit for objectivity.<sup>48</sup> The

41. MERRYMAN, *supra* 32, at 16-18 (citations omitted); see also KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 68-74 (1977).

42. The right of property appears in Article II of the *Déclaration des droits de l'homme et du citoyen*, approved in August 1789, as one right that is "natural and imprescriptible."

43. FOUILLEE ET AL., *supra* note 40, at 16-18. The French code project of the year VIII included a preliminary book entitled DU DROIT ET DES LOIS [OF LAW AND LEGISLATION] which contained explicit references to natural law. This book was ultimately dropped, but on grounds of form, not substance. Bergel, *supra* note 30, at 1083. But natural law foundations were not the exclusive province of French codification; continental codification was, in general, similarly inspired. See Edgar Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30 AM. J. COMP. L. 15 (Supp. 1982); Nicolas Nitsch, *L'inflation juridique et ses conséquences*, 27 ARCH. PHIL. D. 161, 165 (1982). For the German Civil Code, see ZWEIGERT & KÖTZ, *supra* note 41, at 8.

44. See GEORGES RIPERT, *LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE* 50 (1936) (stating that civil law jurists believed Code embodied natural law).

45. FOUILLEE ET AL., *supra* note 40, at 16-18.

46. THOMAS AQUINAS, *SELECTED POLITICAL WRITINGS, SUMMA THEOLOGICA*, Questions 90-94, at 109-27 (A.P. D'entrèves ed., 1959). This is not to say that all human beings will in fact access the Law of Nature equally. It is only in their potential for such access that they are equal.

47. In France, Descartes is most famous for such emphasis. See generally RENÉ DESCARTES, *DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING THE REASON AND SEEKING FOR TRUTH IN THE SCIENCES* (1637), reprinted in *A DISCOURSE ON METHOD, MEDIATIONS ON THE FIRST PHILOSOPHY, PRINCIPLES OF PHILOSOPHY* (John Veitch trans., J.M. Dent & Sons Ltd. 1969). For an account of the sweeping influence this piece had on the French intellectuals of the time, see 4 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 175 (1985). In Germany, the work of the School of the Pandectists has perhaps been the most extreme version of such rationalism. MERRYMAN, *supra* note 32, at 100-01.

48. See, e.g., Benedict de Spinoza's discussion of human reason and passions in parts III and IV of *Spinoza's Ethics Demonstrated According to the Geometrical Orders*, in *THE CHIEF WORKS OF BENEDICT DE SPINOZA* (R.H.M. Elwes trans., 1951). Since it is not part of the present purpose to question the validity of the metaphysical premises that underlie the civil law tradition, it is assumed here that the above proposition is tenable. It is worth emphasizing nonetheless that the fact that some or even many people

Rationalists therefore thought that if judges could be made to abstract from their subjective desires and abide by what reason dictates as the right decision at (natural) law, judicial power would be properly tamed. Judges would then truly be aiming to limit themselves to speaking for *the law*, as rational beings, rather than indulging in speaking for *themselves*, as subjective individuals. The Rationalists understood this idea as an ideal, of course. In practice, such restraint is a pious wish, for judges, however sincere, are doomed to make mistakes. Moreover, even if judges were impeccably rational, judicial discretion still could not be completely eradicated, because residual (and ultimately indeterminate) human judgment or "practical wisdom,"<sup>49</sup> is always involved in applying rules to facts, if only to bridge the gap that divides them.<sup>50</sup>

Well versed in the teachings of the Scholastics and the Rationalists, the codifiers certainly knew that mistakes and residual discretion would stand in the way of perfect objectivity in adjudication, but they also knew this would be true of any legal system.<sup>51</sup> Therefore, short of a code like the one devised by the Prussians that would provide for all possible fact situations, a code "[b]ased on the postulate of the school of natural law according to which there existed a legal system of permanent and universal value, founded on human reason"<sup>52</sup> seemed the best available means to minimize judicial power. And thus was Cambacérès' first draft proposal of a code (the second of three to be presented) introduced as "the Code of Nature, sanctioned by Reason, and guaranteed by Liberty."<sup>53</sup>

In conclusion, it appears that the view of civil law as narrowly

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may disagree with this proposition would, in the eyes of the Rationalists, be irrelevant for the purpose of assessing its validity.

49. Aristotle wrote:

[T]he man who is capable of deliberating has practical wisdom . . . Now no one deliberates about things that are invariable, nor about things that it is impossible for him to do. Therefore, since scientific knowledge involves demonstration, but there is no demonstration of things whose first principles are variable (for all such things might actually be otherwise), and since it is impossible to deliberate about things that are of necessity, practical wisdom cannot be scientific knowledge.

6 Aristotle, *Nicomachean Ethics* ch. 5, §§ 1140a-40b, in *THE BASIC WORKS OF ARISTOTLE* 1025-26 (Richard McKeon ed., 1941).

50. Ernest Weinrib explains: "Particulars . . . always contain something contingent with respect to their universal. Because of this contingency, they *cannot* be derived from any definition of the concept." Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 *COLUM. L. REV.* 472, 506 (1987); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-39, 68-71 (1977).

51. Portalis stated:

The legislator . . . must not lose sight of the fact that . . . [although] it may be possible, in a new institution, to assess the advantages offered by theory, it is not possible to know all the inconveniences that only practice can discover; . . . that it would be absurd to aim for absolute ideas of perfection in things that are amenable only to relative goodness.

J.E.M. Portalis, *Discours préliminaire prononcé lors de la présentation du projet*, in 1 PIERRE-ANTOINE FENET, *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* 464 (2d ed. 1968) (my translation).

52. Bergel, *supra* note 30, at 1074; see also Michel Adam, *La relativité des lois selon Pierre Charron*, 27 *ARCH. PHIL. D.* 349, 358 (1982) (relating Charron's critique of this aspect of the Code).

53. Robert Taschereau, *Le siècle de la renaissance et son influence sur le droit civil du Québec*, 12 *THÉMIS* 7, 13 (1962) (my translation).

positivistic, a view often held by common law jurists<sup>54</sup> since Bentham's admonition that England adopt a civil code system in order to strengthen state power,<sup>55</sup> is only half true. At a purely formal level, civil codes have been officially enacted by states. Yet, "[w]hen one talks about [civil] law it is consequently its source in human reason that one has in mind, rather than the role and the sense of the intervention of state organs in its formation."<sup>56</sup> While civil legal systems are rooted in positivism, this positivism is not of a bare Hobbesian kind whereby the legislator proceeds, entirely unconstrained, from a clean juridical slate;<sup>57</sup> the positivism that roots civil legal systems is itself solidly rooted in ethical premises of Cartesian naturalism. As I show next, these premises in turn permeate all aspects of civil legal materials and method.

## B. *The Civil Code*

The civil law owes its highly dogmatic profile — its hallmark — to its combination of unconditional faith in reason and stringent first premises. Indeed, the deductive mode of reasoning has traditionally characterized the civil law, unlike the common law, which is usually described as proceeding inductively from the accumulation of discrete cases.<sup>58</sup>

The role of the Civil Code in this deductive process is somewhat elusive, for the Code is both its product and its source.<sup>59</sup> The rules contained in the Code are the product of rational deduction from the premises stated above<sup>60</sup> and, at the same time, the starting point for judges' reasoning when solving

54. This view dominated the debate spurred by the American codification movement in the late nineteenth century. For an excellent account of this debate, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 109-43 (1992); see also Sheal Herman, *Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 *TUL. L. REV.* 380, 396 (1978-79).

55. JEREMY BENTHAM, *PRINCIPLES OF THE CIVIL CODE IN THE WORKS OF JEREMY BENTHAM* 297 (London, Simpkin, Marshall & Co. 1837). But see Austin's critique of Bentham on this point. John Austin, *Notes on Codification*, in 3 *LECTURES ON JURISPRUDENCE* 273, 286 (London, John Murray 1863).

56. One of the French codifiers declared that, "[l]aws are not pure acts of will; they are acts of wisdom, of justice, and of reason. The legislator does not so much exercise a power as fulfil a sacred trust." André Tunc, *The Grand Outlines of the Code*, in *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 19, 32 (Bernard Schwartz ed. 1950) (quoting Jean Étienne Marie Portalis).

57. According to Hobbes, "The only way to erect . . . a Common Power . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men . . . This is more than Consent . . . it is . . . as if every man should say . . . *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men . . .*" THOMAS HOBBS, *LEVIATHAN* 227 (Crawford Brough Macpherson ed., 1968).

58. See Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 *AM. J. COMP. L.* 419, 31 (1967) (suggesting this is main difference between civil law and common law); Mirjan Damaska, *A Continental Lawyer in an American Law School*, 1162 *U. PA. L. REV.* 1363, 1365-67 (1968). For suggestions that the traditional deductive/inductive distinction between the two systems is not as significant as traditionally believed, see CHRISTIAN ATIAS, *SAVOIR DES JUGES ET SAVOIR DES JURISTES* 38 (1990); LAWSON, *supra* note 32, at 65.

59. For a general discussion on this point, see MICHEL VAN DE KERCHOVE & FRANCOIS OST, *LE SYSTÈME JURIDIQUE ENTRE ORDRE ET DÉSORDRE* 130-47 (1988).

60. "Codification presupposes a carefully thought-out rational framework for the law, consciously chosen, consistently followed and logically inter-related . . . in which all the concepts relating to a given area of the law are logically derived from first principles, meticulously developed and systematically ordered." R.A. Macdonald, *Comments*, 58 *CAN. B. REV.* 185, 188 (1980); Trigeaud, *supra* note 39, at 254 ("To legislate, according to Montesquieu, is to 'tie' . . .") (my translation).

cases.<sup>61</sup> For this reason the Code is relatively abstract, paramount if not exclusive, and comprehensive — three interrelated and fundamental features that I now describe in greater detail.<sup>62</sup>

In order for the Code to be intertemporal, as its drafters intended it to be,<sup>63</sup> its provisions must be formulated abstractly, as principles, for concrete formulations are vulnerable to obsolescence.<sup>64</sup> Indeed, Rousseau maintained that laws differ from acts of magistracy in that the former are abstract, and hence intertemporal, while the latter concern “a particular object” and are accordingly fleeting.<sup>65</sup>

Still, Code provisions that are too abstract lose much of their guidance power in solving concrete cases. In Bodenheimer’s words:

Specificity in regulating a subject serves the cause of legal certainty because it gives advance notice to lawyers, judges, and the lay public how a particular issue coming before the courts is likely to be resolved. It carries with it the danger, on the other hand, that the mode of regulation adopted with respect to a certain subject matter will prove to be defective or become obsolete after passage of a certain time.<sup>66</sup>

Hence, the optimal level of abstraction for Code provisions is achieved by balancing the need to respect the intertemporality of the Code’s premises against the need to provide adequate guidance in adjudication. Thus, the Code is “relatively abstract.”

The Civil Code is also necessarily exclusive in the sense that, at least theoretically, it is the only legitimate source of law in its jurisdiction, namely,

61. “The *Civil Code* does not contain the whole of civil law. It is based on principles that are not all expressed there, which it is up to case law and doctrine to develop.” *Cie. Immobilière Viger Ltée. v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, 76. Another commentator views the Code as “a loose, dialogic whole, whose constitutive norms are even loose, leaving to its designated readers much liberty in decoding . . . .” Gerard Timsit, *Pour une nouvelle définition de la norme*, 1988 RECUEIL DALLOZ-SIREY [D.S. CHRON.] 267, 268 (my translation).

62. These basic characteristics of civil codes have been described in different terms by different scholars. Brierley and Macdonald, for example, sum up the content of the discussion of the next few pages as follows:

Fundamental to the successful functioning of a Civil Code are four assumptions about the logical possibilities of enacted law. Codification assumes that the general law may be presented and expressed in writing in such a manner that any special legislation in derogation from it will necessarily imply that the Code elaborates the residual law. Codification also assumes the possibility of synthesizing the legal rules and concepts of a complete sector of the law — for example, the private law — into a theoretically gapless exposition. Third, a Code rests on the premise that the human intellect is capable of discovering and articulating a rational and systematic presentation of these rules and concepts. Finally, codification presumes that legal rules can be expressed meaningfully at a degree of generality that ensures their relative stability and permanence, and that provides flexible baselines for self-regulation.

J.E.C. BRIERLEY & R.A. MACDONALD, *QUEBEC CIVIL LAW—AN INTRODUCTION TO QUEBEC PRIVATE LAW* 99 (1993).

63. See Bodenheimer, *supra* note 43, at 15.

64. “The mission of the law is to crystallize as broad statements the general maxims of the Law, to establish principles fertile in consequences, and not to descend into the details of the questions that may present themselves in each matter.” Portalis, *supra* note 51, at 470 (my translation).

65. “[E]ven what the sovereign itself commands with respect to a particular object is not a law but a decree, not an act of sovereignty, but an act of government.” JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 82 (Maurice Cranston trans., Penguin Books 1968) (1762).

66. Bodenheimer, *supra* note 43, at 25; see also Bergel, *supra* note 30, at 1082.

private law.<sup>67</sup> This is not to say that the Code is the only physical piece of legislation in that field but rather that alternative legislative materials cannot exist independently from it.<sup>68</sup> Alternative materials consistent with the Code are deemed implicit cross-references whose authority is ultimately derived from the Code itself.<sup>69</sup> Alternative materials that conflict with Code provisions are to be presumed void if they predate the Code; they are deemed automatic codal amendments if they were enacted after the Code.<sup>70</sup>

The reason for the necessary exclusivity of the Code is straightforward — if the process of rational deduction from first premises that gave rise to the Code itself had produced rules other than those contained therein, it would be irrational to keep these separate. Rules that might have emerged from distinct reasoning are explicitly stripped of any legal authority by the very premises underlying the Code. Indeed, natural rights, by their very essence, not only inform positive law but also delineate its contours.<sup>71</sup> In this respect, Ripert wrote: “If positive law does not contain any rule, one looks to natural law, and if the legal rule is contrary to the principles of this law, that rule must disappear, for justice condemns it.”<sup>72</sup>

The third feature of a Civil Code flowing from its deductive character is conceptual comprehensiveness or gaplessness, sometimes referred to as the “codification effect.”<sup>73</sup> Max Weber provided a more detailed explanation of this codification effect, which, he wrote, allows a Civil Code to “represent an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules.”<sup>74</sup>

While the exclusivity of the Code has been mostly overlooked by

67. “Codification rests on the view that the private law of a jurisdiction can be assembled in one place, in a similar format, in a single volume, cross-referenced and inter-connected, with one concordance, and no appendices or references to extraneous texts.” Macdonald, *supra* note 60, at 188; see also ALAN WATSON, *THE MAKING OF THE CIVIL LAW 2-5* (1981) (defining “civil law” as law that derives from Roman law relating to citizens).

68. Brierley and Macdonald suggest accordingly that the Code’s exclusiveness is “theoretical” rather than “empirical.” See *supra* note 62, at 100.

69. See, e.g., P.P.C. Haanappel, *Contract Law Reform in Quebec*, 60 CAN. B. REV. 393, 396 (1982) (“Historically it is probably correct to say that codes were intended to have a force superior to that of special statutes and this because of their rather general rules of a lasting nature.”).

70. Such conflicts occur very rarely, since alternative materials conflicting with the Code usually are enacted simultaneously with the requisite codal modification. While the possibility of modifying the Code legislatively does not undermine its authority in principle (only the content of its authoritative statement is thereby modified, cf. ATIAS, *supra* note 58, at 50), excessive and *ad hoc* legislative modification of the Code would certainly impair its practical import, as I suggest in Valcke, *Clash of the Titans*, *supra* note 21.

71. See Trigeaud, *supra* note 39, at 246 (stating that positive law is concrete expression of natural law).

72. GEORGES RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* 15 (4th ed. 1949) (my translation).

73. Alain-François Bisson, *Effet de codification and interprétation*, 17 REVUE GÉNÉRALE DE DROIT [REV. GÉN.] 359, 360 (1986). To wit, art. 1 of the Swiss Civil Code, which proclaims that the code must be interpreted by reference to its spirit rather than to its letter. See also Bergel, *supra* note 30, at 1083 (“It follows that each Code article has a meaning only because of its relationship to a cluster of articles to which it is linked; each institution has a meaning only because of its relationship with the whole system to which it belongs. There lies the difference between a true code and a mere compilation of disparate statutes, even dealing with the same subject matter.”).

74. MAX WEBER, *ECONOMY AND SOCIETY* 656 (Guenther Roth & Claus Wittich eds., 1968).

legislators and academics alike,<sup>75</sup> its gaplessness or comprehensiveness is widely known. Gaplessness is what makes the Code typically civil<sup>76</sup> and distinguishes civil codes from codes that are “merely a juxtaposition, a summary of rules and norms of varied juridical content.”<sup>77</sup> These non-civil codes are alternatively described in the literature as “static” (as opposed to “dynamic”),<sup>78</sup> “formal” (as opposed to “substantive”),<sup>79</sup> “administrative,”<sup>80</sup> or “codes” of common law.<sup>81</sup> In sum, while all codes (civil or not) achieve the *physical* unification of a jurisdiction’s legal materials, that achieved by the Civil Code is also, theoretically at least, *conceptual*.

The comprehensiveness of the Civil Code, like its abstractness and exclusivity, can be explained by reference to the naturalistic philosophy underlying civil law generally. Portalis explained:

When what is established or known offers no guidance, when at issue is an absolutely new fact, one returns to the principles of natural law. For while the foresight of the legislators may be limited, nature is infinite; it applies to all that may interest mankind.<sup>82</sup>

75. For one exception, see Justice Scarman, *Codification and Judge-Made Law: A Problem of Co-Existence*, Lecture at Birmingham University (Oct. 20, 1966), *reprinted in* 42 *IND. L.J.* 355, 359 (1967) (“[C]odification will almost invariably include revision and consolidation; but it is something more, for it purports not only to revise, rearrange, and restate existing statute law but to formulate comprehensively — with amendments, if necessary — all the law within its field . . .”).

76. See 1 GÉRARD CORNU, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS* § 222 (2d ed. 1985) (noting that work of formulating law in [civil] legislation should be comprehensive and seek to harmonize various parts of legislation into coherent whole); FRANÇOIS GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* § 52 (1954) (describing purposes of codification); 1 ALEX WEILL & FRANÇOIS TERRÉ, *DROIT CIVIL: INTRODUCTION GÉNÉRALE* § 142 (4th ed. 1979) (discussing codification as promoting further unification of law); H.R. Hahlo, *Codifying the Common Law: Protracted Gestation*, 38 *MOD. L. REV.* 23 (1975); Denis Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 *ISR. L. REV.* 1, 3 (1979) (arguing that restatements and consolidations are formal codifications). Some controversy remains, however, over whether the codes that preceded the Napoleonic Code were properly civil in that sense. For the claim that these codes were mere consolidations, see Tallon, *supra*, at 3, and Dominique Terré, *Hégel et les sources du droit*, 27 *ARCH. PHIL. D.* 121, 126 (1982) (suggesting this is what led Max Weber to compare Anglo-Saxon common law with Roman law). *But see* Stein, *supra* note 31, at 280.

77. Carlos de la Vega Benayas, *Judicial Method of Interpretation of Codes*, 42 *LA. L. REV.* 1643, 1647 (1982). A civil code, in contrast, is “linked to certain fundamental ideas and purposes . . .” *Id.*

78. Pierre Issalys, *Vers la systématisation des lois québécoises*, 21 *C. DE D.* 523, 527 (1980).

79. Sylvio Normand, *Le Code et la protection du consommateur*, 29 *C. DE D.* 1063, 1081 (1988); Bergel, *supra* note 30, at 1076, 1088-89. Bergel argues:

Formal codification, contrary to true or substantive codification, does not involve a construction of a coherent body of texts, new or renewed, which have for their object the establishment or the renewal of a legal order. Rather, it is an administrative undertaking aimed only at grouping together preexisting and scattered rules without modifying their content. It is nothing but a compilation for the purpose of facilitating, through their gathering, the knowledge of numerous rules, from varied and scattered sources.

*Id.* (citations omitted).

80. Jean-Charles Groeshens, *La codification par décret des lois et règlements*, 1958 *D.S. CHRON.* 157.

81. Bodenheimer, *supra* note 43, at 25; 3 ROSCOE POUND, *JURISPRUDENCE* 715 (1959) (describing Georgia Code); Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 *CAL. L. REV.* 185, 188-90 (1922) (describing codification of system of private rights); Kenneth L. Chasse, *The Meaning of Codification*, 35 *CRIM. REP. NEW SERIES ANNOTATED* 178 (describing Canada’s Criminal Code).

82. Portalis, *supra* note 51, at 466 (my translation).

Hence, civil law theorists have written that their Code's structure is "born from the nature of things" and "conform[s] . . . to the natural course of ideas,"<sup>83</sup> and that it makes "authentic distinctions."<sup>84</sup> Therefore, the Civil Code's comprehensiveness is primarily conceptual because the Code is the expression of natural ideas.

It should be clear from the above description that the relative abstractness, paramountcy, and gaplessness of the Civil Code are intimately related. For the Code to be paramount, it must be formulated in a way that is sufficiently abstract to root all (concrete) rules of private law. Similarly, the Code could not be gapless if it were not abstract, since the scope of any rule or principle is inversely proportional to its contextualization, and a string of limited rules could hardly constitute a gapless system.

### C. Codal Reasoning

Not surprisingly, codal interpretation at civil law is as distinct from other forms of juridical reasoning as civil codes are distinct from other forms of juridical materials. This difference is largely due to the conceptual unity/gaplessness/"codification effect" characteristic of civil codes. Codal interpretation differs from statutory interpretation in that Code provisions are a priori unsuited to literal or strict interpretation.<sup>85</sup> Insofar as literal interpretation is possible, it can proceed only from text that is precise enough to be readily applicable to given fact situations. In contrast, legal texts that articulate abstract principles require some form of interpretive, reconstructive, or extrapolative exercise before they can find concrete application, and the standards for conducting such an exercise are not contained within the words themselves.<sup>86</sup> One civil law judge stated: "A literal and stringent interpretation of the texts . . . while it may be acceptable in tax law, is definitely out of place in matters of civil law."<sup>87</sup>

Against the claim that literal interpretation is fundamentally unsuited to the style of the Code, it has been suggested that literal interpretation was propounded by no less than the French *École de l'exégèse*, the dominant school of codal interpretation throughout the nineteenth century.<sup>88</sup> This

83. Tronchet & Jaubert, in *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL*, *supra* note 51, at lxix, cxiii (my translations).

84. Bergel, *supra* note 30, at 1084.

85. See PIERRE-ANDRÉ CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA 25-29* (Katherine Lippal et al. trans., 1991). Côté writes:

In common law jurisdictions, statute law is traditionally regarded as a law of exception, filling in the gaps where the common law is incomplete. From this has developed the "strict" or "restrictive" interpretation of all statutes, considered as exceptions to common law. Clearly, such reasoning is inapplicable to the *Civil Code*, which sets out, in its own field, the general law of Quebec.

*Id.* at 26-27.

86. "A text plainly and concisely setting forth certain general principles does not easily lend itself to a purely grammatical method of legislative interpretation. Other methods (contextual, purposive, historical) tend to be more appropriate." *Id.* at 27.

87. *General Motors Prods. of Can. v. Kravitz*, [1979] 1 S.C.R. 790, 813 (Pratte, J.).

88. See JULIEN BONNECASE, *L'ÉCOLE DE L'EXÉGÈSE EN DROIT CIVIL 25-26* (E. de Bocard ed., 1924) (describing the *exégètes* interpretive method as rigorous and clean, without influence from philosophy or ancient jurisprudence); EUGÈNE GAUDEMET, *L'INTERPRÉTATION DU CODE CIVIL EN FRANCE*

description is somewhat misleading, for although a few of the *exégètes* did move very close to strict literalism, the large majority of them were textualists, not literalists. They did not, in other words, believe that respect for legal texts mandated excluding interpretive standards found outside the letter of these texts.<sup>89</sup> The *exégètes* did suggest that the proper standard for interpretation lies in legislative intent, but by this they meant not the intent of the Code's actual authors, nor even that of an ideal representative of the people, but rather that of the omniscient, infallible logician. "Who stands for God on earth? The legislator!" wrote Thibaudeau.<sup>90</sup> Similarly, two contemporary scholars paraphrase the *exégètes* as follows: "The law being treated as a reasonable will, one must call upon the resources of logic in order to derive from the explicit rules the implicit solutions that they contain."<sup>91</sup> For this reason, in fact, one prominent civil jurist accused those *exégètes* claiming to be literalists of hypocrisy.<sup>92</sup>

The presumption against literalism also applies to the use of definitions in codal interpretation. Definitions are essential instruments in statutory interpretation, where literalism is the dominant form of reasoning. In the field of taxation, for instance, legal reasoning is highly contextual. Taxation law is a law of things, not concepts, and is accordingly not only amenable to, but in fact largely dependent upon definitions.<sup>93</sup> At civil law, in contrast, the high level of abstraction forecloses the possibility of formulating law as a series of definitions.<sup>94</sup> Abstract concepts are best expressed through broad statements of principle. Moreover, as explained above,<sup>95</sup> the Code could not be intertemporal if it consisted of definitions. "Every definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown."<sup>96</sup>

The comparison between codal and statutory interpretation — and the conclusion that literal interpretation is irremediably ill suited to the former — also provide some insight into the French tendency to allow resort to the Code's *travaux préparatoires* in interpreting the Code.<sup>97</sup> While not

DEPUIS 1804, at 10 (1935), reprinted in BASLER STUDIEN ZUR RECHTSWISSENSCHAFT (C. Wieland et al. eds., n.d.); Léon Husson, *Analyse critique de la méthode de l'exégèse*, 17 ARCH. PHIL. D. 115, 115 (1972).

89. See 1 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL 119-20 (1955) (describing school of *exégèse*); Serge Gaudet, *La doctrine et le Code civil du Québec*, in LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION 222, 233-34 (Proceedings of the Journées Maximilien-Caron, 1992).

90. ANTOINE-CLAIRE THIBAudeau, MÉMOIRES SUR LE CONSULAT, 1799-1804, at 423 (Paris, Chez Ponthieu et Cie. 1827) (my translation).

91. JACQUES GHESTIN & GILLES GOUBEUX, TRAITÉ DE DROIT CIVIL, INTRODUCTION GÉNÉRALE § 144 (3d ed. 1990) (my translation). To the same effect, see CH. PERELMAN, LOGIQUE JURIDIQUE: NOUVELLE RHÉTORIQUE 51-52 (1976); Christian Atias, *Réflexions sur les méthodes de la science du droit*, 26 D.S. CHRON. 5, 146 (1983).

92. See MICHEL VILLEY, *François Gény et la renaissance du droit naturel*, in SEIZE ESSAIS DE PHILOSOPHIE DU DROIT 121, 122 (1969).

93. This is not to say that definitions are static; rather, they vary from context to context. The point is that such variations in the "law of things" result from their ad hoc quality, not from their appeal to abstract legal concepts.

94. See generally Gérard Cornu, *Les définitions dans la loi*, in MÉLANGES DÉDIÉS À J. VINCENT 77 (1981).

95. See *supra* text accompanying notes 63-66.

96. DIG. 50.17.202 (Javolenus, Letters 11), quoted in ATIAS, *supra* note 58, at 153 n.102.

97. Bergel, *supra* note 30, at 11-13.

authoritative, the *travaux préparatoires* are, like any other form of legal materials that embodies some of the reasoning behind formal legal statements, one more useful tool in reconstructing the spirit of the Code.<sup>98</sup> In contrast, the precision with which statutes are worded theoretically eliminates the need to look beyond their letter for their exact meaning. Hence, literalism is inappropriate in codal interpretation.

Perhaps the best way to describe codal legal reasoning is by analogy to mathematical reasoning.<sup>99</sup> For it is indeed in logic that the judge of civil law will find the standards by which to apply the law from the few abstract formulations of principle found in the Code. The orthodox civil law jurist will readily qualify his judicial reasoning as "syllogistic" and judicial decisions at civil law as "logically necessary."<sup>100</sup> Thus, it is only appropriate to sum up civil legal reasoning by way of rules or postulates, as Max Weber did in the following terms:

[F]irst, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.<sup>101</sup>

To be sure, once a given rule of law has been formulated and identified as applicable in a given situation, the process of applying it to the facts is the same whether it takes place in the mind of a civil or a common law jurist or judge.<sup>102</sup> This epistemological sameness may explain why the outcomes of

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98. The question of whether to refer to the *travaux préparatoires* in interpreting the Code has been debated frequently among civil law scholars. See, e.g., GÉNY, *supra* note 76, at 256-57 (criticizing purely textual analysis); Henri Capitant, *L'interprétation des lois d'après les travaux préparatoires*, 1935 D.S. CHRON. 77, 79 (famous objection to use of *travaux préparatoires*); Michel Couderc, *Les travaux préparatoires de la loi ou la remontée des enfers*, 1975 D.S. CHRON. 249. However, the question under consideration has concerned the extent to which documents such as the *travaux préparatoires* should, if at all, be considered apt representations of the rational foundations of code provisions; those who oppose resorting to the *travaux* have done so, not on the ground that these documents lack proper institutional standing, but rather on the ground that they fail to provide an apt representation of the Code's rational foundations. The suggestion made above that exegesis should not be equated with literalism, see CÔTÉ, *supra* note 85, at 27, is further supported by the fact that those nineteenth century French scholars who supported exegesis as the appropriate method of codal interpretation were not consistently the same scholars who objected to consulting the *travaux préparatoires* in that interpretive process.

99. See Stein, *supra* note 31, at 282. For an argument that the reality of judicial decisionmaking at civil law falls far short of this ideal, see MacLean, *supra* note 33. I discuss the analogy with mathematical reasoning in greater detail in Valcke, *Clash of the Titans*, *supra* note 21.

100. "A rational judicial process involves always determination of issues in accordance with the requirements of formal logic. The judicial decision is a conclusion reached on the basis of syllogism: rules of law furnish the major premise, fact situations form the minor premise, and the conclusion follows with logical necessity." ATHANASSIOS YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* 89 (1977).

101. MAX WEBER, *ECONOMY AND SOCIETY* 657-58 (Ephraim Fischhoff et al. trans., 1978).

102. See Neil MacCormick, *Le raisonnement juridique*, 33 ARCH. PHIL. D. 99, 103 (1988) (syllogistic reasoning is basic logic and as such is part of judicial reasoning in all legal systems); *supra* note 58 and accompanying text.

judicial decision making in the two systems differ only slightly in practice.<sup>103</sup> Yet, the difference subsists at a systemic level, in the way interpreters in each system go about identifying the applicable rules and circumscribing the relevant facts before the actual process of applying the former to the latter can take place. And, these initial steps make up the larger part of the interpretive process.

This systemic difference between the two legal traditions is clearly reflected in their different styles of judgment. As a judicial decision at civil law is considered the logical outcome of a quasiscientific form of reasoning, the judgment in civil law similarly is considered an objective statement of truth that does not admit dissent. It is not a subjective, contingent personal opinion.<sup>104</sup> The typical civil law judgment is accordingly written in an objective, entirely impersonal style and contains no dissenting opinion.<sup>105</sup>

But the systemic difference between these legal traditions is nowhere more explicit than in their differing treatment of past judicial decisions ("case law" at common law; "*la jurisprudence*" at civil law). More specifically, at the heart of this difference lies the absence in civil law of anything resembling the common law doctrine of precedent.<sup>106</sup> In civil systems, the authority of judicial decisions is indeed a matter of fact; it is not a matter of rule, as at common law.<sup>107</sup> A lower court in France has no formal duty to follow a higher tribunal's decisions, and the highest court, the *Cour de cassation*, enjoys full power to renounce its own decisions.<sup>108</sup>

103. Cf. Edouard Lambert & Max J. Wasserman, *The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law*, 39 YALE L.J. 1, 11 (1929) (arguing that case method applies with equal force in predominantly written and unwritten legal systems).

104. That is not to say that civil law jurists believe that judges are always right. They agree that what civil law judges take to be statements of objective truth are often not so and that subsequent judges in similar cases would therefore be well advised to reach a different conclusion. Given the absence of a rule of precedent at civil law, this is entirely legitimate, as I explain *infra* text accompanying notes 106, 109-112. Yet, it is possible to acknowledge judges' fallibility in this respect while maintaining that their judgments embody a process of truth seeking. In this sense, civil law judgments are at least tentative truth statements, just as scientific statements are deemed theories of an objective reality amenable to subsequent refinement or refutation.

105. See, e.g., LOUIS BAUDOUIN, *LE DROIT CIVIL DE LA PROVINCE DE QUÉBEC* 532 (1953); WATSON, *supra* note 67, at 176-77; Gaudet, *supra* note 89, at 242-43.

106. The notion of *jurisprudence constante* should not be mistaken for a civil law version of the common law doctrine of precedent. Although "the repetition of similar decisions permits the conclusion that the courts recognize the existence of a rule governing the solution," 1 MARCEL PLANIOL & GEORGE RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 50-52 (1948), this conclusion is a mere finding of fact. *But see* BRIERLEY & MACDONALD, *supra* note 62, at 122, 124 (arguing that *Cour de cassation* has increasingly relied on precedent). A particular holding's normative significance lies in its being repeatedly demonstrated as correct on rational grounds; it draws no significance from the repetition itself. For the same reason, Robespierre and Le Chapelier, then parliamentary deputies, insisted that the duties of the *Cour de cassation* in no way included that of unifying judicial decisions in consistent lines of opinions. See the debate of the parliamentary session of November 18, 1790 in 20 ARCHIVES PARLEMENTAIRES DE 1787 À 1860, at 516-17 (1st ser. 1885).

107. Lambert & Wasserman, *supra* note 103, at 14. See generally Paul Esmein, *La jurisprudence et la loi*, 50 REVUE TRIMESTRIELLE DE DROIT CIVIL [R. TRIM. D. CIV.] 17, 19 (1952); Gino Gorla, *Civilian Judicial Decisions—An Historical Account of Italian Style*, 44 TUL. L. REV. 740, 748 (1970).

108. See 1 AUBRY & RAU, *DROIT CIVIL FRANÇAIS* 55-59 (Paul Esmein & André Ponsard eds., 7th ed. 1964); 1 AMBROISE COLIN & HENRI CAPITANT, *TRAITÉ DE DROIT CIVIL* 113-14 (1957); JOHN P. DAWSON, *THE ORACLE OF THE LAW* 416-31 (1968); GHESTIN & GOUBEAUX, *supra* note 91, § 407; 1 GABRIEL MARTY & PIERRE RAYNAUD, *DROIT CIVIL* 215-18 (2d ed. 1972); 1 GEORGE RIPERT & JEAN BOULANGER, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 51 (1948).

This is readily explained in light of the above discussion. If the doctrine of precedent is meaningful in custom-based systems such as the common law, such a rule would be out of place in systems where reason prevails over custom. For where adjudication proceeds from the recollection of possibly incoherent customs, the written text of decisions becomes the receptacle of all that properly qualifies as "law,"<sup>109</sup> and it is paramount for this reason. In such a system, the only way to infuse the (judge-made) law with some form of coherence and predictability is to require that the text of new decisions accord with that of past ones; hence, the doctrine of precedent. "In legal systems based on rationality, in contrast . . . [t]he question whether a particular set of circumstances should be governed by precedent A or precedent B . . . is of no consequence if precedents A and B are logically consistent. The question will not even arise."<sup>110</sup> In reason-based systems, in other words, it makes as much sense to say that judges must defer to their predecessors' authority because these predecessors did no more than express the unwritten law as to demand that judges not defer to this authority because they are as capable as their predecessors of deciphering this unwritten law.<sup>111</sup> In sum, at civil law, unlike at common law, judicial decisions matter because of the authority of reason, not by reason of authority.<sup>112</sup>

Other traits distinguish judicial reasoning in the two systems, most of which can be traced more or less directly to the existence of the rule of precedent at common law and its absence at civil law. As common law judges realize that their decisions will be binding in subsequent cases, they have traditionally tended to formulate holdings narrowly, "lest essential factors be omitted in the wider survey and the inherent adaptability of [the] law be unduly restricted."<sup>113</sup> And while some common law judges have undeniably

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109. "[O]ne cannot acquire the knowledge [of the common law] otherwise than by reading the numerous *in-quarto* that it fills." Terré, *supra* note 76, at 124 (paraphrasing Hegel).

110. Tunc, *supra* note 56, at 30.

111. Terré, *supra* note 76, at 125.

112. "Each case must hence be examined freely and healthily, judges being obliged to reason alone." Adam, *supra* note 52, at 363 (quoting 2 PIERRE CHARRON, *DE LA SAGESSE*, 8,7, at 441 (1768) (my translation)); see also 3 *id.* 16,6 at 731; see also PIERRE MESNARD, *L'ESSOR DE LA PHILOSOPHIE POLITIQUE AU XVIIÈ SIÈCLE* 393-94 (1951) (exalting reason over obedience). In *Lavallé v. Bellefleur*, Justice Bissonnette writes,

[I]n principle the Court of Appeal of this province [Quebec] is not bound by the decisions of the Supreme Court of Canada. . . . '[P]recedents have, in our judicial system, only an authority of reason; their value can only come from their legal grounds. The reasons underlying the decision of a tribunal prevail over the fact that this decision has been rendered; when an issue already adjudicated presents itself anew, the Court of Appeal may therefore consider and take account of previous decisions, but not so much to rely on the very fact of these precedents as for the purpose of discovering their underlying reasons, appreciating them in light of the law, principles, and logic.'

1958 B.R. 53, 58-60 (quoting Rivard, J.) (my translation). This accounts for the inability of civil courts ever to "settle" a point of law, as is done in common law jurisdictions. To this effect, Gaudet notes the example of the debate among French jurists over the issue of "loss of chance" in the law of civil responsibility, which endures to this day in spite of the fact that, since 1965, the *Cour de cassation* has given the same consistent answer to the question in over twenty cases involving the matter. See Gaudet, *supra* note 89, at 245 n.58.

113. *Donoghue v. Stevenson*, 1932 App. Cas. 562 (P.C.) (appeal taken from Scot.). In the branch of the law that deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in

aspired to greater activism, it is unclear how successful they have been in this respect, for it is always open to judges to tailor the binding force of prior cases to the specific facts at issue in recent ones.

This practice contrasts starkly with the broad rules of flexible application that predictably emerge from the synthesist policy of civil adjudication. Since judicial decisions are not binding at civil law, the judicial function at civil law cannot be described as rule making but merely as rule applying. The result is that civil law judges may dispense with lengthy instructions to future users, that is, with detailed speculations as to the way a rule being established would apply to different, as yet unmaterialized, fact scenarios. And so the typical French *arrêt* is usually no longer than one paragraph composed of a broad statement of law, a series of findings of facts, and a perfunctory conclusion, all laid out in syllogistic form.<sup>114</sup>

In turn, the cursory form of judicial decisions at civil law suggests that judges must look elsewhere than in judicial reports to unearth the full reasoning behind the skeletal conclusions contained in these reports. For this reason, civil courts typically tend to consult *la doctrine*<sup>115</sup> more readily than *la jurisprudence* in search of the right legal answer.<sup>116</sup> In fact, some argue that the *jus respondendi* of Roman law (the juriconsults' commentaries on the texts) were considered a primary source of law on an equal footing with the *Corpus Juris Civilis*.<sup>117</sup> Similarly, and apparently much to Napoleon's

the wider survey and the inherent adaptability of English law be unduly restricted. *Id.* at 583-84.

114. See also Roderick A. Macdonald, *Understanding Civil Law Scholarship in Quebec*, 23 OSGOODE HALL L.J. 573, 583 (1985) (reproducing text of one *arrêt* in full); André Tunc, *Pour une motivation plus explicite des décisions de justice, notamment de celles de la Cour de cassation*, 72 R. TRIM. D. CIV. 487 (1974) (criticizing this aspect of French cases).

115. The term *doctrine* here refers to all forms of nonjudicial scholarly writings about law. See Pierre-Gabriel Jobin, *Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d'une affaire de famille*, in ASSOCIATION HENRI CAPITANT, LA RÉACTION DE LA DOCTRINE À LA CRÉATION DU DROIT PAR LES JUGES 65, 65-67 (1980).

116. Max Rheinstein describes the development of common law and civil law: While the common law of England and America was essentially shaped by judges, the civil law of the Continent of Europe was built by university professors. The Curia Regis of the English king was the centralizing agency, which, out of innumerable customs of cities, manors, counties, guilds, forests, stannaries, of the Church and of the navy, of the constables' courts and of the law merchant, molded the common law of England. No royal, papal, or imperial court attained such a role on the Continent. The elaboration of a common law on the basis of the law of ancient Rome was the work of the universities, of the scholars of Pavia, Bologna and Padua, of Paris and Bordeaux, of Leyden, of Prague, Vienna, Budapest, Cracow, of Copenhagen, of Leipzig, Heidelberg, Ingolstadt, and Halle, of Berne, Zurich, and Geneva.

Max Rheinstein, *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany*, 1938 WIS. L. REV. 5, 6; see also WATSON, *supra* note 67, at 171 (stating that French jurists were not bound to follow higher court opinions before codification); Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 255-57 (1958) (stating that French judges follow precedent only as interpretation of legislation).

Henry deVries notes other, more technical reasons for the precedence of doctrinal writings over judicial opinions at civil law, among them that these writings initially appeared in Latin, which was the universal language of the administrative class, at that time when printing had yet to make written texts available to many and customary rules were difficult to prove without relevant codes of laws. HENRY P. DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 300 (1976).

117. WATSON, *supra* note 67, at 171. Although Justinian, the author of this code, disapproved of resorting to sources other than his own words and attempted to bring this practice to an end by burning the work of the juriconsults, the practice long antedated and outlived him. See MERRYMAN, *supra* note 32, at 8-9.

dismay,<sup>118</sup> “[t]he great commentaries on the Civil Code [were] scarcely less authoritative than the Code itself . . . .”<sup>119</sup>

The absence of a doctrine of precedent at civil law affects the use of doctrinal writings by civil law judges in at least two ways. First, civil law judges are not formally required to give more weight to judicial opinions than to doctrinal writings when deciding cases. These opinions are therefore rather uninformative, which explains why judges tend to turn for guidance to doctrinal writings instead.<sup>120</sup> Second, the privileged standing of *la doctrine* at civil law is consistent with the archrationalism of the civil law jurist. Indeed, once the primacy of reason over experience in judicial decisionmaking is acknowledged, it only makes sense to ascribe greater weight to the opinions of professional scholars, who have the time and intellectual energies to devote to analysis of the Code, than to the opinions of those whose judgments are likely to be clouded by the daily pressures and contingencies of legal practice and administration.<sup>121</sup> Decontextualization is deemed key to rational thinking at civil law.<sup>122</sup>

Thus, it is not surprising that when commenting on the disposition of judicial cases, civil scholars discharge a function common lawyers would view as quasijudicial. As one author writes, “It is not too much to say that there are large and important fields of law which were created by continental jurists just as the English common law was the judges’ handiwork.”<sup>123</sup>

As the abstract, and comprehensive expression of the Law of Reason with respect to private matters, Napoleon’s Civil Code aspired to delineate the boundaries of legitimate judicial power. Within these boundaries, civil judges

118. Upon publication of the first commentary on the Napoleonic Code, the Emperor is said to have exclaimed: “My Code is lost!” Gustave Rousset, *De la lettre des lois ou de la rédaction et de la codification rationnelles des lois*, 9 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE [REVUE CRIT. LÉGIS. & JUR.] 324, 352 n.1 (1856).

119. CARLETON KEMP ALLEN, LAW IN THE MAKING 123 (1930). For French scholars making this point, see 1 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL § 99, at 138 (François Chabas ed., 9th ed. 1989). This is less the case nowadays, however. See 1 PIERRE AZARD, DROIT CIVIL QUÉBÉCOIS, § 27, 37 (1971) (“[M]uch less than jurisprudence, *doctrine* could not claim title as a creative source of law.”) (my translation) GHESTIN & GOUBEAUX, *supra* note 91, § 227, at 187-89 (“*Doctrine* is not a source of law.”) (my translation). For Quebec scholars making this point, see Pierre Azard, *Le problème des sources du droit civil dans la province de Québec*, 44 CAN. B. REV. 417, 430 (1966) (“*Doctrine* cannot claim to create . . . positive rules of law . . . .”) (my translation); Adrian Popovici, *Dans quelle mesure la jurisprudence et la doctrine sont-elles source de droit au Québec?*, 8 REVUE JURIDIQUE THÉMIS [R.J.T.] 189, 190 (1973) (“*Jurisprudence* and *doctrine* are but ‘authorities’; they merely interpret the law.”) (my translation). One author remarks that the Supreme Court of Canada (and thus presumably continental courts, whose practice the Canadian courts adopted) used to prefer relying upon the work of deceased individuals, because the authors could no longer change their minds! Ernest Caparros, *La Cour suprême et le Code civil*, in THE SUPREME COURT OF CANADA 107, 113 (Gérald A. Beaudoin ed., 1986).

120. This is a circular process. Part of the reason that judicial opinions are uninformative in the first place must be that their authors know that subsequent judges will consider doctrinal writings before they consider the earlier opinions. For further discussion of this circular process, see Valcke, *Legal Education in a “Mixed Jurisdiction”*, *supra* note 21.

121. “[O]nly men admittedly aloof from political affiliation and skilled in the processes of textual interpretation could serve the need for impartial statement of allegedly immutable universal principles.” DEVRIES, *supra* note 116, at 301.

122. “Juristic opinion was [in Roman times] treated as valuable in itself as an interpretation of the law and was timeless, whereas judicial decision was strictly tied to time and place. Whereas judges did not ignore jurists, jurists in their writings ignored the judges.” WATSON, *supra* note 67, at 171.

123. van Caenegem, *supra* note 33, at 53.

are to play an active, but not discretionary,<sup>124</sup> role. Rather than implementing Code provisions literally, they are supposed to reconstruct the spirit of the Code as it bears on these provisions and illuminates the application process in concrete cases — a task deserving of the now notorious label “Herculean.”<sup>125</sup> In this reconstruction exercise, therefore, all materials likely to assist the rational thought process should be considered. To this extent, judges should take particular account of the *travaux préparatoires*, of doctrinal writings, and of any judicial opinion relevant to the issues at bar, although the latter should, in the same spirit, be viewed as possibly persuasive but never binding.

Having described the typical civil law method, let me turn to the discussion of legislative and judicial institutional features of Canadian federalism that hamper the preservation of this view in Quebec.

### III. QUEBEC'S LEGISLATIVE POWERS IN THE CANADIAN FEDERATION

And be it further enacted by the Authority aforesaid, That all his Majesty's Canadian Subjects within the Province of Quebec, the religious Orders and Communities only excepted, may also hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all other their Civil Rights, in as large, ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments, had not been made, and as may consist with their Allegiance to his Majesty, and Subjection to the Crown and Parliament of Great Britain; and that in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada. . . .<sup>126</sup>

This section of Britain's 1774 Quebec Act set the stage for two centuries of legal and political history in Quebec. It aimed to institutionalize a firm dividing line between the public and private spheres of Canadian political life and to consecrate Quebec's exclusive and autonomous legislative power with respect to matters falling in the private sphere.<sup>127</sup>

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124. In other words, civil judges are not automatically to exceed the residual discretion. *Cf.* text accompanying notes 52-53 (noting that some discretion is inevitably required). That a form of judicial reasoning can properly be described as both “active” and “nondiscretionary” may puzzle many common law practitioners. However, there is no contradiction in saying, on the one hand, that “the high level of abstraction of code provisions gives the civil law judge far more latitude in shaping the law than the common law judge has . . .” H.R. Hahlo, *The Civil Law Tradition by John Merryman*, 48 CAN. B. REV. 810, 813 (1970) (book review), while asserting, on the other hand, that civil law judicial reasoning is “narrow” and “uncreative,” MERRYMAN, *supra* note 32, at 37-39, and allows “no room for discretion because formal logic is compelling.” YIANNPOULOS, *supra* note 100, at 90. On this last point, see Timsit, *supra* note 61, at 267-68.

125. The reference is to Ronald Dworkin's ideal judge, whom he aptly calls “Hercules.” DWORKIN, *supra* note 50, at 105.

126. Quebec Act, R.S.C. ch. 83, § 8 (1985). In this provision, the phrase “laws of Canada” meant the French derived civil law that prevailed before the conquest, as Canada was then a reference to French-Canada.

127. This allocation of legislative powers between provincial and federal Canadian governments follows what is usually referred to as the “classical,” “coordinate,” or “autonomy” model of Canadian federalism. See W.H.P. Clement, *THE LAW OF THE CANADIAN CONSTITUTION* 21-22, 45-47, 141-44 (Toronto, Casewell 1892) (noting that Great Britain secured adherence of French Canadians to British connection by giving them extensive legislative power over their private lives); R.C. VIPOND, *LIBERTY AND COMMUNITY: CANADIAN FEDERALISM AND THE FAILURE OF THE CONSTITUTION* 40-41 (1991)

But this two sphere model for the division of legislative powers between the federal and provincial governments, while enthusiastically received by Quebecers at the time,<sup>128</sup> was never successfully implemented. One of its acknowledged drawbacks was that it could not adequately provide for an exhaustive division of constitutional powers.<sup>129</sup> An exhaustive division of powers required that some hierarchy be established between the two spheres, whereby the secondary sphere would capture whatever competence escapes the ambit of the primary sphere.

In this third part, I describe various constitutional developments spurred by the Quebec Act of 1774 and its successor, the British North America Act of 1867, which reveal that it is the provincial sphere of private law that was constituted as secondary. Therefore, rather than being autonomous and exclusive, the provincial sphere was subordinated to the federal sphere. Its content was determined by what the federal government was willing to forbear from appropriating.<sup>130</sup> The provincial sphere ended up being a very small secondary sphere because the primary (federal) sphere grew to large proportions.

The small sphere of provincial competence is problematic for all ten Canadian provinces, not just for Quebec. Yet, in Quebec the discordance in legal culture between the exercise of constitutional powers in the private and public spheres has further compounded the problem. In addition, while provincial autonomy may be important to all Canadian provinces, it is crucial to Quebec, since the preservation of its distinct private legal culture is at

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(discussing David Mills' label for Canadian federalism); Louis-Philippe Pigeon, *The Meaning of Provincial Autonomy*, 29 CAN. B. REV. 1126, 1126-27 (1951) (interpreting federalism as provincial autonomy); *Liquidators of Maritime Bank of Can. v. New Brunswick*, 1892 App. Cas. 437, 441-43 (P.C.) (appeal taken from Can.) (holding that debt owing to province is held by Crown in right of province, which is entitled to prerogative privilege of payment in priority to other creditors); *R. v. Hodge*, [1883] 9 App. Cas. 117 (P.C.) (appeal taken from Ont.), *aff'g* [1882] 7 O.A.R. 246 (regarding provincial statute purporting to regulate good management of local taverns); *Citizens Ins. v. Parsons*, [1881] 7 App. Cas. 96 (P.C.) (appeal taken from Can.), *aff'g* [1881] 4 S.C.R. 215 (regarding power to incorporate companies whose objects are other than provincial).

The adoption of federalism in Canadian constitutional law (in principle if not in fact, as I argue in this section) may explain why in Canada, unlike in the United States, exclusivity is the rule with respect to allocating legislative competence, and concurrency the exception. See HOGG, *supra* note 1, at 410. One alternative to the autonomy model is the more centralized "model of subordination," which emphasizes that Canada is a constitutional monarchy over the fact that it is a federal structure, and as a corollary, depicts the provinces as "mere administrative entities whose functions should be restricted to the application of general policies defined by the central authority." Pigeon, *supra*, at 1127. Another alternative is "the well-worn view that Confederation was a political settlement that responded to various identifiable interests but elicited little reflection about basic political and constitutional ideas." VIPOND, *supra*, at 104. While views differ about which of these alternatives offers the best account of Canadian federalism, see Richard C. Risk, *The Puzzle of Jurisdiction*, 46 S.C. L. REV. 703 (1995), it is clear that the autonomy model best captures Quebecers' understanding. See *infra* note 135.

128. The Quebec Act was viewed by Quebecers as marking the beginning of an era of general colonial benevolence in their favor. Mason Wade remarked that the Quebec Act was "virtually the Magna Carta of the French Canadians." MASON WADE, *THE FRENCH-CANADIANS: 1760-1945*, at 63 (1955).

129. HOGG, *supra* note 1, at 435-36.

130. For a discussion of this problem in other legal systems, see REVÉ SAVATIER, *DU DROIT CIVIL ET DROIT PUBLIC* (2d ed. 1950); John Henry Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3 (1968).

stake.<sup>131</sup>

The specific constitutional developments examined here are the provinces' exclusive legislative power in matters of property and civil rights (Section A); the federal government's general legislative power (Section B); the federal government's particular legislative power with respect to trade and commerce matters and to matters related to "peace, order, and good government" (Section C); the judicial doctrine of ancillary legislative power (Section D); and the Canadian Charter of Rights and Freedoms (Section E).

A. *The "Property and Civil Rights" Clause of Section 8 of the Quebec Act and Subsection 92(13) of the British North America Act*

The phrase "property and civil rights" contained in section 8 of the Quebec Act,<sup>132</sup> broadly construed under the terms of the section,<sup>133</sup> provided ample room for Quebec to develop a fully distinctive civil body of private law. In spite of the unification of Upper and Lower Canada and the concomitant merger of their legislatures in 1840, Quebec was able to develop and preserve its separate legal culture.<sup>134</sup> In fact, this distinctive legal culture was so well established on the eve of confederation that few would have questioned the proposition that Lower Canada would remain a stronghold of the continental tradition of civil law.<sup>135</sup>

Thus it is no surprise that throughout the confederative negotiations Quebec insisted upon retaining as much provincial autonomy within the confederation as it had hitherto enjoyed.<sup>136</sup> The Quebecers' demands were

131. "The French-speaking population of the province of Quebec is obviously the group of Canadian citizens specially interested in [provincial autonomy]. For them autonomy is linked up with the preservation of their way of life." Pigeon, *supra* note 127, at 1134. Even Trudeau, the architect of official pan-Canadian biculturalism, recognized that "[c]entral government encroachments, which are accepted in other provinces as matters of expediency, cannot be so viewed in Quebec. . . . On the contrary, a scrupulous respect of the postulates of federalism . . . [is necessary to] lend greater force to the efforts of those Quebecers who are trying to turn their province into an open society." Trudeau, *supra* note 3, at 140-41. For discussions of Quebec's Civil Code as a key element in the cultural and intellectual survival of the French Canadian nation, see BRIERLEY & MACDONALD, *supra* note 62, at 71.

132. Quebec Act, R.S.C., ch. 83, § 8 (1985).

133. Section 8 provides that the "Property and Possessions," "Customs and Usages," and "all other their Civil Rights" be enjoyed "in as large, ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made." Quebec Act, R.S.C., ch. 83, § 8 (1985).

134. "The two Canadas . . . possessed a single legislature, but had been compelled by the differences in their cultures to conduct their affairs almost as in a federation." Brady, *supra* note 5, at 259.

135. See ARTHUR I. SILVER, *THE FRENCH-CANADIAN IDEA OF CONFEDERATION: 1864-1900*, at 15-16 (1982); John E.C. Brierley, *Quebec's Civil Law Codification: Viewed and Reviewed*, 14 *MCGILL L.J.* 521, 532 (1968); Robert Yalden, *Unité et Différence: The Structure of Legal Thought in Late Nineteenth-Century Quebec*, 46 *U. TORONTO FAC. L. REV.* 365, 369 (1988).

136. "The French were emphatic in contending for genuine federalism, and those among them who opposed the projected confederation did so because it appeared to offer a provincial autonomy that was shadowy and insufficient." Brady, *supra* note 5, at 260; see COOK, *supra* note 4 at 44-45; SÉGUIN, *supra* note 11, at 9; SILVER, *supra* note 135, at 111-30. It has even been argued that Quebec conditioned its adherence to the Canadian federation upon obtaining a sphere of exclusive and autonomous legislative power. In 1956, for example, the Tremblay Commission asserted:

If [the Union of 1867] assumed a federative character it was doubtless due to their divergencies, but it was especially due to the irreducible presence of the French Canadian bloc which only accepted Confederation because it had been given every conceivable promise that it would be able to govern itself in autonomous fashion and thereby develop, along with all

initially successful insofar as the legislative powers of the future federal Parliament were subtracted from the powers already enjoyed by the provinces, rather than the other way round.<sup>137</sup> This residual definition of federal power seemed to set Canada on the same constitutional path that had been traced by the United States earlier,<sup>138</sup> and that would be followed by Australia later,<sup>139</sup> wherein the federal sphere of legislative competence consisted of powers relinquished by the federal constituents. This definition would render the federal sphere secondary and the provincial sphere primary.

This was not to be in Canada, however. In *Church v. Blake*,<sup>140</sup> the Quebec Superior Court considered whether unclaimed inheritance devolved to the federal or the provincial government. The Quebec government argued in favor of provincial devolution on the basis of subsection 92(13) of the B.N.A. Act (the successor to the "Property and Civil Rights" clause of the Quebec Act), which provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say . . .

13. Property and Civil Rights in the Province.

B.N.A. Act § 92(13). The Court disagreed, finding that unclaimed inheritance did not qualify as "property" or "civil rights" and hence automatically devolved to the federal government. Writing for the Court, Justice Taschereau explained:

Before Confederation, each province bore the traits of sovereignty; but in joining the federal union each province completely ceded this sovereignty, and with it gave up the revenues to be derived from the exercise of concomitant privileges, prerogatives and attributes. By virtue of the B.N.A. Act, the central power returned to the provinces some of these rights and sources of revenue, and it is only in these reversions that the provinces can ground their entitlements and their rights.<sup>141</sup>

This interpretation of confederation is supported by the "Peace, Order, and Good Government clause" of section 91 of the B.N.A. Act, which reads:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of

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its institutions, according to its special way of life and its own culture.

COOK, *supra* note 4, at 178 (quoting Tremblay Commission); *see also* Pigeon, *supra* note 127, at 1129 n.8 (quoting Sir John A. Macdonald). In this respect, it is worth noting that Quebecers refer to the head of their provincial government as the "Premier ministre," just as they refer to the head of the federal government, while other Canadians use the term "Premier," in contrast to the Canadian "Prime Minister."

137. For an argument that this approach was implicit in the Quebec Resolutions of 1864, *reprinted in* BRITISH NORTH AMERICAN ACTS AND SELECTED STATUTES 39 (Maurice Olliver ed., 1962), and the London Resolutions of 1866, *reprinted in id.* at 50, which led up to the B.N.A. Act, *see* W.R. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. B. REV. 597, 601 (1975).

138. *See* U.S. CONST. art. 1, § 8, amend. X.

139. *See* AUSTL. CONST. §§ 51, 52, 107.

140. 1 Q.L.R. 177 (C.S. 1876), *rev'd*, 2 Q.L.R. 236 (Q.B. 1876).

141. *Church v. Blake*, 1 Q.L.R., at 181. Taschereau was promoted directly to the highest court in the country two years later without having to sit first on the provincial court of appeal. Yalden, *supra* note 135, at 376.

Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated. . . .

To the great relief of Quebec's legislators, the Superior Court's decision was reversed on appeal, and the reversal was implicitly endorsed by the Judicial Committee of the Privy Council<sup>142</sup> in a similar case from Ontario seven years later.<sup>143</sup> Although it was reversed, the case was important in establishing the battlelines for the upcoming struggle. Nonetheless, the primacy of the federal sphere over the provincial was to prevail throughout the following century of Canadian constitutional history. It was to be accepted from very early on that the concurrent reading of section 91 and subsection 92(13) of the B.N.A. Act rendered secondary the provincial sphere of legislative competence over matters of private law,<sup>144</sup> a proposition that led one federal negotiator to declare, "I am opposed to the scheme of Confederation, because the first resolution is nonsense and repugnant to truth; it is not a Federal union which is offered to us, but a Legislative union in disguise."<sup>145</sup>

#### B. *The General Legislative Powers of Section 91 of the B.N.A. Act*

The provincial government's relegation to a secondary sphere of legislative power did not necessarily defeat Quebec's civil law tradition. Even as a secondary sphere, exclusive competence over matters of "property and

142. Until 1949, decisions of Canada's Supreme Court could be appealed to England's Privy Council. For a brief historical account of the Judicial Committee's status as an appellate body, see the remarks of Viscount Sankey in *British Coal Corp. v. The King*, 1935 App. Cas. 500, 510-12 (P.C.) (appeal taken from Que.). Appeals to the Privy Council in civil matters were abolished in 1949. See Amendments to Supreme Court Act, ch. 37, § 3, S.C. (1949) (2d sess.) (Can.). See generally Bora Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 CAN. B. REV. 1038 (1951) (detailing mechanics of Canadian Supreme Court's operation).

143. Yalden, *supra* note 135, at 377 n.45 (discussing *A.G. Ontario v. Mercer*, 6 LEGAL NEWS 244 (1883), in which the rights of provincial governments with respect to property arising upon escheat to Crown for defect of heirs was addressed.)

144. For example, a report published by the Canadian senate asserted:

The residuum in the Dominion was necessarily exclusive by reason of the extractive nature and character of the grant to the provinces. The draftsman, I submit, knowing this, and having partially to interpret and declare the legislative authority of the dominion, rightly mentioned it as 'the exclusive legislative authority of the Parliament of Canada,' without any such (as I think) unreasonable idea in his mind as that he was thereby constituting the following enumerations as the only provisions of section 91 which were, as against the provisions of section 92 to be exclusive.

SENATE OF CAN., REPORT OF THE PARLIAMENTARY COUNSEL RELATING TO THE BRITISH NORTH AMERICAN ACT, 1867, at 63 (1939); see also ALBERT S. ABEL & JOHN I. LASKIN, CANADIAN CONSTITUTIONAL LAW 191 (4th ed. 1975) (examining residuary character of Canadian national power).

145. Jean Bte. Eric Dorion, Speech delivered before the Legislative Assembly of Canada (Mar. 9, 1985) in PARLIAMENTARY DEBATES ON THE SUBJECT OF THE CONFEDERATION OF THE BRITISH NORTH AMERICAN PROVINCES 858 (3d sess., 8th Provincial Parl. Can.) (Quebec, Hunter, Rose & Co. 1865). Dorion's opposition was echoed by Wheare, who insisted that the Canadian constitution could only be described as "quasi-federal." K.C. WHEARE, FEDERAL GOVERNMENT 21 (3d ed. 1953); see also Jean-Charles Bonenfant, *L'esprit de 1867*, 17 REVUE D'HISTOIRE DE L'AMÉRIQUE FRANÇAISE [R. D'HIST. L'AMÉR. FR.] 19 (1963) (reviewing political ideals underlying confederation).

civil rights” might have been all that Quebec needed in order to maintain its distinct legal culture. After all, the civil law tradition is one of private law, and if the provincial sphere had been clearly delineated to capture all “civil” matters, Quebec would have had little cause for complaint, at least on the juridical front.

But the provincial sphere would not capture *all* civil matters. While the list of powers that section 91 designates as federal is supposedly mentioned only “for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section,” the list in fact extends federal competence beyond these general terms.<sup>146</sup> Indeed, at least eight of the twenty-nine subdivisions of exclusive federal power enumerated in section 91 concern property and civil rights matters, matters that would otherwise have fallen exclusively to the provinces.<sup>147</sup> The Bills of Exchange Act, Interest Act, Bankruptcy and Insolvency Act, Bank Act, and Divorce Act are only a few notorious examples of federal legislation enacted under these enumerated powers.<sup>148</sup>

Admittedly, a minimum of federal intervention into matters of property and civil rights may well be inevitable in any federal union. However, this minimal intervention need not carry with it the privilege of exclusivity. Surely, the *possibility* of federal intervention in these matters, coupled with a paramountcy privilege in cases of direct conflict with provincial legislation, would be sufficient for the purposes of the union. Yet, the property and civil rights matters listed at section 91 are excluded altogether from provincial jurisdiction. Indeed, the last paragraph of this section provides:

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.<sup>149</sup>

The measure of federal intervention in property and civil rights matters authorized under section 91 is thus far greater than the minimum required for the proper functioning of a federal union.

Of course, the legislative powers of all ten Canadian provinces were thereby curtailed, but section 91 had a greater impact on Quebec than on the other provinces. In order to minimize the disruption that federal property and civil rights statutes might introduce into general provincial law, the federal legislature has generally taken care to draft these statutes in a manner consistent with provincial law. But this is true only of provincial *common*

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146. See Lederman, *supra* note 137, at 603.

147. See, e.g., B.N.A. § 91(2) (“Regulation of Trade and Commerce”), (15) (“Banking, Incorporation of Banks, and the Issue of Paper Money”), (18) (“Bills of Exchange and Promissory Notes” (19) (“Interest”), (21) (“Bankruptcy and Insolvency”), (26) (“Marriage and Divorce”).

148. An Act Respecting Divorce, 3 R.S.C. ch. D-8 (1970); An Act Respecting Banks and Banking, R.S.C. ch. 32 (1923); Bankruptcy and Insolvency Act, R.S.C. ch. 36 (1919); An Act Respecting Interest, R.S.C. ch. 120 (1906); Bills of Exchange Act, R.S.C. ch. 33 (1890).

149. BNA Act § 91.

law.<sup>150</sup> In fact, it is unclear whether the federal legislature could have enacted statutes consistent with Quebec's civil law with such common law statutes even if it had tried. How could the statutes of one legal tradition be drafted so as not to clash with a body of provincial law from a different tradition? In fact, the clashes have been many.<sup>151</sup>

For example, although the federal Bankruptcy and Insolvency Act of 1919<sup>152</sup> was enacted mainly for procedural purposes, some of its key provisions conflicted directly with the code provisions that had been in force in Quebec for nearly forty years. Indeed, since the repeal in 1880 of the 1875 Bankruptcy Act, the federal legislature had remained silent on bankruptcy matters. For example, under the C.C.L.C., insolvent private parties who had ceded their property in partial payment of their debts remained bound for the balance.<sup>153</sup> In contrast, the new federal legislation largely relieved insolvent debtors from future payment obligations. In so doing, the federal statute directly contradicted part of the civil law of obligations.<sup>154</sup> Similarly, the federal Divorce Act<sup>155</sup> touches upon matters of filiation, support obligations, and matrimonial property, all of which were previously governed by the C.C.L.C. under a very different principle, namely, that marriage cannot be dissolved except by death.<sup>156</sup> In one flagrant case, the Bills of Exchange Act, not only were over seventy C.C.L.C. articles dealing with the form and evidence of bills or notes explicitly repealed,<sup>157</sup> but the C.C.L.C.'s substantive principles of contract law in such matters were also implicitly displaced.<sup>158</sup>

In addition, as a civil law jurisdiction, Quebec has traditionally lacked the

150. In many cases, federal statutes are directly inspired from similar texts in force in common law provinces. LOUIS BAUDOIN, *LES ASPECTS GÉNÉRAUX DU DROIT PRIVÉ DANS LA PROVINCE DE QUÉBEC* 55 (1967). In addition, the mere fact that most federal statutes are drafted in English has caused considerable problems in Quebec. See R. MICHAEL BEAUPRÉ, *INTERPRÉTATION DE LA LÉGISLATION BILINGUE* 12 (1986); Louis-Philippe Pigeon, *La rédaction bilingue des lois fédérales*, 13 REV. GÉN. 177 (1982).

151. See *infra* text accompanying notes 152-58; An Act Respecting Interest, R.S.C. ch. 120 (1906) (governing interest rates in commercial transactions); *Immeubles Fournier Inc. v. Construction St-Hilaire Limitée*, [1975] 2 S.C.R. 2 (holding that creditor entitled to fifteen percent bonus if suit necessary to enforce loan contrary to Act, even though suit is permitted under C.C.L.C.). On the Bank Act, see Bankruptcy and Insolvency Act, R.S.C. ch 36 (1919); *A.G. Canada v. Mandigo*, 1965 B.R. 259 (regarding good faith purchaser of secured goods); *National Bank of Can. v. William Neilson*, 1991 R.J.Q. 712 (C.A.) (regarding right of rescission by seller); *National Bank of Can. v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059 (regarding private right of creditor to realize on its security). See generally R.A. Macdonald, *Security Under Section 178 of the Bank Act: A Civil Law Analysis*, 43 R. DU B. 1007 (1983) (relating inconsistencies Act introduced into Quebec law).

152. Bankruptcy and Insolvency Act, R.S.C. ch 36 (1919).

153. See C.C.L.C. bk. IV, *repealed* by Bankruptcy and Insolvency Act, R.S.C. ch. 36 (1919).

154. For critiques of this phenomenon, see Sylvio Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil*, 32 MCGILL L.J. 559, 588 (1978); Léo Pelland, *L'injustice dans les affaires*, 4 R. DU D. 513, 525 (1926).

155. An Act Respecting Divorce, 3 R.S.C. ch. D-8 (1970).

156. See BRIERLEY & MACDONALD, *supra* note 62, at 47.

157. C.C.L.C. arts. 2279-2354; see Bills of Exchange Act, R.S.C. ch. 33, § 10 (1890).

158. Section 10 of the Act provides that "the common law and law merchant" apply where not inconsistent with it. Bills of Exchange Act, R.S.C. ch. 33, § 10 (1890). For an illuminating discussion of the Act's profound impact on other commercial matters, such as bank notes, bearer bonds, nonnegotiable instruments, and assignments of claims, see Jean Leclair, *La constitution par l'histoire: portée et étendue de la compétence fédérale exclusive en matière de lettres de change et de billets à ordre*, 33 C. DE D. 535 (1992).

case law that is presupposed in federal drafting and is essential in interpreting and applying federal statutes. Quebec's courts have therefore had to turn for interpretive guidance to common law precedents from other Canadian provinces.<sup>159</sup> As a result, every federal statute applied in Quebec carries with it a whole body of "foreign" judicial law.<sup>160</sup> Provincial law was thus most disrupted in the Canadian province that had the most to lose by federal interference.

C. *The "Trade and Commerce" and "Peace, Order, and Good Government" Clauses of Section 91 of the B.N.A. Act*

On numerous occasions, the federal government successfully argued that its competence to make laws for "Peace, Order, and Good Government" and with respect to "Trade and Commerce" should be extended to include the authority to act on newly emerging legal issues that require federal intervention.<sup>161</sup> Given the exclusivity privilege attached to section 91 federal powers,<sup>162</sup> each time the courts endorsed such extensions of federal power, they further restricted the sphere of provincial competence over private law. In one case involving the proper interpretation of the Trade and Commerce clause, for example, Justice Ritchie insisted that "[t]he regulation of trade and commerce must involve full power over the matter to be regulated, and must necessarily exclude the interference of all other bodies that would attempt to intermeddle with the same thing."<sup>163</sup> Each instance of expanded federal power has been accompanied by restrictions of provincial power disproportionately damaging to Quebec's legal tradition.<sup>164</sup>

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159. For an account of the judicial confusion that early federal bankruptcy legislation stirred up in Quebec, see Kölish, *supra* note 23, at 7-8; see also *Royal Bank of Can. v. Larue*, 1928 App. Cas. 187 (P.C.) (appeal taken from Can.), discussed in Léo Pelland, *Problèmes de droit constitutionnel*, 15 R. DU D. 65, 75-78 (1936). For a similar discussion of judicial developments surrounding the Divorce Act, see generally Normand, *supra* note 154, at 586-88; Léo Pelland, *Encore le divorce*, 8 R. DU D. 7, 16 (1929); Léo Pelland, *Nos lois sur le mariage*, 3 R. DU D. 289 (1925). For a discussion of comparable phenomena with respect to the Interest Act and the Bank Act, see Macdonald, *supra* note 114, at 575.

160. In *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, 108, the Supreme Court of Canada held that the rule of common law formulated under federal constitutional power is paramount over conflicting provisions of provincial law. On the doctrine of federal paramountcy, see *infra* note 186.

161. See, e.g., *R. v. Justices of the Peace*, [1875] 15 N.B.R. 53 (striking down interpretation of provincial statute prohibiting sale and manufacture of liquor); *Hart v. Missisquoi*, [1876] 3 Que. L.R. 170 (invalidating attempts by local governments to amend or repeal sections of federal Temperance Act of 1864); *Cooley v. County of Brome*, [1877] 21 Lower Can. Jurist 182 (holding regulation of traffic in intoxicating liquors to be within jurisdiction of Parliament of Canada); R.C.B. Risk, *Canadian Courts Under the Influence*, 40 U. TORONTO L.J. 687, 692 (1990) (providing overview of this phenomenon with emphasis on liquor cases from 1870 to 1900).

162. "And any matter coming within any of the Classes of subjects enumerated in the Section shall not be deemed to come within the Class of Matters of a local or private Nature . . . assigned exclusively to the Legislatures of the Provinces." B.N.A. Act § 91.

163. *R. v. Justices of the Peace*, [1875] N.B.R. at 59.

164. For a description of the particularly serious ousting effect of federal antitrust, trademarks, and product labelling legislation on Quebec's corporate, securities, and consumer protection law (enacted under the Trade and Commerce powers and the general legislative powers of section 91), see generally 1 ANTONIO PERRAULT, *TRAITÉ DE DROIT COMMERCIAL* 160-257 (1936) (reviewing effect of B.N.A. Act and subsequent federal legislation on Quebec's commercial law); ALEXANDER SMITH, *THE COMMERCE POWER IN CANADA AND THE UNITED STATES* 236-54 (1963); Rosalie Jukier & Roderick A. Macdonald, *The New Quebec Civil Code and Recent Federal Law Reform Proposals: Rehabilitating Commercial Law in*

The Fathers of Confederation had apparently anticipated such extensions of federal power, for the generality of the words "Trade and Commerce" contained in subsection 91(2) of the Act could hardly have been accidental. Rather, it can be inferred from such broad wording that the clause was intended to provide the federal government with a disposition of last resort in cases where the enumerated powers of section 91 would fail to supply the requisite constitutional legitimacy.<sup>165</sup>

Indeed, in an early reading of subsection 91(2), the Privy Council declared that this provision captures not only interprovincial and international trade and commerce but also "general regulation of trade affecting the whole dominion,"<sup>166</sup> including the incorporation of provincial companies with extraprovincial objects.<sup>167</sup> So broad is this interpretation that it could conceivably have turned the Trade and Commerce clause into an outright *carte blanche* in favor of the federal legislature with respect to all commercial matters. Although in this century, the Privy Council, the Viscount Haldane in particular, repeatedly attempted to hold the Supreme Court to a narrow definition of "Trade and Commerce,"<sup>168</sup> the Supreme Court rejected these attempts after appeals to the Privy Council were abolished in 1949.<sup>169</sup>

*Quebec?*, 20 CAN. BUS. L.J. 380, 399-405 (1992).

165. Hogg draws this inference from the fact that the only precedent available to the drafters of the clause was the much more limited one of the United States Constitution, which confers upon the federal government the power to regulate "commerce with foreign nations and among the several states and with the Indian tribes." HOGG, *supra* note 1, at 108-09 (quoting U.S. CONST. art. I, § 8, cl. 3). Hogg explains that the difference between the Canadian and U.S. constitutions "was part of a design to create a stronger central government in Canada than existed in the United States." *Id.* at 436; *see also*, W.P.M. KENNEDY, *THE CONSTITUTION OF CANADA, 1534-1937*, at 408-12 (2d ed. 1938).

166. *Citizens Ins. Co. v. Parsons*, [1881] 7 App. Cas. 96, 113 (P.C.) (appeal taken from Can.).

167. *See* A.G. Ontario v. A.G. Canada, 1937 App. Cas. 405 (P.C.) (appeal taken from Can.) (recognizing "advance clearance" power of federally established Dominion Trade and Industry Commission, under which it could approve and exempt from prosecution certain agreements or practices). This general branch of the Trade and Commerce clause was not exercised until the 1970s, however. *See* MacDonal v. Vapour Can. Ltd., 66 D.L.R.3d 1 (1976) (accepting federal Trade Marks Act prohibiting certain business practices and providing for civil actions if violated); *Dominion Stores v. R.*, 106 D.L.R.3d 581 (1979) (holding that part I of the federal Canada Agricultural Products Standards Act mandates compliance with federal standards in local trade if federal grade names used).

168. *See* A.G. Canada v. A.G. Alberta, [1916] 1 App. Cas. 588 (P.C.) (appeal taken from Can.) (finding federal Insurance Act unconstitutional). In his opinion, Viscount Haldane noted that: "[i]t must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces." *Id.* at 596; *see also* *In re* Board of Commerce Act, [1922] 1 App. Cas. 191 (P.C.) (appeal taken from Can.) (striking legislation including anti-combines provisions and regulations governing hoarding and excessive prices of certain "necessaries of life" such as food, clothing, and fuel). Viscount Haldane suggested that the trade and commerce power had no independent content and could be invoked only as ancillary to other federal powers. *A.G. Canada v. A.G. Alberta*, [1916] 1 App. Cas. 588, 596. This suggestion was later followed in *Toronto Elec. Comm'rs v. Snider*, 1925 App. Cas. 396, 410 (P.C.) (appeal taken from Can.), where federal labor laws were denied the constitutional support of subsection 91(2). *But see* *Proprietary Articles Trade Ass'n v. A.G. Canada*, 1931 App. Cas. 310, 326 (P.C.) (appeal taken from Can.) (Atkin, L.J., dissenting) (criticizing Viscount Haldane's ancillary theory).

169. In *In re* a Reference Respecting the Farm Products Marketing Act, R.S.O. 1950, Ch. 131, As Amended, 1957 S.C.R. 198, 204, 209, 231, four judges implied that federal power extended to some transactions which were completed within the province of Ontario. Although the particular transaction that gave rise to the failed challenge to the Canadian Wheat Board Act in *Murphy v. Canadian Pac. Ry. Co.*, 1958 S.C.R. 626, was interprovincial, the Manitoba Court of Appeal in *R. v. Klassen* applied the Act to a purely local work — a feed mill that processed locally produced wheat and sold it as feed to local farmers. 20 D.L.R.2d 406 (1959). Having denied leave to appeal that decision, the Supreme Court later endorsed its suggested extension of the Privy Council's consistent interpretation of § 91(2). In *Caloil Inc.*

The history of the Peace, Order, and Good Government (P.O.G.G.) clause is a variation on the same theme.<sup>170</sup> Indeed, because the P.O.G.G. and Trade and Commerce clauses were relied upon concurrently in many of the most important constitutional cases, their judicial developments have been very similar.

Like the Trade and Commerce clause, the main part of the P.O.G.G. clause was drafted broadly to serve as "a compendious means of delegating full powers of legislation" to the federal government.<sup>171</sup> While similar clauses are found in nearly all other Anglo-Saxon constitutions, the P.O.G.G. clause, unlike the clauses in the other constitutions, has been interpreted in apparent disregard of "limitations which may be derived from other language in the constitution."<sup>172</sup> Indeed, the phrase "Peace, Order and Good Government of Canada" in section 91 is immediately followed by the important limitation: "in relation to all Matters not coming within the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."<sup>173</sup> As one Supreme Court Justice noted, "[i]f due attention is paid to these words, it becomes impossible to construe the grant of residuary power otherwise than as saving provincial authority instead of overriding it."<sup>174</sup> Canadian courts, however, appear to have downplayed, if not altogether overlooked, the latter part of the P.O.G.G. clause.<sup>175</sup> As with the Trade and Commerce clause, the Privy Council first interpreted the P.O.G.G. clause rather narrowly,<sup>176</sup> but the Supreme Court reinterpreted it more

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v. A.G. Canada, 1971 S.C.R. 543, the Court unanimously upheld a federal prohibition on the transportation or sale of imported oil west of the Ottawa Valley. It then reasoned that the law was "an incident in the administration of an extraprovincial marketing scheme" *Id.* at 551. For the final stretch of the Trade and Commerce Clause, see *In re Agricultural Prods. Mktg. Act*, [1978] 2 S.C.R. 1198, in which the Court declined to strike down a national egg marketing scheme with strong provincial components.

170. See Bora Laskin, *Peace, Order and Good Government Re-examined*, 25 CAN. B. REV. 1054, 1054-60 (1947) (arguing that § 91(2) Trade and Commerce power is just one "aspect" of broader § 91 general federal legislative power); Albert S. Abel, *What Peace, Order and Good Government?*, 7 W. ONT. L. REV. 1 (1968) (arguing against residual interpretation of § 91); Albert S. Abel, *The Neglected Logic of 91 and 92*, 19 U. TORONTO L.J. 487 (1969) (arguing §§ 91 and 92 have inherently coherent structure); Lederman, *supra* note 137 (advocating broad sociocultural and economic, as opposed to grammatical, interpretation of §§ 91 and 92); K. Lysyk, *Constitutional Reform and the Introductory Clause of § 91*, 57 CAN. B. REV. 531 (1979) (arguing that confusion surrounding proper interpretation of §§ 91 and 92 is due to misreading of text of B.N.A. Act and Privy Council decisions).

171. 1 IVOR JENNINGS, *CONSTITUTIONAL LAWS OF THE COMMONWEALTH* 49 (1957). For cases endorsing Jennings's interpretation, see *Riel v. R.* [1885] 10 App. Cas. 675 (P.C.) (appeal taken from Can.); *A.G. Saskatchewan v. Canadian Pac. Ry.*, 1953 App. Cas. 594 (P.C.) (appeal taken from Can.).

172. HOGG, *supra* note 1, at 437 n.7.

173. B.N.A. Act § 91.

174. Pigeon, *supra* note 127, at 1128.

175. In *Gold Seal Ltd. v. A.G. Alberta*, [1921] 62 S.C.R. 424, for example, Justice Duff stated:

Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause.

*Id.* at 460 (Duff, J., dissenting).

176. In 1896, the Privy Council cautioned against its own earlier view that the P.O.G.G. clause would give the federal Parliament the power to intervene legislatively whenever a problem was important to Canada, and uniformity of legislation was desirable. *A.G. Ontario v. A.G. Canada*, 1896 App. Cas. 348, 361 (P.C.) (appeal taken from Can.). In *A.G. Ontario v. A.G. Canada*, Lord Watson indeed warned

broadly after 1949.<sup>177</sup>

The great variation in the way the P.O.G.G. and Trade and Commerce clauses have been interpreted by the courts over the years has apparently been due largely to these courts' own bias in favor of or in opposition to centralization of constitutional powers. Such variation in the interpretation of the Trade and Commerce and P.O.G.G. clauses would not have been possible if the provisions of the B.N.A. Act had not been "open-textured."<sup>178</sup> Constitutional provisions are inherently open-textured, and constitutional interpretation, correspondingly, involves some measure of redefinition. The problem in the case of the B.N.A. Act is that the redefinition process has heavily favored the federal government. What should have been a "mutual modification"<sup>179</sup> process has turned out to be rather one sided.

#### D. *The Judicial Doctrine of Ancillary Legislative Power Under the B.N.A. Act*

Unlike the United States Constitution, which confers upon Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,"<sup>180</sup> the B.N.A. Act does not explicitly provide for an ancillary power to legislate outside the sphere of exclusive competence allotted to each level of government. Arguably, such ancillary power would be redundant, because routine constitutional scrutiny is restricted to the "pith and substance"<sup>181</sup> of Canadian laws. Thus, the constitutional

that "great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local and provincial . . . and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada." 1896 App. Cas. 348, 361 (P.C.) (appeal taken from Can.) (invalidating provincial legislation conflicting with Canada Temperance Act). However, it was only after 1911, when Viscount Haldane was appointed to the Privy Council, that the "general concern" test of Russell was replaced by the stricter one of "emergency." In *Toronto Elec. Comm'rs v. Snider*, 1925 App. Cas. 396 (P.C.) (appeal taken from Ont.), for example, Viscount Haldane defined emergency as an evil "so great and so general that at least for the period it was a menace to the national life of Canada so serious and so pressing that the National Parliament was called on to intervene to protect the nation from disaster." *Id.* at 412. The "general concern" test was reinstated however in *A.G. Ontario v. Canada Temperance Fed'n*, 1946 App. Cas. 193 (P.C.) (appeal taken from Ont.), three years before appeals to the Privy Council were abolished.

177. See *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292 (1951) (invalidating municipal regulations enacted under provincial statute regarding location of aerodromes); *Munro v. National Capital Comm'n*, 57 D.L.R.2d 753 (1966) (defining extent of federal expropriation powers conferred upon National Capital Commission). These cases established that the emergency test cannot be the exclusive touchstone for the P.O.G.G. clause.

178. This expression is from Hart, H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961), and was borrowed by Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1044-45 n.62 (1977) (" [T]he original text serves through authoritative interpreters to give ongoing guidance in changing circumstances. ").

179. Lederman borrows this expression from *Citizens Ins. v. Parsons*, [1881] 7 App. Cas. 96 (P.C.) (appeal taken from Can.), quoted in WILLIAM R. LEDERMAN, *CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS* 243 (1981).

180. U.S. CONST. art. 1, § 8, cl. 18.

181. It falls to the courts to determine what feature of a law is most important and to characterize the law in these terms. This dominant feature is the "pith and substance" or "matter" of the law. The law's other features are considered merely incidental and hence irrelevant for the purpose of assessing the law's constitutional validity. For example, in *Bank of Toronto v. Lambe*, [1887] 12 App. Cas. 575 (P.C.) (appeal taken from Can.), the Privy Council held that the dominant feature of a provincial law that imposed a tax on banks was to raise revenue, and that the law's "pith and substance" was not banking but

validity of Canadian laws is not jeopardized merely by their bearing incidentally on matters reserved to the other level of government.<sup>182</sup>

Nonetheless, Canadian courts have occasionally suggested that an ancillary power distinct from the "pith and substance" doctrine should be inferred from the constitution. In *Citizens' Insurance v. Parson*, the Canadian Supreme Court stated that if the federal parliament had the power to create insurance companies, it had the power to regulate them.<sup>183</sup> The Court later confirmed on several occasions the existence of a distinct ancillary power to legislate implicit in the B.N.A. Act.<sup>184</sup>

Whether or not "ancillary power" is just another label for "pith and substance," this power is significant insofar as its exercise by the federal government affects provincial law on property and civil matters. Unlike the legislative power derived from explicit provisions of the B.N.A. Act, this ancillary power is concurrent rather than exclusive.<sup>185</sup> Hence, the federal government's exercise of ancillary power has not effected a permanent reduction of provincial competence over property and civil rights. At most, it has placed temporary restrictions on the provinces' ability to exercise this competence.

Given the doctrine of federal paramountcy,<sup>186</sup> however, the distinction between having legislative competence and being able to exercise this competence is merely one of degree.<sup>187</sup> Since provisions of federal law enacted under a concurrent federal power automatically take precedence over

taxation. In other words, although the law was found to affect banking, it dealt more fundamentally with taxation. The law was accordingly upheld, since taxation falls within provincial power.

182. In *A.G. Canada v. Nykorak*, 33 D.L.R.2d 373 (1962), the Supreme Court upheld legislation that conferred on the federal government a civil cause of action for the loss of the services of an injured serviceperson. Justice Judson declared for the majority that it was "meaningless" to rely on a "necessarily incidental" (or ancillary) doctrine to legitimate the effect on property and civil rights since "legislation of this kind comes squarely under [the defense power] of Section 91, notwithstanding the fact that it may incidentally affect property and civil rights." *Id.* at 335. In *Papp v. Papp*, [1970] 1 O.R. 331, 336 (Ont. C.A. (1969)) (involving custody provisions of federal Divorce Act), Judge Laskin adopted similar reasoning, enunciating the "rational, functional connection" test; see also *R. v. Zelensky*, [1978] 2 S.C.R. 940 (upholding federal Criminal Code provision authorizing payment of compensation to crime victim); *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 (upholding provision of federal corporate law).

183. [1881] 7 App. Cas. 96, 117 (P.C.) (appeal taken from Can.).

184. See *Fowler v. R.*, [1980] 2 S.C.R. 213, 224, 226 (allowing federal statute that prohibits pollution of fishing waters); *Grand Trunk Ry. v. A.G. Canada*, 1907 App. Cas. 65, 68 (P.C.) (appeal taken from Can.) (allowing federal statute that prohibits railway companies under federal jurisdiction from contracting out of liability for personal injuries to employees).

185. See HOGG, *supra* note 1, at 381.

186. The doctrine of "federal paramountcy" provides for federal supremacy in cases of inconsistency or conflict between otherwise constitutionally valid federal and provincial laws. See W.R. Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada*, 9 MCGILL L.J. 185, 190 (1963) ("If the meeting [between federal and provincial legislation] is a collision... the federal statute prevails..."). This solution to federal and provincial legislative conflicts has been adopted in most federal unions. See U.S. CONST. art VI, cl. 2 (supremacy clause); AUSTL. CONST. § 109 (inconsistency rule).

187. In this sense, Hogg notes that even where exclusive powers are exercised:

[While] the powers of one level of government cannot expand or contract depending upon the absence or presence of laws enacted by the other level of government... courts do occasionally make reference to the absence or presence of such laws, and it seems likely that in practice they are sometimes influenced in favor of validity by the failure of the other jurisdiction to act.

HOGG, *supra* note 1, at 404 n.158.

more general provisions of provincial law with which they conflict, every federal enactment effectively overrides provincial jurisdiction whenever the provincial position differs from the federal position.

Moreover, Quebec's sphere of competence has been more severely curtailed than that of other provinces. Just as Quebec's competence was disproportionately curtailed by federal exercises of exclusive competence,<sup>188</sup> its authority was also more severely affected by federal exercises of ancillary power. Also, the likelihood of conflict between federal and provincial law on any given issue is greater in Quebec than in any other province because of the cultural gap between federal law and Quebec law.

Like much Canadian constitutional law, judicial rulings on the extent of encroachment permitted through the exercise of ancillary power have been inconsistent. While the Supreme Court has been content at times to use a broad "rational connection" test to uphold federal incursions in provincial matters of property and civil rights,<sup>189</sup> on other occasions it has preferred to use the much stricter "true necessity" test.<sup>190</sup> The Court recently merged the two tests in a case involving a federal statute imposing a civil remedy.<sup>191</sup> The Court stated: "As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained."<sup>192</sup> Thus, the "rational connection" test would be appropriate when the encroachment is minor, but that major encroachments call for the "true necessity" test.

Aside from the difficult questions that this holding raises concerning the measurement of encroachments and the treatment of encroachments that are neither minor nor major,<sup>193</sup> the question of how to account for Quebec's cultural difference in the assessment of the severity of encroachments must be addressed. If federal encroachments upon provincial law are relatively more severe in Quebec than in other provinces, then, according to the reasoning underlying the above test, courts should allow fewer such encroachments within Quebec. While it may appear from recent developments in ancillary legislative power that a two-tiered constitutional system is developing — one

188. See *supra* part III.B.

189. "Where there is admitted competence . . . to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged." *Papp v. Papp*, [1970] 1 O.R. 331, 335-36 (Ont. C.A. (1969)). This test was endorsed by the Supreme Court in *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, 183, and in *R. v. Zelensky*, [1978] 2 S.C.R. 940, 955. In *A.G. Que. v. Kellogg's of Can.*, [1978] 2 S.C.R. 211, a case involving a provincial exercise of ancillary power, Chief Justice Laskin maintained that "[i]n so far as the *British North America Act* may be said to recognize an ancillary power or a power to pass legislation necessarily incidental to enumerated powers, such a power resides *only in the Parliament of Canada*." *Id.* at 216 (second emphasis added). Although this remark would make sense in the American constitutional context, given that enumerated powers there have been conferred upon Congress, only it is inapposite in the context of Canadian federalism where both federal and provincial entities have enumerated powers. See *supra* text accompanying note 138.

190. "[T]he ancillary power doctrine . . . is limited to what is truly *necessary* for the effective exercise of Parliament's legislative authority." *R. v. Thomas Fuller Constr.*, [1980] 1 S.C.R. 695, 713. See *Regional Mun. of Peel v. MacKenzie*, 139 D.L.R.3d 14 (1982).

191. See *General Motors v. City Nat'l Leasing* [1989] 1 S.C.R. 641, 641 (finding private right of action under federal Combines Investigation Act).

192. *Id.* at 671.

193. See HOGG, *supra* note 1, at 409.

for Quebec and one for the rest of Canada — it is unlikely that such a system will materialize, given the weak political support Quebec recently received when it formally requested such an arrangement.<sup>194</sup>

However, while it is unlikely that the Supreme Court will ever establish a two-tiered system *favoring* Quebec, it has established a system working *against* Quebec in other respects, as shown next.

### E. *The Canadian Charter of Rights and Freedoms*

Since 1982, the Charter of Rights and Freedoms<sup>195</sup> has imposed additional limitations on provincial competence in matters of private law. Provincial legislation, in order to be constitutionally valid, must now conform to Charter provisions or else include an explicit “notwithstanding clause” exempting the legislation from the application of the Charter, an exemption mechanism that is not without political costs for a provincial government using it.<sup>196</sup>

In Quebec, the resulting limitations have been both direct and indirect. Indirect limitations stem from the Charter’s nature as a general, paramount, comprehensive, and somewhat permanent body of substantive law, much like the Civil Code.<sup>197</sup> Since directly competes with the Civil Code, the Charter has “the effect of diminishing the symbolic role of the Code as social constitution.”<sup>198</sup>

More directly, the Quebec legislature risks its enactments being struck down for violating Charter provisions. In this respect, Quebec’s predicament would be no more serious than that of any other Canadian province but for a recent Supreme Court decision suggesting otherwise. In *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*,<sup>199</sup> the Supreme Court affirmed the decision of a provincial appeals court<sup>200</sup> to uphold an injunction granted to a delivery company involved in a labor dispute. The provincial court had found that the injunction was justified on the

194. See *supra* text accompanying notes 9-10 (discussing Charlottetown Accord).

195. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

196. For more details on this exemption mechanism and instances of its use by provincial governments, see *supra* note 8.

197. References to the Code as a “civil constitution” are not uncommon. See, e.g., BAUDOIN, *supra* note 150, at 54; Jean-Louis Baudouin, *Conférence de clôture*, 24 R.J.T. 619, 620 (1990) (referring to Code as “social blueprint”); Jean Carbonnier, *Le Code civil*, in 2 LES LIEUX DE MÉMOIRE 293, 309 (Pierre Nora ed., 1986); M.F. Terré, *Codification: insertion du droit nouveau*, in CODIFICATION: VALEURS ET LANGAGE 375, 385 (Conseil de la langue française du Québec ed., 1985).

198. BRIERLEY & MACDONALD, *supra* note 62, at 49; see also Legrand, *supra* note 29, at 311. Legrand also notes, however, that since 1789, the French have had fifteen constitutions but only one civil code, and concludes that the latter has been “a more powerful legal symbol than the formal Constitution itself.” *Id.*

199. 33 D.L.R.4th 174 (1986) (LEXIS, Intlaw library, Cancas file) [hereinafter *Dolphin Delivery*]. For more detailed accounts of this decision, see, e.g., Robert Howse, *Dolphin Delivery: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law*, 46 U. TORONTO FAC. L. REV. 248 (1988) (criticizing decision as exemplifying return to narrow technical interpretation of Charter); J.A. Manwaring, *Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of Dolphin Delivery Ltd.*, 19 OTTAWA L. REV. 413 (1987) (arguing that case was wrongly decided because secondary picketing is “expression” under § 2(b) of Charter and because § 1 is inapplicable).

200. [1984] 3 W.W.R. 481 (B.C.C.A.).

basis of the common law tort of secondary picketing and had denied the appellant's request that the injunction be quashed for violating Charter guarantees concerning freedom of expression. Furthermore, the provincial court insisted that only state action was subject to constitutional review under the Charter and that court orders in private matters involved no such state action.<sup>201</sup>

However, the provincial court went on to explain that state action reviewable under the Charter was limited to those actions embodied in the written law, not in unwritten law that emerges from the courts.<sup>202</sup> This distinction between "written" and "unwritten" law was meant to reflect the deeper one between legislation and the common law and to recognize that the Charter ought not apply to the latter, which is concerned with matters of private law. What neither the provincial court nor the Supreme Court realized at the time, however, was that in focusing on the written versus unwritten law distinction, its holding allowed Quebec's Civil Code to fall into the category of laws subject to Charter review, despite the fact that this body of written law governs private matters the common law does in the other provinces.<sup>203</sup>

Quebec scholars severely denounced the *Dolphin Delivery* decision. From their point of view, this decision established a two-tiered system of constitutional review in Canada in which Quebec's private law would henceforth be reviewable under the Charter while that of the other Canadian provinces would not.<sup>204</sup> This claim may have been exaggerated, since the damage caused by the decision can be easily undone. After all, rather than the written versus unwritten law distinction, it is the private versus public distinction that lies at the root of the *Dolphin Delivery* holding.<sup>205</sup> Moreover,

201. See *Dolphin Delivery* 33 D.L.R.4th 174 (1986). This decision is in stark contrast with U.S. law. Cf. *New York Times v. Sullivan*, 376 U.S. 254 (1963) (allowing state to award damages to elected official for libelous statements concerning his official conduct printed in appellant's newspaper without proof of malice); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1711 (2d ed. 1988).

202. *Dolphin Delivery*, 33 D.L.R.4th 174 (1986).

203. A similar problem would arise with respect to rules of common law that have been legislated, and the different treatment afforded to legislated and unlegislated rules of common law would hardly be justified as a matter of principle.

204. José Woehrling, *La modification constitutionnelle de 1987, la reconnaissance du Québec comme société distincte et la dualité linguistique du Canada*, 29 C. DE D. 3 (1988) (explaining that rather than modifying existing division of legislative powers, Constitutional Accord of 1987 would further protect this division from centralizing force of Charter); Yves DeMontigny, *Le domaine des relations privées: un "no man's land" constitutionnel*, 22 R.J.T. 243 (1988) (describing Quebec civil law provisions subject to Charter limitations). But see Danielle Pinard, *Les dix ans de la Charte canadienne des droits et libertés et le droit civil québécois: quelques réflexions*, 24 OTTAWA L. REV. 193 (1992) (asserting that Charter has not had effect on Quebec civil law that everyone had feared ten years ago).

205. In *British Columbia Gov't Employees' Union v. British Columbia*, 53 D.L.R.4th 1 (LEXIS, Intlaw library, Cancas file), Chief Justice Dickson distinguished between a court's acting to resolve "a purely private dispute [as in *Dolphin Delivery*]" and a court's acting "on its own motion and not at the instance of any private party," the latter action being "entirely 'public' in nature, rather than 'private.'" *Id.* In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, a case from Quebec, the Supreme Court refused to hear the respondent's Charter argument on the grounds that the action was "a civil action between two private parties. For the Canadian Charter to be invoked there must be some sort of state action which is being impugned. . . . The respondent pointed to no 'law' of any sort which he can claim is infringing his rights or anyone else's rights." *Id.* at 571 (citing *Dolphin Delivery*). But, as the Court found no basis under the Civil Code for the respondent's alleged right, it declined to discuss further whether the Code would qualify as "law" under the *Dolphin Delivery* definition.

the Civil Code is as different from statutory law as is the common law.<sup>206</sup> The outcry elicited in Quebec by the *Dolphin Delivery* decision may thus be attributed more to Quebecers' misunderstanding of their own legal system than to mistreatment of this system by the Supreme Court. More importantly, this outcry reflects Quebecers' mistrust in the Court's willingness or ability to redress the problem. As the discussion in the last two parts of this Article will reveal, this sentiment is not without historical foundations. Furthermore, quite aside from the question whether Quebec's reaction was exaggerated, the failure of Canada's own Supreme Court to recognize the problems that *Dolphin Delivery* would create for Canada's only civil law province is disturbing in itself.

It thus seems that Quebec did not get what it had insisted upon when it entered the Canadian federation. Provincial competence over matters of private law has been secondary and limited rather than autonomous and exclusive. This competence has been secondary in that it has been defined negatively as capturing whatever aspects of property and civil rights have not been expressly reserved for the federal government under section 91 of the B.N.A. Act or effectively blocked from provincial competence by the federal exercise of ancillary power implicitly allowed under this Act and endorsed by the courts. Provincial competence has been limited in that many aspects of property and civil rights have thereby fallen to federal competence, expressly or de facto. Moreover, since 1982 the general field of constitutional competence of all the provinces has been further limited by the requirement that provincial legislation conform to the Canadian Charter of Rights and Freedoms. Yet, while the legislative competence of all ten Canadian provinces has been curtailed by these constitutional developments, this curtailment has inevitably affected Quebec the most severely, given the juridical uniqueness of this province. As a result, the Canadian province that has most needed legislative autonomy in matters of private law has gotten the least.

#### IV. THE JUDICIAL ENFORCEMENT OF QUEBEC LAW IN THE CANADIAN FEDERATION

Another threat to the preservation of the civil law tradition in Quebec stems from the fact that the laws duly enacted by the Quebec legislature within its field of constitutional competence are implemented by a judicial body whose source, profile, and mission can be only dubiously described as civil. The particular features of Canadian judicial institutions examined here are the provinces' limited legislative powers with respect to the administration of justice in their territories (Section A), the general jurisdiction of provincial courts (Section B), and the jurisdiction of the Supreme Court of Canada as the national court of last resort in all provincial matters (Section C).

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206. See *supra* text accompanying notes 73-81. The Privy Council has, however, traditionally considered the Civil Code just another statute. Pierre-Basile Mignault, *L'avenir de notre droit civil*, 1 R. DU D. 104, 107-10 (1923). It has been suggested that this oversight on the part of the Law Lords was particularly unforgivable given that some of them were civil jurists from the Scotland. See Léo Pelland, *Statut international du Canada*, 6 R. DU D. 442, 442-43 (1928). However, while Scotland is a civil law jurisdiction, its law is not codified.

A. *The Legislative Powers Concerning the Administration of Justice Under Sections 101 and 92(14) of the B.N.A. Act*

The confederative negotiators were fully aware of the risks involved in conferring the administration of a body of law rooted in one legal tradition upon judicial institutions grounded in another legal tradition.<sup>207</sup> Indeed, the administration of justice under the Quebec Act had hardly been a model of peaceful coexistence between the two Canadian legal cultures. As one legal historian reports:

[I]n Lower Canada . . . the Bench [had] to combine its role of support to the British connection, to the English law and legal system, with the administration of laws derived from a civil law system, and this in a colony where the British population was not in a majority. It is not surprising, in this context, that a predominantly British Bench was maintained, or that its members generally looked to London rather than Paris in their daily interpretation of the law.<sup>208</sup>

It was hence determined that, while the federal Parliament would enjoy the power to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada,"<sup>209</sup> the general court systems in operation in the provinces prior to Confederation would be maintained;<sup>210</sup> the provinces would retain exclusive competence over matters relating to "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters of those Courts."<sup>211</sup>

At the time of Confederation, Quebec, like the other Canadian provinces, was endowed with a court system modeled after England's, consisting of an

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207. "Lower Canada, with her laws, which are peculiar to her, ought especially to resist the interference of the General Government in the administration of justice." Dorion, *supra* note 145, at 860. This may have been the reason that the Canadian confederators, unlike their United States and Australian counterparts, refrained from creating a "general court of appeal" at the time of Confederation. Indeed, one of the federal legislators warned that in such a court, Quebec civil law "would be explained by men who would not understand [it] and who would, involuntarily perhaps, graft English jurisprudence upon a French code of laws." J. Cauchon, Speech delivered before the Legislative Assembly of Canada (Mar. 2, 1865), in *PARLIAMENTARY DEBATES ON CONFEDERATION*, *supra* note 145, at 575; see also PETER H. RUSSELL, *THE SUPREME COURT OF CANADA AS A BILINGUAL AND BICULTURAL INSTITUTION* 7 (Royal Commission on Bilingualism and Biculturalism, Canada ed., 1969) ("It was this possibility of the new federal Court's appellate jurisdiction extending to provincial law matters which touched off the strongest reaction against the Court during the Confederation Debates. The protests were voiced exclusively by representatives of Lower Canada."); D. Girouard, Speech delivered before the House of Commons (Mar. 9, 1881) in *DEBATES OF THE HOUSE OF COMMONS OF THE DOMINION OF CANADA* 1290 (3d sess., 4th Parl.) (Ottawa, McLean, Roger & Co. 1881); Sir John A. Macdonald, Speech delivered before the House of Commons (Feb. 26, 1886) in *DEBATES OF THE HOUSE OF COMMONS OF THE DOMINION OF CANADA* 239-50 (2d sess., 4th Parl.) (Ottawa, C.W. Mitchell 1880).

208. Kölish, *supra* note 23, at 17. Neatby similarly describes Quebec's legal development prior to that period as a process of "gentle but steady and determined anglicization." HILDA NEATBY, *QUEBEC: THE REVOLUTIONARY AGE, 1760-1791*, at 140 (1966).

209. CAN. CONST. § 101.

210. Section 129 of the B.N.A. Act reads in relevant part: "[A]ll Courts of Civil and Criminal Jurisdiction . . . existing . . . at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made . . . ."

211. B.N.A. Act § 92(14).

“inferior” court of special jurisdiction (the *Cour provinciale*), a “superior” court with general jurisdiction unlimited by subject matter (the *Cour supérieure*), and an appeals court (the *Cour d’appel*).<sup>212</sup> The *Cour d’appel* hears appeals from the inferior and superior courts, and its decisions have been appealable to the Supreme Court of Canada since 1875.<sup>213</sup> This court system remains largely unmodified today.

However, just as the provinces lacked full control over property and civil rights matters, provincial competence over the administration of justice was never whole.<sup>214</sup> The appointment, remuneration, and fixing of pensions of provincial judges fall within federal competence under sections 96 and 100 of the B.N.A. Act,<sup>215</sup> and criminal procedure falls within federal competence under subsection 91(27).<sup>216</sup>

Federal control over the appointment and compensation of state or provincial judges is unheard of in most other federal unions.<sup>217</sup> One author ascribes this anomaly to the fact that the jurisdiction of provincial courts at the time of confederation included all matters of federal private and public law, suggesting that some measure of federal involvement in the profile of provincial judiciaries would have been appropriate then.<sup>218</sup> And while the jurisdiction of provincial courts over federal matters has gradually diminished since 1971, when the federal government established the Federal Court of Canada,<sup>219</sup> these courts have nonetheless retained jurisdiction over many

212. Code of Civil Procedure, ch. 80, art. 34, S.Q. (1965) [hereinafter C.C.P.].

213. The institution of the Supreme Court of Canada is discussed in Part IV.C. Before 1875, decisions of the provincial appeals courts could be appealed to the English Privy Council. See *supra* note 142.

214. “The B.N.A. Act divided the administration of justice and the judiciary in such a fashion so as to make it impossible for either level of government to act independently in judicial reform.” Swainger, *supra* note 25, at 64. See generally Édith Deleury & Christine Tourigny, *L’organisation judiciaire, le statut des juges et le modèle des jugements dans la Province de Québec*, in *DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE* 191, 209-13 (H. Patrick Glenn ed., 1993) (discussing development of judicial discretion in Quebec).

215. “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.” B.N.A. Act § 96. “The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts . . . shall be fixed and provided by the Parliament of Canada.” B.N.A. Act § 100.

216. “[T]he exclusive Legislative Authority of the Parliament of Canada extends to . . . :

... .

(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”

B.N.A. Act § 91.

217. Sections 96 and 100 have no counterparts in the United States and Australian constitutions; thus the federal government in each of these countries has no control over the appointment and financial treatment of state judges.

218. See Nicole Duplé, *La réforme constitutionnelle et l’article 96 de l’Acte de l’Amérique du Nord britannique 1867*, in 1 *CANADA AND THE NEW CONSTITUTION* 129, 153 (Stanley M. Bech & Ivan Bernier eds., 1983).

219. Until 1875, the federal government was content to leave federal matters for the determination of provincial courts. In 1875, however, it decided to exercise its § 101 power to establish courts “for the better Administration of the Laws of Canada,” B.N.A. Act § 101, and created the Exchequer Court of Canada to adjudicate matters of revenue and the Crown. Supreme and Exchequer Courts Act, ch. 11. S.C. (1875). This initially limited jurisdiction had been gradually enlarged by 1970 to include copyright, trademark, patent, admiralty, tax, and citizenship law. Exchequer Court Act, R.S.C. ch. E-11 (1970). The more elaborate Federal Court of Canada was established in 1971 to replace the Exchequer Court. Federal Court Act, ch.1, S.C. (1970-71-72). The Federal Court has a trial division and an appeal division, and although it remains a court of special jurisdiction, this jurisdiction has been further enlarged to cover

important fields of federal private and public law,<sup>220</sup> such as family, commercial, criminal, and constitutional law.<sup>221</sup> As a result, this argument for federal involvement in the appointment and compensation of provincial judges still carries much weight today.

Admittedly, federal competence over the appointment of provincial judges is qualified by section 98, which provides that "Judges of the Courts of Quebec shall be selected from the Bar of that province."<sup>222</sup> Any other prescription would have allowed Quebec to become "saddled with a judiciary unschooled in the legal heritage of the province"<sup>223</sup> and would have been rejected by Quebec during confederative negotiations. Yet, section 98 did not prevent federal competence over judicial appointments from being exercised in a manner uncongenial to the preservation of this legal heritage. There are numerous instances of the federal government's selecting Quebec judges among jurists who, although members of the Quebec Bar, lacked proper civil law training.<sup>224</sup>

Still more problematic has been federal competence over the remuneration and pensions of provincial judges.<sup>225</sup> Through the fixing of financial benefits, the federal government has shaped the size and profile of the provinces' judiciaries.<sup>226</sup> As explained next, the proper administration of civil law in Quebec may necessitate greater judicial specialization than is currently present, which in turn would require that the total number of Quebec judges be increased. Quebec lacks the constitutional power to accomplish this

matters of aeronautics and interprovincial undertakings.

220. GARRY D. WATSON & NEIL J. WILLIAMS, *CANADIAN CIVIL PROCEDURE* 1-36 to 1-42 (2d ed. 1977) (regarding jurisdiction of Ontario and other Canadian provincial courts with exception of Quebec); C.C.P. art. 34 (describing jurisdiction of Quebec courts); *see also* Ontario v. Pembina Exploration Ltd., [1989] 1 S.C.R. 206, 217 (stating that federal courts did not exercise admiralty jurisdiction of superior and inferior provincial courts at confederation); Criminal Code, R.S.C. ch. C-46, §§ 468, 798 (1985); An Act Respecting Divorce, 3 R.S.C. ch. D-8, § 3 (1970); Young Offenders Act, R.S.C. ch. Y-1, § 2 (1985). Each of these statutes expressly designates provincial courts as the correct adjudication forum.

221. Very early on after Confederation, the Privy Council, the court of last resort in all matters at that time, assumed the power to review the constitutional validity of laws enacted by Canadian federal and provincial legislators. HOGG, *supra* note 1, at 117. This power was naturally appropriated by the Supreme Court of Canada after its establishment in 1875. BARRY L. STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS* 21 (3d ed. 1988). In 1982, a stronger basis for power of judicial review was incorporated in the Constitution. CAN. CONST. (Constitution Act, 1982), § 52(2).

222. The federal government's general policy with respect to judicial appointments in Quebec has been to select judges from among members of the Quebec Bar and, therefore, from among jurists at least ostensibly educated in civil law. BRIERLEY & MACDONALD, *supra* note 62, at 54.

223. Swainger, *supra* note 25, at 63.

224. Brierley and Macdonald report that many of Quebec's judges have been selected from among practitioners whose fields of expertise are from fields of Canadian common law such as administrative law, criminal law, and general public law. BRIERLEY & MACDONALD, *supra* note 62, at 54. On the related problem of selecting civil law judges from among practitioners rather than from among graduates of specialized judicial training programs (as in France), *see* Valcke, *Legal Education in a "Mixed Jurisdiction"*, *supra* note 21.

225. *See* Swainger, *supra* note 25, at 63-64 (arguing that vesting authority for compensation in the federal government hindered means for Quebec to reform its courts); Deleury & Tourigny, *supra* note 214, at 211.

226. *See* Swainger, *supra* note 25, at 63-64. For example, by fixing the amount of judges' pensions at less than their full salaries, the federal government has limited incentives for judges to step down and thereby has slowed the turnover necessary to rid the system of incompetent judges. Similarly, the federal government has the ability to limit the expansion of a province's judicial system by refusing to finance additional judges' salaries. *Id.*

unilaterally and is unlikely to obtain the necessary power from the federal government unless all other provinces are granted the same power.

Finally, the division of powers between the provincial and federal governments with respect to judicial procedure is also not without problems. The reservation of criminal procedure to federal competence makes sense, given that substantive criminal law falls under federal competence and that the drafters of substantive law are usually in the best position to devise the procedure most suited to the administration of that law. By the same token, civil procedure should and does follow substantive civil law into provincial jurisdiction. With respect to Quebec law in particular, one English jurist claimed to be "professionally convinced of the absurdity and confusion which is ever occasioned when the style and forms of one system of law . . . is applied to the practice of another . . . . The forms and style of English writs and pleadings ill agree with the language of the French civil law."<sup>227</sup>

However, the division of powers between the two levels of government does not entail an impermeable dividing line, particularly where federal and provincial laws are administered jointly through the same court system, as in Canada.

### B. *The General Jurisdiction of Provincial Courts*

Civil lawyers' insistence on dividing law into tight public versus private and codal versus extracodal compartments is reflected in the profile of their court systems, which are generally more specialized than those of Anglo-Saxon jurisdictions.<sup>228</sup> The jurisdiction of courts of the ordinary courts of the continental system is limited to matters of private law and criminal law, each of which is adjudicated by a particular civil or criminal chamber within these courts.<sup>229</sup> Moreover, judges are appointed to one or the other of these chambers but never to both. Matters of public law other than criminal law, sometimes even commercial and labor law matters, are referred to specialized courts.<sup>230</sup> Civil systems that allow constitutional review by the courts entrust this power exclusively to a special constitutional court.<sup>231</sup> In most civil jurisdictions, consequently, each judge deals with no more than a single field of law.

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227. JAMES MARRIOTT, ADVOCATE GENERAL, GREAT BRITAIN, PLAN OF A CODE OF LAWS FOR THE PROVINCE OF QUEBEC 68-69 (London, n.p. 1774).

228. See generally Joseph Dainow, *The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems*, 37 IND. L.J. 1 (1961) (describing the more specialized court structure of France and Germany).

229. RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 435-36 (4th ed. 1980).

230. *Id.*

231. Wilhelm Karl Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L. REV. 250, 256-57 (1966); Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, 16 ST. LOUIS U. L.J. 359, 360-65 (1972). See generally MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971) (describing the emergence of judicial review particularly in Western nations). In France, the power of constitutional review is reserved to a constitutional council, which the Executive or the Assembly may consult prior to statutory enactment. For general accounts of judicial review in France, see James E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972); Barry Nicholas, *Fundamental Rights and Judicial Review in France*, 85 PUB. L. 82 (1978).

In contrast, all Canadian provinces, including Quebec, as mentioned above, have retained the Anglo-Saxon court system that was established on their territories prior to confederation.<sup>232</sup> Civil matters are adjudicated in the same general court system and by the same judges as matters of public law. Each provincial judge routinely decides issues of provincial private law, federal private law, criminal law, and constitutional law within the same short time period, if not within the same case.

This need not be problematic in provinces where private and public law adjudication follows the same method. When moving from one field of the law to another, judges are required merely to move from one body of Anglo-Saxon law to another.<sup>233</sup> But in Quebec, judges moving from an issue of provincial private law to one of constitutional law or federal private law must switch from the Civil Code to Anglo-Saxon common law or statutes. In other words, they must switch not only bodies of law but also legal methods. This is no easy task, given that civil and Anglo-Saxon legal methods are each complex on their own terms.

The already difficult task of preserving the integrity of the civil legal method in such a dual legal context is further compounded by another factor, also a product of this dual legal context. Quebec judges have never operated in a truly civil law procedural context to begin with,<sup>234</sup> and over the years, Quebec's Code of Civil Procedure has become further "distanced . . . from its continental French counterpart by reason of the continuing influence of English and American conceptions."<sup>235</sup>

By retaining its preconfederation Anglo-Saxon court system, Quebec foreclosed the possibility that its rules of civil procedure would ever be truly civil, and this foreclosure could not be undone simply by obtaining competence over the drafting of these rules under subsection 92(14) of the B.N.A. Act.<sup>236</sup> Before Quebec's first Code of Civil Procedure was even completed, its drafters were already confessing their inability to follow the French model due to the Anglo-Saxon character of Quebec's judicial institutions.<sup>237</sup> Thus, Quebec's Code of Civil Procedure allows judges to create remedies where none are explicitly provided by law,<sup>238</sup> to monitor

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232. See B.N.A. Act § 129.

233. Naturally, there are differences of methodology within Anglo-Saxon law. The process of interpreting cases differs from statutory interpretation, for example. Nonetheless, the Anglo-Saxon lawyer attempts to arrive ultimately at a general understanding of the law on any given issue, one which weaves cases and statutes into a somewhat coherent whole. This general interpretive process is common to all fields of Anglo-Saxon law. See, e.g., DWORKIN, *supra* note 50, at 107-15.

234. See generally J.M. BRISSON, *LA FORMATION D'UN DROIT MIXTE: L'ÉVOLUTION DE LA PROCÉDURE CIVILE DE 1774 À 1867*, at 41-42 n.60 (1986) (documenting early civil law development in Quebec).

235. BRIERLEY & MACDONALD, *supra* note 62, at 52; see also Maurice Tancelin, *Introduction to WALTON*, *supra* note 17, at 24-25, 27; Jean-Louis Baudouin, *Le Code civil québécois; crise de croissance ou crise de vieillesse*, 44 R. DU B. CAN. 391, 403 (1966).

236. See *supra* text accompanying note 211. One commentator observed at the time that, had the codifiers of Quebec's Code of Civil Procedure abided by a pure French model, they would have "thereby foisted disturbance upon [the] courts." 1 GONZALVE DOUTRE, *LES LOIS DE LA PROCÉDURE CIVILE* iv (Montreal, Eusèbe Senécal 1867) (my translation).

237. See BRISSON, *supra* note 234, at 33, 144.

238. See C.C.P. art. 46.

exercises of jurisdiction by inferior tribunals through prerogative writs,<sup>239</sup> and to make rules of practice supplementing the provisions of the C.C.P.<sup>240</sup> All these powers are drawn directly from English law and involve a measure of judicial power much greater than that traditionally deemed legitimate in civil jurisdictions, as discussed above.

Inevitably, the increasing anglicization of Quebec's civil procedure was bound to cause the anglicization of its substantive law, which in turn was bound to cause the anglicization of its legal method. In *Quebec County Railway v. Montcalm Land Co.*,<sup>241</sup> for example, Quebec's Court of Appeal invoked the strict rules of procedure governing mandatory injunctions<sup>242</sup> to deny a request for an order of specific performance, which is otherwise generally considered the primary contractual remedy at civil law, even for positive covenants.<sup>243</sup> And in *National Bank of Canada v. Soucisse*,<sup>244</sup> the Supreme Court of Canada resorted to the common law doctrine of estoppel to uphold a decision of Quebec's Court of Appeal,<sup>245</sup> barring the appellant Bank from recovering a debt against the estate of the debt's guarantor. Finding that the Bank had acted in bad faith in not disclosing to the estate that the guarantee was revocable, the Court concluded that the bank's suit was "inadmissible because no one should profit from his own fault or seek the aid of the courts in doing so."<sup>246</sup> In so doing, the Court disregarded earlier judicial statements that the common law doctrine of estoppel has no place in civil law<sup>247</sup> because it would create a new general legal obligation that was

239. See C.C.P. arts. 33, 838-61.

240. See C.C.P. arts. 47-48.

241. 46 R.J.Q. 262 (K.B. 1929) (finding breach of contractual obligation to install railroad tracks at street level or raise street level around tracks).

242. See C.C.P. art. 751. The violation of an injunction is punishable by contempt of court, a criminal offense under § 127(1) of Canada's Criminal Code. An Act respecting the Criminal Law, R.S.C. ch. C-46, § 127(1) (1985). In France, specific performance of civil obligations is sanctioned through the civil remedy of the *astreinte*. MAURICE TANCELIN, *DES OBLIGATIONS: CONTRAT ET RESPONSABILITÉ* §§ 707-11 (1988); Ghislain Massé, *L'exécution des obligations via l'astreinte française et l'injonction québécoise*, 44 R. DU B. 659, 661 (1984).

243. See C.C.L.C. art. 1065. For an application of this article to a positive covenant, see *Propriétés Cité Concordia v. Banque Royale du Can.*, 1981 C.S. 812, *aff'd*, [1983] R.D.J. 524 (C.A.) (ordering defendant bank to remain open on Saturdays as it had agreed to do in its lease with plaintiff).

244. [1981] 2 S.C.R. 339.

245. 1976 C.A. 137.

246. [1981] 2 S.C.R. 339, 358. The Court considered this maxim included under the C.C.P.'s *fins de non-recevoir*. While *fins de non-recevoir* are "certain causes which prevent a creditor from coming to court to enforce his claim," *id.* at 359 (quoting 2 POTHIER, *TRAITÉ DES OBLIGATIONS* 371 (Paris, M. Bugnet, 3d ed. 1890)), these "certain causes" have traditionally been distinguished from "defences . . . which go to the substance of the claim." *Id.* at 359 (quoting 10 POTHIER, *TRAITÉ DE LA PROCÉDURE CIVILE* 20 (Paris, M. Bugnet, 3d ed. 1890)). They are thus limited to a strict list of specific preliminary exceptions, such as lack of standing or *res judicata*. *Id.* at 360 (quoting 8 DENISART, *COLLECTION DE DÉCISIONS NOUVELLES* 645 (Paris, Desaint 1889)).

247. In *Soucisse*, Justice Beetz maintained that "*fins de non-recevoir* do exist in Quebec civil law and are sometimes confused with estoppel, despite the warning of Mignault J. in *Grace and Company v. Perras* . . . 'I venture to observe that the doctrine of estoppel as it exists in England and the common law provinces of the Dominion is no part of the law of the Province of Quebec.'" [1981] 2 S.C.R. 339, 360 (quoting *Grace and Company v. Perras*, [1921] 62 S.C.R. 166, at 172); see also *W.T. Rawleigh Co. v. Dumoulin*, 1926 S.C.R. 551, 555 (holding that guarantor's negligence in signing guarantee document did not bar his claim for rescission on ground of mistake).

implicitly excluded under the C.C.L.C.<sup>248</sup> In both cases, the new rules that the courts imported into Quebec's law of obligations disturbed the internal coherence of this body of law and increased judicial discretion beyond what is legitimate for a civil law court.

Quebec's actual power over the management of its courts may therefore be far more limited than a reading of the relevant constitutional provisions would suggest. While Quebec is nominally in charge of the "Administration of Justice in the Province," this power is not whole. The federal government retains competence over criminal procedure and exerts substantial control over the profile of provincial judiciaries by appointing provincial judges and fixing their financial benefits. As a result, Quebec has been unable to establish a truly continental court system in which civil matters are adjudicated independently with a view to preserving the integrity of codal method. The resulting dual legal context caused the anglicization of Quebec's civil procedure, which in turn has detrimentally impacted its substantive law and legal method.

### C. *The Institution of the Supreme Court of Canada*

No federal exercise of constitutional power has proven more damaging to the integrity of civil law in Quebec, however, than that which gave rise to the Supreme Court of Canada in 1875.<sup>249</sup> Since the Privy Council had been serving as the final court of appeal for all British colonies, the federal government hitherto had no real need to use its section 101 legislative power.<sup>250</sup> It is therefore hardly surprising that Sir John Macdonald's first proposal to create a national court of last resort<sup>251</sup> with jurisdiction to hear civil appeals from Quebec met with much suspicion from French Canadians<sup>252</sup> and that this suspicion quickly grew into outright hostility when the proposal became law in 1875.<sup>253</sup>

By the turn of this century, it had been repeatedly objected that the Privy Council was inclined to standardize legal rules across the Commonwealth

248. *In Industrial Fuel & Refrigeration Co. v. Pennboro Coal Co.*, 1957 S.C.R. 160, Justice Taschereau insisted that the liability of a person inducing another to alter his position to his prejudice under article 1730 of the C.C.L.C., which deals with specific cases of "mandate," is the only case akin to estoppel in the civil law of Quebec. *Id.* at 163.

249. B.N.A. Act § 101.

250. *Id.*

251. Some thirty years later, the Privy Council in *Crown Grain Co. v. Day*, 1908 App. Cas. 504 (P.C.) (appeal taken from Can.), struck down a Manitoba statute that exempted a particular field of Manitoba's legislative competence from review by the Supreme Court. Their lordships held that this provision was inconsistent with the Supreme Court Act, *see infra* note 253, which conferred on the Supreme Court of Canada a right of appeal from any final judgment of a province's court of last resort. Under the doctrine of paramountcy, the grant of a right of appeal contained in the Act prevailed over the Manitoba statute's denial of this right. *See also In re Sutherland*, 134 D.L.R.3d 177 (Man. C.A. 1982) (holding that Manitoba statute making decisions of inferior courts concerning wage recovery "final" bars appeals to Manitoba Court of Appeal but not to Supreme Court of Canada).

252. Frank MacKinnon, *The Establishment of the Supreme Court of Canada*, 27 CAN. HIST. REV. 258, 260 (1946); Yalden, *supra* note 135, at 381.

253. Supreme and Exchequer Courts Act, ch. 11, S.C. (1875), replaced by Supreme Court Act, R.S.C. ch. S-19 (1970).

colonies.<sup>254</sup> A Canadian supreme court was thought likely to do the same within Canada. The press warned, "One thing is certain . . . the Supreme Court, as now organized, is going to move us toward legislative union and the destruction of our law codes."<sup>255</sup>

The warning was pertinent. From very early on, the Supreme Court did define its mission as federal unification of Canadian law.<sup>256</sup> Indeed, less than ten years after its inception, the Supreme Court declared in a case about civil responsibility:

[I]t would be much to be regretted if we were compelled to hold that damages should be assessed by different rules in the different provinces through which the same railroad may run. . . . It cannot have been intended by this legislation, that if a man was killed in Upper Canada, no *solatium* should be granted to his wife or legal representatives by way of damages, but that if he was killed in Lower Canada, such a *solatium* could be given. That in the present case, for instance, this plaintiff can get a *solatium*, because her husband was killed in Lower Canada, whilst if he had been killed a few miles further west, in Upper Canada, none would be granted under the same statute.<sup>257</sup>

Both this statement and its ultimate reliance upon common law authorities in denying *solatium* recovery to the plaintiff from Quebec are especially striking, given that the case concerned an area of law that is treated very differently at civil law than at common law and that there was ample Quebec and French doctrine to invoke on the matter.<sup>258</sup> Moreover, examples of this type of reasoning are common. A decade later in another important case, for instance, the Court held:

By the conclusion we have reached upon the question, we declare the law to be in the Province of Quebec upon the same footing as it stands in England, and in the rest of this Dominion, a fact rightly alluded to by Mr. Justice Bossé in *Underwood v. Maguire*, as of great importance specially in commercial matters.<sup>259</sup>

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254. Alan C. Cairns, *The Judicial Committee and Its Critics*, 4 CAN. J. POL. SCI. 301, 317-18 (1971); see also Albert Mayrand, *Le droit comparé et la pensée juridique canadienne*, 17 R. DU B. 1 (1957) (arguing that there are still obstacles to diversity of judicial styles in Canada); J.-G. Castel, *Le juge Mignault, défenseur de l'intégrité du droit civil québécois*, 53 CAN. B. REV. 544, 557 (1975) (reciting efforts of Justice Mignault to preserve civil law in Quebec); P.-B. Mignault, *L'appel au Conseil privé*, 15 R. DU D. 133, 153-55 (1936-37) (defending application of judicial comity to preserve diversity of juridical styles).

255. SILVER, *supra* note 135, at 122 (quoting LE COURIER DE CAN., Mar. 24, 1875).

256. See H. Patrick Glenn, *Droit comparé et droit québécois*, 24 R.J.T. 341, 345 (1990) (stating that Supreme Court accepted unification of Canadian laws as its mission); Denis Lemieux, *The Quebec Civil Law System in a Common Law World: The Seven Crises*, 1989 JURID. REV. 16, 22-24 (identifying establishment of Supreme Court as difficult moment in history of Quebec civil law); G.V.V. Nicholls, *Canada, in THE MIGRATION OF THE COMMON LAW* 38 (A.L. Goodhart ed., 1960) (asserting that binding precedent of Supreme Court decisions had a unifying effect on Canadian law); cf. Jean-Louis Baudouin, *L'interprétation du Code civil québécois par la Cour suprême du Canada*, 53 CAN. B. REV. 715, 718-24 (1975) (documenting Supreme Court's frequent reliance on common law materials when deciding Quebec cases); Pierre-Gabriel Jobin, *L'influence de la doctrine française sur le droit civil québécois. Le rapprochement et l'éloignement de deux continents*, 2 R.I.D.C. 381, 390-91 (1992) (relating Supreme Court's failure to rely on French materials when deciding cases from Quebec).

257. *Canadian Pac. Ry. v. Robinson*, [1887] 14 S.C.R. 105, 111, 124 (emphasis added), *rev'd on other grounds*, 1892 App. Cas. 481 (P.C.) (appeal taken from Can.).

258. See Baudouin, *supra* note 256, at 717-18.

259. *Magann v. Auger*, [1901] 31 S.C.R. 186, 193 (citing *Underwood v. Maguire*, [1897] 6 Q.B. 237); see also *Curley v. Latreille*, [1920] 60 S.C.R. 131, (dealing with employers' liability for employees' actions under C.C.L.C. art. 1054(7)). In *Curley*, Justice Anglin declared, "[t]he only reasonable

What is more, the Supreme Court's centralizing action was not to be limited to incidental tampering. When the law of Quebec was brought before the Court, it was generally treated like foreign law, and despite Justice Mignault's systematic and largely vain opposition,<sup>260</sup> the reasoning adopted in *Magann v. Auger* eventually became the rule. Civil law rules were henceforth to be presumed identical to common law rules unless proven otherwise, at least in the early days of the Court.<sup>261</sup> Alternatively, the Court would often look directly to judicial reports of other Canadian provinces without even inquiring whether French writings existed on a matter that was not explicitly addressed by the Code.<sup>262</sup>

Even more perplexing than the phenomenon itself, however, are the reactions it elicited among Canadian scholars. The Supreme Court's approach to the civil law did not provoke the wide condemnation that one would have expected from such a blatantly antifederalist stance.<sup>263</sup> To the contrary, this approach has been endorsed as one of "constructive exchange," whereby the best elements of both the common law and civil law traditions would be added

conclusion seems to me to be that the limitation of the master's responsibility . . . was intended to be substantially the same as that which English courts understand to be imposed. . . ." [1920] 60 S.C.R. 131, 161. Justice Anglin also stated, "[s]o far as they may be considered, English authorities uphold this conclusion and French modern authorities, . . . although on the whole adverse, are not uniform in forbidding it." *Id.* at 164.

260. In *Colonial Real Estate v. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal*, [1918] 57 S.C.R. 585, Justice Mignault wrote:

May I say, with all possible deference, that I would deprecate, on a question under the Quebec law, relying upon a decision, even of the Privy Council, rendered according to the rules of the English law. It would first be necessary to shew that there is no difference between the two systems of law by referring to authorities binding under the French law, and this has not been done. Very earnestly, I am of the opinion that each system of law should be administered according to its own rules and by reference to authorities or judgments which are binding on it alone.

*Id.* at 603. This is but one illustration of Mignault's lifelong crusade in defense of the integrity of civil law. See Castel, *supra* note 254.

261. *Chapman v. Larin* [1880] 4 S.C.R. 349 (upholding application of common law rule of contractual interpretation, whereby term of reasonable time for delivery implied where no explicit term provided, even though contract was "plain" under C.C.L.C. art. 1067); *Ross v. Hannan*, [1890] 19 S.C.R. 227, 230-31 (asserting intersection of French civil law and English common law with respect to transfer of risks in contracts of sale imported under C.C.L.C. art. 1474); *City of Quebec v. R.*, [1894] 24 S.C.R. 420, 434 (finding that requirement of negligence by owner of adjoining land in order to recover damages for water damages is identical under law of England and law of Quebec); *Gervais v. McCarthy*, [1909] 35 S.C.R. 14 (holding prohibition of parol testimony by C.C.L.C. not a rule requiring judicial notice); *Royal Guardians v. Clarke*, [1914] 49 S.C.R. 229, 250-51 (holding that common law rule that debtor seeks creditor, rather than contrary rule of French law, applies in Quebec); *Vipond v. Furness, Withy & Co.*, [1916] 54 S.C.R. 521, 525-26 (ruling that common law rule regarding carriers' ability to contract out of liability applies in Quebec); *Hutchison v. Royal Inst. for the Advancement of Learning*, 1932 S.C.R. 57 (holding that common law notion of consideration applied to interpretation of *cause* under C.C.L.C. art. 982).

262. See, e.g., *V. Hudson Cotton Co. v. Canada Shipping Co.*, [1882] 13 S.C.R. 401, 404 (invoking common law cases to affirm liability of principal to third parties with whom agent contracted in his own name).

263. It must be kept in mind that for Quebecers, a "federalist" stance is one that respects the autonomy and equality of the provinces as federal members, whereas an "antifederalist" stance is one that emphasizes Canada as a constitutional monarchy and promotes a greater centralization of powers by denying provincial autonomy and equality. See *supra* text accompanying note 127. This runs counter to the terminology used in the United States, where "antifederalist" refers to those who opposed federalism, not because they believed it was not centralized enough but rather because they saw it as *too* centralized.

to the other with a view to building two superior, distinct legal systems.<sup>264</sup> In other words, civil law rules would be substituted and supplemented with ones from the common law in a process of constructive juridical exchange between equal Canadian partners.<sup>265</sup> However, if “constructive exchange” is indeed what has been driving the highest bench in the country since 1875, it is puzzling that this court, while drawing heavily upon the common law to modify the civil law, has very rarely proceeded the other way around.<sup>266</sup> Exchange, after all, is reciprocal by definition.

Back in 1875, the deepest fears of Quebeckers with respect to the establishment of the Supreme Court did not pertain to the potential for *conscious* unifying action by the Court; it was what the Court did not know that most concerned them.<sup>267</sup> A century earlier, Chief Justice Hey had written that “it would require great Abilities, uncommon Industry, Length of Time, and a perfect acquaintance with the French Language to attain such a Knowledge of the Canadian Laws considered as a complete System of Jurisprudence, as would enable them to execute their office with any degree of sufficiency.”<sup>268</sup> That a body of six judges, only two of whom were from Quebec,<sup>269</sup> could overrule a Court of Appeal with five judges trained in Quebec’s civil law seemed aberrant.<sup>270</sup> The discussion of the last part of this

264. Brierley, *supra* note 17, at 39.

265. Economic arguments have also been advanced in support of the judicial standardization of Canadian law, if only in fields such as interprovincial commerce. *See, e.g.*, JEAN HAMELIN & YVES ROBY, *HISTOIRE ÉCONOMIQUE DU QUÉBEC, 1851–1896*, at 362–64 (1971); Raymonde Crête, *Aspects méthodologiques de la jurisprudence québécoise en droit commercial à la fin du XIXe siècle*, 34 C. DE D. 219, 244–45 (1993). Such arguments reach beyond judicial intervention, however, for it would seem that the progressive elimination of Canadian biculturalism as a whole would, from this perspective, prove more effective than an occasional judicial check on those departures from main stream lawmaking deemed most damaging to national unity. *See, e.g.*, Lambert & Wasserman, *supra* note 103, at 7, 20 (recommending that legal rules be internationalized). As this argument raises the broader question of the desirability of preserving two distinct legal cultures within Canada in the first place, it falls outside the bounds of the present project, as explained above in the Introduction to this article.

266. *See* J.A. CLARENCE SMITH & JEAN KERBY, *PRIVATE LAW IN CANADA: A COMPARATIVE STUDY 22–23* (1975) (describing frequent influence of common law on civil law); David Howes, *From Polyjurality to Monojurality—The Transformation of Quebec Law, 1875–1929*, 32 MCGILL L.J. 523, 526–27 (1987) (describing increasing receptivity of Quebec judges to common law rules and materials).

267. *See* RUSSELL, *supra* note 207, at 7–9 (reporting that Quebeckers viewed Privy Council as better equipped to interpret Quebec’s law than general Canadian court, perhaps due to fact that some of Law Lords were Scottish, as noted *supra* note 206). Baudouin expresses the view that even the Court’s impulse toward making Canadian law uniform in cases such as *Canadian Pac. Ry. v. Robinson*, [1888] 14 S.C.R. 105, *rev’d on other grounds*, 1892 App. Cas. 481 (P.C.) (appeal taken from Can.), and *Magann v. Auger*, [1902] 31 S.C.R. 186, discussed *supra* text accompanying notes 257–59, may have been “almost subconscious.” Baudouin, *supra* note 235, at 407 n.43. He explains that, “it is psychologically normal that a judge educated the English way would seek to establish such comparisons [of civil law rules to common law rules] in order to rest his reasoning on a juridical system that he knows better and in which he feels more confident.” *Id.*

268. *REPORTS ON THE LAWS OF QUEBEC, 1767–1770*, No. 12, at 75 (W.P.M. Kennedy & Gustave Lanctôt eds., 1931).

269. *Supreme and Exchequer Courts Act*, ch.11, § 4, S.C. (1875), *replaced by* *Supreme Court Act*, R.S.C. ch. 5–19, § 6 (1970). That number rose to seven in 1927 and to the current nine in 1949. Since that year, a pattern of regional representation has been maintained, whereby three judges are from Quebec, three from Ontario, two from the Western provinces, and one from the Atlantic provinces. Chief Justices have been alternately French and English speaking. PAUL WEILER, *IN THE LAST RESORT: A CRITICAL STUDY OF THE SUPREME COURT OF CANADA 17* (1974).

270. Different institutional reforms have since been proposed in order to alleviate this problem, none of which has ever been implemented. One such proposal was to divide the Supreme Court into two

Article suggests that these fears were not unfounded.

## V. LEGAL METHOD IN QUEBEC

The discussion of Part I indicates that if Quebec courts (and the Supreme Court of Canada when resolving appeals from Quebec decisions involving matters of civil law) were to operate in true civil law fashion, they would aspire to stay away from literalism when implementing Code provisions. They would engage actively, and not discretionarily, in the arduous task of codal interpretation and aim to reconstruct the spirit of the Code as it bears on these provisions and illuminates the process by which each is to apply in concrete cases. In this reconstructive exercise, all materials likely to assist the rational thought process would be considered. To this extent, Quebec judges would take particular account of the *travaux préparatoires*, the doctrinal writings, and any judicial opinion relevant to the issues at bar, although the latter might be viewed as persuasive but never as binding. It seems that the Canadian legislative and judicial institutions hitherto examined have taken their toll on legal method in Quebec, for their method falls far short of this ideal.

As one would expect of a civil law jurisdiction, Quebec officially recognizes both the paramountcy<sup>271</sup> and the comprehensiveness<sup>272</sup> of its Civil Code as the primary source of law in private matters. Yet, this is hardly reflected in the substance, sources, and form of civil law judgments from Quebec, which in too many respects bear greater likeness to the common law of its neighbors than to the *jurisprudence* of its ancestors abroad.

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chambers, one of civil law and the other of common law. For authors supporting this suggestion, see Pierre Azard, *La Cour suprême de Canada et l'application de droit civil de la Province de Québec*, 43 R. DU B. CAN. 553, 557-59 (1965); BAUDOUIN, *supra* note 150, at 81; Edward McWhinney, *Legal Theory and Philosophy of Law in Canada*, in CANADIAN JURISPRUDENCE 18 (Edward McWhinney ed., 1958); Baudouin, *supra* note 235, at 412; Léon Lalonde, *Audition des appels de Québec à la Cour suprême*, 33 CAN. B. REV. 1104 (1955); Mayrand, *supra* note 254, at 2. For authors opposing this suggestion, see S.M. WADDAMS, INTRODUCTION TO THE STUDY OF LAW 149-52 (2d ed. 1983) ("It is difficult . . . to judge whether . . . Quebec law has been deleteriously affected by the influence of common law judges."); Gerald E. Ledain, *Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level*, 2 R.J.T. 107 (1967); At least one author has suggested that the highest court in each province be the final court of appeal on provincial matters. See Albert S. Abel, *The Role of the Supreme Court in Private Law Cases*, 4 ALTA. L. REV. 39 (1965).

271. See Act Respecting the Interpretation of the Statutes of this Province, 31 Vict. ch. 7, § 10 (1868) (Can.). Questions arise, however, concerning the authority of the Act, since it is distinct from the Code and must therefore be appended to it in order to have legislative authority. It is also hard to see how the appendage could determine the authority of the principal, or even how the principal could determine its own authority. Indeed, the C.C.L.C. declares itself the principal source of private law in Quebec. The most recent revised version of the Code reiterates that in matters of private law, "[the Code] constitutes the foundation of the other laws which may themselves add to the Code or derogate from it." C.C.Q.(Preliminary Provision).

272. "The object of the Code is to answer in express terms or by legal implication all the questions that fall within the broad scope of the subjects with which it deals. It constitutes a system whose parts are carefully tied to one another . . ." C.C.L.C. — SIXTH AND SEVENTH REPORTS AND SUPPLEMENTARY REPORT 263 (Quebec, George E. Desbarats, 1865) (my translation).

### A. *The Substance of Judgments from Quebec*

As explained above,<sup>273</sup> one hurdle to preserving the civil character of Quebec law adjudication in Canada stems from the power of constitutional review that all judges sitting in ordinary courts possess. Indeed, given civil lawyers' traditional vision of the proper role of the judiciary, it would be odd for a civil legal system to allow its civil law judges to strike down enactments duly passed by its legislature, particularly since such extensive judicial powers could conceivably be exercised against the Civil Code itself, the "constitution"<sup>274</sup> to which all judicial action is theoretically subordinated in civil legal systems. For this reason alone, all Canadian cases involving substantive matters of Quebec civil law that include a discussion of the law's constitutionality are anomalous from a civil perspective.

Yet, Canadian courts can hardly be blamed for an inherent characteristic of the constitutional system in which they operate. Another civil law anomaly affecting Canadian adjudication of Quebec private law can properly be ascribed to judicial behavior, however. There are countless instances of Quebec's courts relying on or even adopting principles of common law,<sup>275</sup> often in utter disregard of a few lower court judges' exhortations concerning the importance of maintaining a clear line between civil and common law.<sup>276</sup>

Admittedly, these lone voices have not been entirely in vain, for the Supreme Court has lately attempted to renew earlier efforts<sup>277</sup> to draw and enforce just such a line.<sup>278</sup> At the same time, however, the Court has too

273. See *supra* Part IV.B.

274. See *supra* note 197.

275. For a general survey of such instances, see H. Patrick Glenn, *Harmonization of Private Law Rules Between Civil and Common Law Jurisdictions*, in INT'L CONG. OF COMP. LAW, GENERAL REPORT TO THE XIII<sup>TH</sup> INTERNATIONAL CONGRESS OF COMPARATIVE LAW (1990). For some particularly striking examples, see *Desjardins v. Gatineau Power Co.*, [1936] 74 C.S. 205, 207 (observing "that there is no difference, on this subject, between the common law and the civil law"); *Caza v. Clercs paroissiaux ou catéchiste [sic] de St-Viateur*, 41 R. de J. 70, 84 (C.S. 1935) ("considering that the English Common Law on the theory of the 'invitee,' 'licensee,' and 'trespasser' is applicable to the decision of cases in the province of Quebec"). More recently, see *Morin v. Corporation de l'École Mission de l'Esprit-Saint*, 1985 R.D.J. 13, 15 (C.A.) (using English cases to delineate government's obligations of natural justice); *La Garantie compagnie d'assurance de l'Amérique du Nord v. Mulco Inc.*, 1985 C.S. 315, 318 (assessing manufacturers' liability by common law standard of care); *In re Les Entreprises Rock Ltée. v. Nozetz et Habitations C.J.C. Inc.*, 1986 R.J.Q. 2671, 2673 (C.S.) (assessing duties of administrators of others' property by reference to trustees' duties at common law); *Maska Auto Spring Ltée. v. La Corporation municipale du village de Ste-Rosalie*, 1988 R.J.Q. 1576, 1586-87 (C.A.) (borrowing standard of fault from common law on negligent misrepresentations).

276. See, e.g., *Nadeau v. Nadeau*, 1988 R.J.Q. 2058, 2065 (C.A.) (finding governing rules of corporate law in C.C.L.C., not in common law); *Droit de la famille — 391*, 1987 R.J.Q. 1998 (C.A.) (interpreting C.C.Q. arts. 533, 559 in light of broader principles contained in Code, not in light of common law decisions); *Bertrand v. Racicot*, 1985 R.D.J. 418, 419 (C.A.) (finding fault standard in C.C.L.C. art. 1053 is French one of "bon père de famille," not common law one of malice); *Gowen v. Tozer*, 10 R.J.O.Q. 1, 2 (C.S. 1896) (holding common law rules concerning debt recovery not applicable in Quebec).

277. See *Young v. MacNider*, [1896] 25 S.C.R. 272, 283-84 (Taschereau, J., dissenting) (distinguishing debentures from promissory notes and stating that they are governed by Quebec law); *V. Hudon Cotton Co. v. Canada Shipping Co.*, [1887] 13 S.C.R. 401, 408-09 (opinion by Fournier, J.) (disregarding English law on principal's liability to third parties).

278. See H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987). The case of *National Bank of Can. v. Soucisse*, [1981] 2 S.C.R. 339 is often cited as another example of good civil legal reasoning because the Court there preferred the civil concept of *fin de non-recevoir* to the common law

often and too easily shied away from crossing that line, making preliminary jurisdictional findings that the matter at hand is to be governed by the common law, either by identifying a province other than Quebec as the proper locus or by qualifying the matter as one of federal constitutional competence.<sup>279</sup>

At any rate, this purification process has yet to reach beyond the substance of legal rules and institutions into the method of judicial reasoning and the form of judgments.

### B. *The Sources of Judgments from Quebec*

Notwithstanding the inadequacy of literal interpretation for civil law legal reasoning,<sup>280</sup> Quebec courts have been known for their unrelenting flirtation with literalism.<sup>281</sup> Their historic endorsement of the Anglo-Saxon policy of disallowing references to prelegislative materials, regardless of whether the judges are engaged in statutory or codal interpretation,<sup>282</sup> is indeed one manifestation of such literalist proclivities.

Judicial reasoning in Quebec has not always been literalist, however. In fact, during the years that immediately preceded and followed codification, judicial opinions from Quebec were noted approvingly for the eclecticism of the sources used in their formulation, which ranged from Roman and French

counterpart of estoppel as the basis for its reasoning. *See, e.g.,* Lemieux, *supra* note 256, at 24. The degree of the Court's faithfulness to the civil law in this case is open to question, however. Indeed, the Court interpreted *fin de non-recevoir* much like estoppel, that is, more broadly than the traditional notion.

279. *See, e.g.,* Gary Lefebvre & Normand Tamaro, *La cour suprême et le droit maritime: la mise à l'écart du droit civil québécois est-elle justifiable?*, 70 CAN. B. REV. 121, 122-25 (1991) (discussing International Terminal Operators Ltd v. Miida Elec. Inc., [1986] 1 S.C.R. 752).

280. *See supra* text accompanying notes 85-103.

281. In this respect, Atias notes that Quebec judges, much more than their French colleagues, resort to definitions for the purpose of argumentation. *See* ATIAS, *supra* note 58, at 158-59. Specific examples of literalism in Quebec judicial opinions include *McRae v. Macfarlane*, 7 M.L.R. 288, 291-92 (C. Rév. 1891) (Johnson, C.J.) (using literal interpretation of "commercial partnership" in using C.C.L.C. arts. 1834, 1858, 1863); *Charest v. Murphy*, 3 R.J.O.Q. 376, 385 (B.R. 1894) (Lacoste, C.J.) (holding that letter of the Code prevails over codifiers' intent in interpreting C.C.L.C. art. 1235 on limitation periods); *Davie v. Sylvestre*, 5 M.L.R. 143, 148 (B.R. 1889) (holding that letter of Code prevails over doctrinal authorities on subject of partners' sharing of liability); *La Corporation des commissaires d'école d'Hochelaga v. Montreal Abattoirs Co.*, 3 M.L.R. 116, 123 (B.R. 1887) (holding that unfair law must be applied as drafted). For a recent example of judicial literalism, see *Pantel v. Air Can.*, [1975] 1 S.C.R. 472, 475-76 (Pigeon, J.) (holding that statute from which C.C.L.C. art. 1056 originates is irrelevant for purpose of interpreting this article). This literalism may have fostered the civil law's image as suffused with state positivism, as is briefly discussed *supra* text accompanying notes 54-57. Indeed, it is no coincidence that most juridical literalists were political nationalists. *See* Crête, *supra* note 265, at 248.

282. *See* A.G. Canada v. Reader's Digest Assoc. (Can.) Ltd., 1961 S.C.R. 775 (discussing Excise Tax Act, R.S.C. ch. 100 (1952)); *Jean v. Les Pétroles Irving Inc.*, 1974 C.A. 279 (interpreting C.C.L.C. arts. 1053, 1571-72, 2468, 2584-86, and Loi des assurances, R.S.Q. ch. 295, art. 242 (1964)); *Gignac v. Commissaires d'écoles pour la municipalité de Ste-Foy*, 1975 C.S. 1156 (discussing Loi sur la langue officielle, ch. 6, L.Q. arts. 1, 4, 40-44, 109, 112 (1974), and Loi pour promouvoir la langue française au Québec, ch. 9, L.Q. arts. 1-2 (1969)). The willingness of Quebec courts to refer to the *Rapport des codificateurs* that preceded the adoption of the C.C.L.C. when interpreting subsequent amendments to that Code has been noted as one exception to that general practice. *See* WALTON, *supra* note 17, at 104. Since the decision of the Privy Council in *Despatie v. Tremblay*, however, even such limited and exceptional references are forbidden. [1921] 1 App. Cas. 702 (P.C.) (appeal taken from Que.) (holding marriage valid based on canon law and Code).

to English and even American law.<sup>283</sup> Such eclecticism is not at odds with literalism and the spirit of civil law method, for where reason prevails, jurisdictional and geographical boundaries lose force.<sup>284</sup> It is therefore entirely legitimate and, in fact, only natural for a civil law court in a given case to consult any form of literature — domestic or foreign — that may assist it in forming the reasoning that will dispose of that case.

In this sense, the geographical openness displayed by the Quebec judiciary at the time of codification should be praised. And the same can be said of their institutional diversity, for Quebec courts indeed considered doctrinal writings<sup>285</sup> a prominent source of guidance in adjudication.<sup>286</sup>

Such geographical and institutional diversity was short lived, however. By the mid-1880s, literalism had overtaken Quebec courts<sup>287</sup> and ended the era of openness and diversity in Quebec adjudication. A narrow and superficial form of exegesis became the prevailing method of legal reasoning.<sup>288</sup> A clear line separated formal and fringe legal materials, and the latter were stripped of both the authority and the legitimacy they had enjoyed as

283. WALTON, *supra* note 17, at 47, 125-31; Crête, *supra* note 269, at 243; Glenn, *supra* note 278, at 289-90; Howes, *supra* note 266, at 526-32. In many cases, the courts did not even feel the need to justify their use of foreign sources. *See, e.g.*, Rolland v. La Caisse d'économie Notre-Dame de Québec, [1894] 3 R.J.O.Q. 315 (B.R.) (using French and English sources); Pratte v. La Manufacture de laine d'Yamachiche, 29 R.J.R. 53 (C.S. 1876) (using French, English, and Roman sources). It was not uncommon for the legal periodicals that preceded official reports in the publication of judgments from Quebec to include foreign cases from France, other Canadian provinces, or even the United States. *See* Sylvio Normand, *Profil des périodiques juridiques québécois au XIXe siècle*, 34 C. DE D. 153, 163 (1993) (describing law journals in nineteenth century).

284. *See supra* text accompanying notes 115-22. In *Monaghan v. Horn*, [1882] 7 S.C.R. 409, for example, the Court refused to follow the majority decision of an English court on the ground that "the weight of reasoning and logic . . . [rests] entirely with [the minority]." *Id.* at 437.

285. The first doctrinal commentaries on judicial decisions took the form of editor's notes integrated into the text of the opinions, much as the glossators did in the 15th and 16th centuries. *See* Helmut Coing, *The Roman Law as Ius Commune on the Continent*, 89 L.Q. REV. 505, 510-16 (1973) (documenting the glossator practice); *see, e.g.*, Pierre-Basile Mignault, *Notes de l'arrêviste*, 17 C.S. 79 (1900) (documenting the Quebec practice).

286. The extent to which doctrinal writings did in fact reach a position of prominence as a source of reference in adjudication seems to be a somewhat controversial issue. While some authors, like Raymonde Crête, seem to take the influence of doctrinal writings for granted, *see supra* note 265, at 253, there are reasons to wonder whether the publication of *la doctrine* ever really took off in Quebec. Normand, for example, reported that in the 19th century, "[a]ll attempts at implanting periodicals favoring the publication of doctrinal articles failed in the short or the medium term," a phenomenon that he explains by the "absence of a sufficient market for this kind of publication, law practitioners being more interested in judicial reports proper." Normand, *supra* note 283, at 165 (my translation). He then adds that "the editors of these periodicals could not count on academics for the production of such texts; doctrine writers were primarily judges and learned practitioners who would devote their free time to such writing." *Id.* at 166. He concludes that "[t]he evidence seems to indicate that the judge was the key player in the system." *Id.* at 173 (my translation).

287. *See generally* Pierre-Gabriel Jobin, *L'influence de la doctrine française sur le droit civil québécois: le rapprochement et l'éloignement de deux continents*, in DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE 91, 109 (H. Patrick Glenn ed., 1993) (relating parallel evolutions of Quebec and French literalist method).

288. Howes argues that the rise of narrow exegetic interpretation in Quebec courts at the turn of the century resulted from the transformation of Quebec's legal culture at that time. The culture shifted from an oral one conducive to rhetorical argumentation to a written one amenable to exegesis. Howes, *supra* note 266, at 526-32. I would argue that such transformation is consistent with the present thesis; where authority depends on the source of given canons (as it does at common law), instead of on the rationality of those canons (as it traditionally does at civil law), interpretation will necessarily focus on the letter of those canons.

interpretive instruments. Foreign law and doctrinal writings were henceforth shunned at all levels of adjudication in Quebec,<sup>289</sup> a fate exacerbated by the rise of French Canadian nationalism in the 1920s and 1930s,<sup>290</sup> and one from which Quebec has yet to recover.<sup>291</sup> Ultimately, the extent to which Quebec courts have immersed themselves in literalism may rule out the possibility of reclaiming civil legal method.

### C. *The Form of Judgments from Quebec*

As even a cursory glance at Quebec's judicial reports would show, Quebec courts have long abandoned the perhaps cryptic, but resolutely syllogistic and impersonal style typical of judicial decisions at civil law.

While the standard civil law judgment from Quebec may once have evinced the succinctness of the French *arrêt*,<sup>292</sup> it has since burgeoned into the longer statement of explanation and personal commentary that epitomizes the common law opinion.<sup>293</sup> Civil law judgments from Quebec are now

289. André Morel, *L'émergence du nouvel ordre juridique instauré par le Code civil du Bas Canada (1866-1890)*, in *LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION* 47, 59-63 (Proceedings of the Journées Maximilien-Caron, 1992); Deleury & Tourigny, *supra* note 214, at 215.

290. David Howes, *The Origin and Demise of Legal Education in Quebec (or Hercules Bound)*, 38 U.N.B. L.J. 127, 140 (1989).

291. Christian Atias notes that only 26.5% of the reported references made by Quebec Court of Appeals judges in 1985 were to doctrinal sources, with the balance comprising references to previous cases. *See supra* note 58, at 131. Such blatant neglect of civil doctrinal writings by Quebec judges could be explained by the fact that judges are likely to find few existing writings helpful. Macdonald, *supra* note 60, at 202 (suggesting this is in fact the case); Jobin, *supra* note 115, at 70-77; Philip Slayton, *Law Reform in Quebec: A Cautionary Note*, 2 DALHOUSIE L.J. 473, 481 (1975). The original cause of the dearth of doctrinal references is difficult to determine, as the underuse of doctrinal writings in Quebec courts may well have caused their underproduction. Indeed, Caparros notes that the *Rapport des Codificateurs* is one doctrinal work that, although available and authoritative, has been underused by Quebec courts and, in recent years, by the Supreme Court. *See Caparros, supra* note 119, at 112. For earlier Supreme Court decisions that used the *Rapport*, see, e.g., *Kungl v. Great Lakes Reins. Co.*, 1969 S.C.R. 342, 348-49; *Gendron v. Duranleau*, 1942 S.C.R. 321, 326; *Curley v. Latreille*, [1919-20] 60 S.C.R. 131, 133.

292. *See Crête's* conclusions from her survey of 253 decisions from Quebec between 1875 and 1900: The reading of decisions [from the Superior Court and the Court of Revision for that period] suggests in effect that the magistrates are not intent on convincing their audience by discussing the various arguments raised by the parties or by expounding on the law. To the contrary, judges clothe their judgements in a very bare and neutral form, briefly exposing the facts and the issues at bar to then succinctly dispose of the case . . . without trying to determine legislative intent or to support their decisions by appeal to other sources.

Crête, *supra* note 265, at 236 (my translation). As illustrations of this method, she lists a large number of cases in which the judges proceeded from a very bare statement of facts and a list of "considering" headings to draw a cursory conclusion. *Id.* Normand notes in this respect that in the colony's early years judges in Lower Canada were not even expected to explain the reasoning behind their decisions. *See Normand, supra* note 283, at 159. The obligation to do so came relatively late, with the 1843 enactment of An Act to render the Judges of the Courts of King's Bench, in that part of this Province heretofore Lower Canada, independent of the Crown, ch. 16, § 7, S. Prov. C. (1843).

293. Several authors have noted this phenomenon. *See, e.g.* ATIAS, *supra* note 58, at 126; Louis Baudouin, *Conflits nés de la coexistence juridique au Canada*, 3 MCGILL L.J. 52 (1956); Gaudet, *supra* note 89, at 243. Pierre-Gabriel Jobin implicitly suggests that the form of judicial decisions from Quebec has evolved toward greater succinctness when he mourns the passing of the days when "judges had . . . the time to expound at length; after having exposed the issues in dispute, they discussed the respective merit, as a matter of law, of the possible solutions, and took positions one way or the other. Now that they are overburdened with files, and that society demands quick justice, they go straight to the point." Jobin, *supra* note 115, at 74 (my translation). I would retort that Crête's studies, at least with respect to decisions

written like common law decisions in a style that suggests they are the judge's personal opinion rather than an objective statement of truth. Moreover, dissenting opinions have come into use,<sup>294</sup> again in typical common law fashion. All in all, civil law judgments from Quebec look much like common law decisions.<sup>295</sup>

To be sure, Quebec's Code of Civil Procedure explicitly mandates that judges include the underlying reasons in their statements of decision.<sup>296</sup> But the transformation of judicial decisions from Quebec may also have been triggered in part by the declining status of *la doctrine* in Quebec courts during the golden years of literalism. During those years juridical commentaries extraneous to the word of law were denied any form of judicial consideration, and therefore judges could no longer rely on noninstitutional commentators to provide authoritative explanations in support of their judgments.<sup>297</sup> Hence, they took the task upon themselves, presumably expecting that by integrating doctrinal commentaries into their written opinions, they would somehow restore the force of *la doctrine*.<sup>298</sup>

What these judges apparently did not appreciate is that to obtain the requisite institutional quality in this way, it is necessary that judicial opinions themselves be endowed with the proper authority in the first place, which the strict literalist might well deny. From the literalist perspective, the most that can be said of any given judicial decision is that it is binding upon the parties involved; it would be a mistake to think that the reasoning supporting that decision carries legal force in future cases. Regardless of how and by whom they may have been formulated, reasons for decisions are, like scholarly opinions, entirely devoid of legal authority under literalism. This observation further underscores the incongruity of literalism with Quebec's civil law.

These reasoned decisions did come to be regarded as authoritative in Quebec, however. It is not that literalist dogmas were unexpectedly relaxed — they were not, at least not in any relevant way. Rather, if any dogmas were set aside to accommodate this development, they were the traditional dogmas of civil law. The sacred civil law motto that judges do not have the power to

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from lower courts, *see supra* note 265, at 236, and an independent review of Quebec judicial reports, past and present, do not bear out his suggestion.

294. Deleury & Tourigny, *supra* note 214, at 215. For example, Atias reports that 56.5% of Quebec Court of Appeals judges wrote a dissenting or partly dissenting opinion in 1985. ATIAS, *supra* note 58, at 128.

295. Deleury & Tourigny, *supra* note 214, at 215; BRIERLEY & MACDONALD, *supra* note 62, at 123; Gaudet, *supra* note 89, at 242-46. One Quebec judge once went so far as to declare: "Let us not allow ourselves . . . to slide into notions of civil law . . . Let us get back to the case in question!" *Commission de protection du territoire agricole v. Venne*, 1985 C.A. 703, 711 (Monet, J.) (my translation).

296. C.C.P. art. 471. This is another example of the impact Canadian legal institutions have had on Quebec civil procedure.

297. Normand reports that in Quebec those unofficial commentaries on judicial decisions were derived from private notes taken by lawyers involved in given proceedings, which were circulated informally among members of the Bar. Normand, *supra* note 283, at 159.

298. One striking example of this is found in *Bernier v. Roy*, [1875] 1 Q.L.R. 380 (Circ. Ct. 1873). In *Bernier*, Justice Tessier states that he has drawn some of his reasoning from *La Minerve*, a periodical of doctrinal writings with no official authority. *Id.* at 381. In so doing, Justice Tessier sanctioned with legal authority what had hitherto remained a doctrinal interpretation of C.C.L.C. art. 1670.

make law eventually withered from Quebec juridical discourse.<sup>299</sup> To wit, expressions such as "authority," "obiter dictum," "distinguishing" cases and "doctrine of precedent" — which are meaningless outside a context of judge-made law — saturate civil law decisions from Quebec at all judicial levels,<sup>300</sup> including those of the Supreme Court.<sup>301</sup>

Even Justice Mignault — incontestably one of civil law's most fervent advocates in the history of Canadian law<sup>302</sup> — believed that the Supreme Court was bound by its own decisions and by those of the Privy Council when adjudicating civil law cases.<sup>303</sup> And in several instances, the Supreme Court went so far as to extend the Privy Council's treatment of common law "codes" to the C.C.L.C., apparently oblivious not only to the absence of a doctrine of precedent at civil law but also to the fact that the two "codes" are of distinct kinds.<sup>304</sup>

Considering the reality of Canadian judicial decisionmaking in matters of civil law, one can only wonder what is left *de facto* of the *de jure* absence of a doctrine of precedent and the corollary powerlessness of civil law judges to make law. In the end, it seems that the judicial need for commentaries on prior decisions was accommodated by tampering not so much with the literalist dogma that nothing outside the law itself can legitimately be given judicial consideration, as with the civil law definition of what counts as the "law."

In summary, reasoned decisions in civil law matters came to have formal authority as Canadian law due to a judicial comedy of errors. The first error was in civil law judges' yielding to literalist impulses and departing from the policy of geographical and institutional openness toward extraneous legal materials that had hitherto earned them the reputation of being good civil lawyers. The second error was committed by judges responding to the scarcity of legal commentaries that followed the first error. Filling the gap left by doctrinal writers, judges integrated the reasons for their decisions into the corpus of their decisions and thereby imported into civil law a method that characterizes common law judgments. These errors most likely resulted

299. BRIERLEY & MACDONALD, *supra* note 62, at 124-25. Deleury and Tourigny wrote in this respect: "When the highest instance, the Supreme Court, clearly puts forward a certain interpretation of some article of the Civil Code, it would appear somewhat frivolous to affirm that the Quebec Court of Appeals would be free not to follow this decision." Deleury & Tourigny, *supra* note 214, at 214 (my translation); *see also* Gaudet, *supra* note 89, at 244-45. Professor Castel concluded that "judges in Quebec are to a great extent the province's jurists." JEAN-GABRIEL CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC* 231 (1962).

300. Two authors in particular have documented this phenomenon. *See* ATIAS, *supra* note 58, at 127; Crête, *supra* note 265, at 247. *See, e.g.*, *Droit de la famille* — 193, 1985 C.A. 92 (Monet, J.).

301. *See, e.g.*, *Taillon v. Donaldson*, 1953 S.C.R. 257, 264-66 (relying on previous cases to confirm custody rights of parents under C.C.L.C. art. 243); *Ouellet v. Cloutier*, 1947 S.C.R. 521, 529-30 (relying on previous cases to clarify duty of care towards child under C.C.L.C. art. 1053); *Drysdale v. Dugas* [1897] 26 S.C.R. 20, 25-26 (relying on previous cases to grant right to recover in nuisance under C.C.L.C. art. 1053).

302. *See generally* Castel, *supra* note 254 (describing Justice Mignault's lifelong crusade to preserve Quebec civil law).

303. P.-B. Mignault, *The Authority of Decided Cases*, 3 CAN. B. REV. 1, 14-15 (1925). *But see* *Lavallé v. Bellefleur*, 1958 B.R. 53, 58-61 (carefully rejecting the rule of precedent in Quebec law).

304. *Lamontagne v. Quebec Ry., Light, Heat & Power*, [1915] 50 S.C.R. 423, 427 (1914) (applying rules of statutory interpretation used in English cases to codal interpretation).

because judges had to shift constantly between codal interpretation when adjudicating matters of Quebec civil law, and common law and statutory interpretation when adjudicating matters of federal private and public law — while immersed in a general legal context tailored to the latter.

The claim that Canadian institutions pose a serious threat to the preservation of the civil law tradition in Quebec is hardly the cliché of Canadian popular culture that some have made it out to be.<sup>305</sup> As the substance, method of reasoning, and form of Canadian judgments in matters of Quebec civil law have taken a markedly uncivil turn since Confederation, it would appear that Quebec's legal culture has indeed greatly changed at the hands of Canada's Anglo-Saxon juridical institutions.

## VI. CONCLUSION

In retrospect, it appears that the cohabitation of civil law and common law within the Canadian federation has been much less successful than anticipated in 1774. The sphere of provincial competence over matters of private law, purportedly institutionalized as autonomous and exclusive, turned out to be secondary and restricted. Given the many areas of private law designated as exclusively federal, the frequent exercise of concurrent federal powers, and the additional limitations later imposed by the Charter, it is fair to conclude that the provinces have been left with little effective power over private law within their territories.

Evidently, the autonomy of all ten Canadian provinces has been curtailed. Nonetheless, Quebec has lost more than the others. While most of these developments have applied to all provinces indiscriminately, a few have uniquely affected Quebec. Moreover, even ostensibly pan-Canadian developments were bound to affect Quebec more severely and detrimentally. Beyond provincial autonomy, the preservation of Quebec's distinct juridical identity is at stake.

Among the various problems arising from Quebec's uncomfortable position in the larger context of Canadian federalism, none has proven more irksome than the administration and implementation of Quebec civil law by noncivil judicial institutions. Federal and provincial jurisdictions have concurred with respect to the creation, administration, and powers of Canadian judicial institutions, the English structure of provincial courts (including those of Quebec), and the institution of the Supreme Court of Canada as the final judicial instance to hear appeals from all provinces. Without question, this consensus has stood in the way of Quebec's preserving its civil law heritage.

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305. "When a legal system borrows a rule from another, one must be aware of the fact that, very often, it . . . also borrows . . . the legal principles and sociological or economic reasons underlying the rule, as well as, sometimes, even the interpretation techniques and methods of the foreign system." Baudouin, *supra* note 273, at 717 (my translation).

