

11-29-2018

Canada's Legal Traditions: Sources of Unification, Diversification, or Inspiration?

Rosalie Jukier

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>



Part of the [Civil Law Commons](#)

Repository Citation

Rosalie Jukier, *Canada's Legal Traditions: Sources of Unification, Diversification, or Inspiration?*, 11 J. Civ. L. Stud. (2018)
Available at: <https://digitalcommons.law.lsu.edu/jcls/vol11/iss1/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

CANADA’S LEGAL TRADITIONS: SOURCES OF UNIFICATION, DIVERSIFICATION, OR INSPIRATION?

Rosalie Jukier*

I. Introduction	76
II. Quebec and the Canadian Legal Landscape.....	78
III. The Unification Model.....	80
IV. The Diversification Model.....	84
V. The Contemporary Position	87
VI. The Inspiration Model	94
A. The Use of “Caution” in Cross-Fertilization	96
B. Divergence Where Appropriate	98
C. Reciprocity in Cross-Fertilization of Ideas	100
VII. Conclusion.....	103

ABSTRACT

Quebec, the only province within Canada to follow the civil law tradition, is an ideal microcosm for the study of unity and diversity within legal orders. The question of whether Quebec’s civilian legal tradition should be interpreted and applied so as to be in unity with the common law or, rather, adhere to its own distinct legal culture has pervaded doctrine and jurisprudence for over a century. Interestingly, the pendulum has swung widely. Quebec has seen moments when the philosophy of the Supreme Court of Canada was one of unification and harmonization of Quebec law with the common law tradition, as well as moments when it advanced staunch diversity.

The situation today is more nuanced. Quebec’s civilian tradition has undoubtedly survived as a distinct legal order within Canada

* Professor and member of the Paul-André Crépeau Centre for Private and Comparative Law, Faculty of Law, McGill University. The author wishes to thank McGill law student, Julia Atask for her invaluable research assistance, generously funded by the Law & You Seminars Fund of the Faculty of Law, McGill University. This paper was first presented at the *Juris Diversitas* Conference, “Unity and/or Diversity: Unité ou Diversité” held at the Louisiana State University, Paul M. Hebert Law Center, Baton Rouge, Louisiana, May 3 – June 1, 2016.

due to legal interpretation but also interdisciplinary factors, including language and politics. Even within areas borrowed through legal transplantation from the common law, Quebec maintains a distinct civilian methodology and interpretation and the Supreme Court has held that Canada's legal traditions should continue to evolve side by side, each maintaining its distinctive character. Diversity, however, has been recently tempered by a growth in comparative law as between Canada's legal traditions. Increasingly, the Supreme Court is looking to Quebec civil law in appeals from common law provinces and Quebec continues to look to the common law in many areas. However, far from leading to unity, comparative law in Canada has been used as a tool for information, education and, most importantly, inspiration.

Keywords: comparative law, legal traditions, mixed jurisdictions, judicial methodology

I. INTRODUCTION

Quebec, the only province within Canada to follow the civil law tradition, is an ideal microcosm for the study of unity and diversity within legal orders. Canada is a bijural country because of the presence of the French civil law tradition, which applies in private law matters in Quebec, and the English common law tradition characteristic of the rest of Canada.¹ For over a century, jurists have debated the status of the civil law tradition within the common law nation and have questioned how, and sometimes whether, the two traditions can co-exist. This article will examine three general trends that have emerged in response to this debate; three different ways to imagine the relationship between Quebec's civilian tradition and the broader Canadian common law legal system. These trends reflect the philosophies of unification, diversification and, more recently, of inspiration and cross-fertilization of ideas between these two traditions.

1. Canada has more than the two legal traditions of the civil and the common law. In particular, it also has indigenous legal traditions. However, the focus of this paper will be on the relationship between the civil and common law traditions.

Over Canada's 150-year history, the pendulum has swung widely between unification and diversification. Towards the end of the nineteenth century, the Supreme Court of Canada was largely motivated by a philosophy of unification, which had the effect of making Quebec civil law more compatible with the common law.² However, by the end of the first decade of the twentieth century, prominent Quebec jurists began to reject this approach and to advance instead a philosophy of staunch diversification emphasizing the civilian tradition's distinctiveness from the common law.³ The situation today is more nuanced. While Quebec's civilian tradition has undoubtedly survived as a distinct legal order within Canada, the emphasis on diversity has recently been tempered by a growth in comparative law between Canada's legal traditions. In recent years, we have seen the Supreme Court of Canada increasingly look to Quebec civil law in appeals from common law provinces, and to the common law in appeals from Quebec, embracing the concept of learning from the other.⁴ This does not, however, imply a return to earlier attempts to harmonize or unify Canadian civil and common law traditions. Rather, it represents an emergent trend, one of inspiration, in which courts use comparative law as a tool for information and education, as a positive influence in the development of each distinct legal tradition.

By focusing on these three trends, this article will examine the dialectic and changing relationship between Quebec civil law and

2. David Howes, *From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929*, 32 MCGILL L.J. 523, 526 (1986-1987). See also Charles D. Gonthier, *Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings*, 21 CANADIAN BUS. L.J. 323, 326 (1992-1993).

3. 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, 564 (1986-1987).

4. This trend, while not as pronounced, can be found in lower court decisions as well. See, e.g., *Opron Construction Co. v. Alberta* (1994) 151 A.R. 241 (Can. Alta. Q.B.) (an Alberta common law case citing Quebec law on duty to disclose) [hereinafter *Opron Construction Co.*]; and *Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec*, 2016 QCCA 1229 (Can. Que.) (a Quebec Court of Appeal decision citing the common law on good faith).

Canadian common law. Many protagonists have helped shape this relationship, from the early Supreme Court justices Henri-Elzéar Taschereau and Pierre-Basile Mignault, to Justice Louis LeBel, who served on the same Court roughly one century later. Their voices are crucial in understanding the philosophies they helped develop. Before examining these figures and these ideological movements, however, it is important to explain Quebec's position as a mixed jurisdiction and the only Canadian province with a civilian legal tradition.

II. QUEBEC AND THE CANADIAN LEGAL LANDSCAPE

Quebec enjoys a unique legal position in Canada, which stems from its history as having been a French colony before becoming a British one. Quebec passed from French to British control after the English conquest in the Battle of the Plains of Abraham in 1759, affirmed by the Treaty of Paris of 1763.⁵ However, a seminal moment in Canadian legal history occurred a decade later, in 1774, when the British Parliament enacted the Quebec Act.⁶ This Act was aimed largely at appeasing the colony's French-Canadian population by guaranteeing them the continued use of the French language, the maintenance of their Catholic religion, and the application of French law in private matters. Public law, however, remained governed by the English common law system. In this way, two legal systems found their home in Quebec.

This bijurality was preserved in the British North America Act (today, the Constitution Act), which established Canada as a Confederation in 1867. The Canadian Constitution divided powers between the federal and provincial governments, leaving provinces the

5. The Definitive Treaty of Peace and Friendship (The Treaty of Paris), Feb. 10, 1763, 15 R.A.T.F. 66.

6. The Quebec Act, 1774, 14 Geo. 3, c. 83, § VII (U.K.).

control over many areas of private law, such as contracts, extra-contractual responsibility (torts), property, successions, and procedure.⁷ Accordingly, in Quebec, these aspects of private law continued to be regulated by a codified civilian legal tradition.⁸ Areas of law falling under federal jurisdiction, such as criminal law, banking, and bankruptcy, became regulated uniformly by the federal government under a common law framework.⁹ As such, Quebec is a mixed jurisdiction that maintains its historically unique position within Canada as the only one of ten provinces and three territories to follow both civilian and common law traditions.

Quebec is a mixed jurisdiction in other respects as well. As judicial institutions are uniform across Canada, Quebec courts, like those of other provinces, are modeled on the English system and are courts of inherent jurisdiction.¹⁰ There is one final appellate court in the country, the Supreme Court of Canada, which reviews all matters of Canadian law: private, public, provincial, federal, civil law and common law. Three out of the nine Supreme Court judges must come from Quebec.¹¹ Moreover, while Quebec judges apply substantive civil law to private matters, they are similar, in style, to their common law counterparts in many ways. They are nominated from the Bar as opposed to educated in an *École de la Magistrature*. Their decisions are written in a similar manner to English common law judgments in the sense that they are discursive and personalized, include dissents, and refer to precedent, although Quebec does not adhere to a formal system of *stare decisis*.¹² Finally, while procedural

7. Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 92(13) to 92(14) (U.K.), reprinted in R.S.C. 1985, app. II, No. 5 (Can.) [hereinafter Constitution Act, 1867].

8. Quebec has both a Civil Code, the first version of which came into force in 1866, and a Code of Civil Procedure, which first came into effect in 1867.

9. See Constitution Act, 1867, *supra* note 7, §§ 91(15), 91(21), 91(26).

10. Héту v. Notre-Dame-de-Lourdes (Municipalité de), 2005 QCCA 199, paras. 35-47 (Can. Que.); I.H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 23 (1970).

11. Supreme Court Act, R.S.C. 1985, c. S-26, §§ 3, 6 (Can.).

12. Rosalie Jukier, *Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec*, 6 J. COMP. L. 54, 59 (2011).

law in Quebec is codified and thus in a civilian format, its content is largely inspired by the common law adversarial process, as opposed to the continental inquisitorial one, and it is focused on oral advocacy and driven by common law rules of evidence and procedure.¹³

III. THE UNIFICATION MODEL

While the federal division of powers in the Constitution has allowed Quebec to maintain its civilian tradition in private law, it was not always clear that this tradition would survive as an autonomous legal order in an otherwise common law country. In the decades following Canada's creation in 1867, there was a distinct trend on the Supreme Court of Canada that favoured standardizing Canadian law, accomplished largely by imposing common law solutions onto Quebec civil law issues.¹⁴ While this trend was based on a philosophy of harmonizing the law across Canada, it unfolded in a markedly non-reciprocal way and ultimately became a project of making the civil law compatible with the common law and not vice versa. Had this trend continued, it is possible that the civilian tradition of Quebec would have lost its distinctive character entirely or, at the very least, would not be the robust legal tradition it has become today.

13. *Id.* at 63. For example, Quebec procedure includes pre-trial discovery and the class action, both quintessential common law elements of procedural law. However, recent revisions to procedural law have significantly broadened judges' powers of case management and have moved Quebec procedure somewhat closer to a judge-centered model. *See also* Rosalie Jukier, *The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure*, 93 CANADIAN BAR REV. 1 (2015).

14. *See, e.g.*, *Magann v. Auger* (1901), 31 S.C.R. 186 (Can.) [hereinafter *Magann v. Auger*]; *Canadian Pacific Ry. Co. v. Robinson* (1887), 14 S.C.R. 105 (Can.) [hereinafter *Canadian Pacific Ry. Co.*]. Note that this case came before the Supreme Court again in 1891, in *Canadian Pacific Railway Co. v. Robinson*, [1891] 19 S.C.R. 292, and that this second decision was overturned by the Judicial Committee of the Privy Council in *Robinson v. The Canadian Pacific Railway (Canada)*, [1892] UKPC 37 (U.K.). The Judicial Committee of the Privy Council in the United Kingdom continued to review appeals from the Supreme Court of Canada until 1949. The *Canadian Pacific Railway* decision referenced in this article is the one decided by the Supreme Court in 1887. *See also* Jean-Louis Baudouin, *L'interprétation du Code Civil Québécois par la Cour Suprême du Canada*, 53 CANADIAN BAR REV. 715 (1975).

This philosophy of unification was prevalent in the “Taschereau years” of the Canadian Supreme Court. Sir Henri-Elzéar Taschereau was appointed as a judge of the Supreme Court in 1878, just three years after its creation, and served until 1906, the last four of those years as chief justice. Taschereau believed in standardizing and unifying the laws across Canada, and saw the Court as the instrument of bringing the civil and common law in line with each other.¹⁵ Taschereau argued in favour of unification for two reasons. First, he thought it was illogical to have contradictory answers to the same legal questions depending on the region of Canada in which a case arose. For instance, in *Canadian Pacific Ry. Co. v. Robinson*, Taschereau, writing for the majority, interpreted an article of the Civil Code of Lower Canada, the primary source for Quebec’s civil law at the time, on the premise that it should be consistent with the rest of Canadian law.¹⁶ In that case, Taschereau held that it would be contrary to the legislative intent behind the Civil Code that a widow should be compensated in damages for her husband’s death in Lower Canada (Quebec) when such compensation did not lie in Upper Canada (Ontario). To interpret the article differently would be to suggest that the legislator intended for such disparity whereas Taschereau believed the intention was, instead, to “put the law in both Provinces on the same footing.”¹⁷ He reasoned that, “a statute would not be held to mean one thing in England and another in Scotland. And so here, I take it, it cannot mean in Lower Canada what it does not mean in Upper Canada, or give a larger remedy in one Province than in the other.”¹⁸ In short, he interpreted the codal article in such a way as to render it consistent with the common law applicable in the rest of Canada.

15. Howes, *supra* note 2, at 525-526.

16. *Canadian Pacific Ry. Co.*, *supra* note 14, at 124.

17. *Id.*

18. *Id.* at 125.

The second reason behind Taschereau's philosophy of unification was that he believed it preferable to base arguments and decisions on any legal source that provided reasonable guiding principles, rather than to adhere exclusively to the sources of a particular legal tradition. He was open to looking beyond the Civil Code of Lower Canada and to using alternative sources to inform his civil law decisions including Roman law, sources from other countries and, most particularly, common law precedent.¹⁹ This approach is visible in *Magann v. Auger*, a case concerning contract formation by post. Here, Taschereau examined a multitude of sources including the approach to the same legal problem in France, a variety of doctrinal writings, and the Civil Code. Ultimately, however, he based his decision on common law precedent, concluding that, "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 the Dominion."²⁰ In so doing, Taschereau indicated that sources like common law precedent could be brought in and prioritized over sources from the civilian tradition if they seemed more appropriate in any given situation. Unlike later jurists, he did not see the civil law as a distinct tradition that should be informed exclusively by its own particular sources. Rather, he believed the use of any source could be valid if it brought about a reasonable outcome. To Taschereau, that often meant a unified outcome across Canada.

In the decades following Justice Taschereau's tenure on the Court, many Quebec jurists voiced opposition to this unifying approach, arguing that it threatened and undermined the civil law tradition. Critics went so far as to argue that the civilian tradition might cease to exist if the pattern were to continue.²¹ A modern lens on Taschereau's approach, however, has shed a more positive light on his philosophy. David Howes has characterized Taschereau's willingness to look across traditions as a form of "polyjurality" and has

19. Howes, *supra* note 2, at 542.

20. *Magann v. Auger*, *supra* note 14, at 193.

21. Howes, *supra* note 2, at 551. Normand, *supra* note 3, at 578-579.

lauded his attempt to develop pan-Canadian legal principles.²² From this vantage point, Taschereau sought “universally admitted rules of law” by looking to every available legal source, rather than narrowing his vision and working within one tradition to the exclusion of others.²³ Moreover, although Taschereau clearly favoured harmonization of Canadian law, he did not undertake this unification project in a conscious attempt to undermine the civilian tradition.²⁴ While he was not a militant protector of the civil law, he nonetheless considered elements of it in his decisions and, on occasion, attempted to bring civilian principles into common law judgments.²⁵

However, regardless of Taschereau’s motives, unification was not, in practice, a reciprocal process. The philosophy of harmonizing the laws of Canada was frequently used to bring common law principles into civil law cases, but never actually resulted in bringing civil law principles into common law ones.²⁶ Gaps in the civil law were filled by importing common law ideas rather than by interpreting civilian sources, such as the Civil Code, or by looking to French law, while the common law remained distinctive and was developed with exclusive reference to its own sources and concepts. This unification philosophy left little autonomy for the application of a distinct civilian tradition, and the approach eventually gave rise to a fear that the civil law was under threat of extinction.²⁷ Not surprisingly, this period was followed by one in which the pendulum swung to the other extreme and jurists adopted an opposing diversification

22. Howes, *supra* note 2, at 525-527.

23. *Id.* at 525, 558.

24. For instance, in 1882, Taschereau wrote to the Prime Minister suggesting that appeals from Quebec should only be heard by the Supreme Court in cases touching on criminal, constitutional, and electoral matters, that is, that the Supreme Court should avoid judging private law cases from Quebec entirely. This suggestion was based on the idea that a majority common-law court was not ideally suited to judge civilian cases. *See* JAMES G. SNELL & FREDERICK VAUGHAN, *THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION* 30, 47 (U. of Toronto Press 1985).

25. *Id.* at 130. *See, e.g.*, *Monaghan v. Horn* (1882), 7 S.C.R. 409 (Can.) (Taschereau, J., dissenting).

26. Baudouin, *supra* note 14, at 719.

27. Normand, *supra* note 3, at 578.

approach, arguing that the civil law tradition was unique and distinct, and should not be informed by anything other than civilian sources.

IV. THE DIVERSIFICATION MODEL

The movement away from the model of unification to one of diversification and legal autonomy for the civil law tradition is largely attributable to Justice Pierre-Basile Mignault, who served on the Canadian Supreme Court from 1918 to 1929. Mignault fervently believed that the civil law was part of Quebec's ancestral heritage and had to be protected at all costs.²⁸ Worried about the survival of the civilian tradition in Canada, Mignault emphasized the distinctiveness of the civil law and argued that it needed to be developed autonomously from common law influences in order to preserve its identity, originality, and integrity.²⁹

In his decisions, Mignault emphasized the differences between Quebec's laws and those of the rest of Canada, focusing more on what was unique about the civil law as opposed to Taschereau's approach, which focused on what was universal and shared with the common law.³⁰ Since the two systems were so distinct, Mignault argued, using one to inform the other was unnecessary and would only render each system less pure and coherent. The civil law, he maintained, was an internally strong and fertile system and there was thus no need to borrow concepts from the common law in order

28. Pierre-Basile Mignault, *L'avenir de notre droit civil*, 1 REVUE DU DROIT 104, 116 (1922).

29. See, e.g., *The Mile End Milling Co. v. Peterborough Cereal Co.*, [1924] S.C.R. 120 (Can.) [hereinafter *The Mile End Milling Co.*]; *Colonial Real Estate Co. v. La Communauté des Sœurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585 (Can.) [hereinafter *Colonial Real Estate Co.*]; *Magann v. Auger*, *supra* note 14, at 193; Mignault, *supra* note 28. Mignault was not the only Supreme Court Justice who used this approach. Justice Brodeur, for instance, serving on the Court from 1911 to 1923, was also "vigilant on behalf of the civil-law tradition" in his decisions. See SNELL & VAUGHAN, *supra* note 24, at 130.

30. Jean-Gabriel Castel, *Le juge Mignault défenseur de l'intégrité du droit civil québécois*, 53 CANADIAN BAR REV. 544, 545-549 (1975).

to answer civilian legal questions or develop principles.³¹ Instead, answers could be found within the civil law tradition, most notably, in the Civil Code, which Mignault believed to be internally consistent and rational, as well as in doctrinal interpretations of codal articles.³²

Mignault believed that it was not only unnecessary but, indeed, undesirable to import common law principles into the civil law since doing so weakened the civilian tradition as a whole. Transplanting common law ideas into the civilian legal framework risked the introduction of concepts that conflicted with existing civil law rules, causing contradictions and detracting from the system's integrity, making an otherwise rational system impure and illogical.³³ Moreover, he believed this endangered the tradition's continued existence, warning that, "we should not forget the case of Louisiana."³⁴ Mignault believed that Louisiana was losing its distinctive civilian tradition and implied the same might happen in Quebec if this importation continued. As a result, Mignault was "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

31. Pierre-Basile Mignault, *Les rapports entre le droit civil et la common law au Canada, spécialement dans la province de Québec*, 11 REVUE DU DROIT 201, 205-206 (1932).

32. Castel, *supra* note 30, at 550-551. *See also* Regent Taxi & Transport Co. v. La Congrégation des Petits Frères de Marie, [1929] S.C.R. 650 (Can.) [hereinafter Regent Taxi]; Mignault, *supra* note 31, at 204-205; Pierre-Basile Mignault, *Le Code civil de la Province de Québec et son interprétation*, 1 U. TORONTO L.J. 104, 129-139 (1935).

33. Castel, *supra* note 30, at 546. *See, e.g.*, The Mile End Milling Co., *supra* note 29, at 129, where Mignault criticized the respondents' lawyers for citing common law authorities stating that, "it is not in this way that we will conserve Quebec civil law in all its integrity" (author's translation) ("Ce n'est pas ainsi que l'on conservera dans toute son intégrité le droit civil dans la province de Québec.").

34. Mignault, *supra* note 28, at 116 ("N'oublions pas le cas de la Louisiane.") (author's translation). Mignault was writing at a time when others were expressing similar concerns in Louisiana itself. In his article, Mignault based his opinion on a letter he received from a lawyer in Louisiana who explained that the common law was becoming increasingly influential within the state. *See also, e.g.*, Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TULSA L. REV. 585, 596 (1937).

on it alone.”³⁵ The difference between Mignault’s and Taschereau’s approach is evident in Mignault’s dissenting opinion in *Regent Taxi*, a case that dealt with the same two articles of the Civil Code that Taschereau had interpreted earlier in *Canadian Pacific Ry. Co. v. Robinson*.³⁶ Where Taschereau’s interpretation was based on a philosophy of unifying different traditions, Mignault’s methodology was completely different as it focused on reconciling the apparently contradictory articles with one another, situating them within the rational framework of the Code.³⁷

Justice Mignault was not alone in this concern for the continued viability of Quebec civil law. Sylvio Normand’s study on the editors and authors of the *Revue du Droit*, a Quebec law journal published from 1922 to 1939, indicates a similar apprehension among numerous Quebec jurists at the time.³⁸ One of the major themes discussed in the *Revue* was the deep connection between Quebec’s heritage, society, culture and its civil law tradition, and the sense that this tradition was under threat by common law influences.³⁹ Like Mignault, participants in the *Revue* sought to protect Quebec’s civilian tradition by emphasizing its distinctiveness, discouraging the importation of common law principles, and developing legal concepts through the exclusive use of civilian sources. David Howes has argued that this staunch diversity approach has its drawbacks since the select use of such sources forces jurists into a narrow, text-focused interpretation of the law and ignores the benefits of attaining global consensus.⁴⁰ However, it is clear that this diversification trend dominated legal discourse in Quebec in the early twentieth century and undoubtedly played a large role in preserving the heritage of the civil law tradition in Canada.

35. Colonial Real Estate Co., *supra* note 29, at 603.

36. *Regent Taxi*, *supra* note 32; *Canadian Pacific Ry. Co.*, *supra* note 14.

37. *Regent Taxi*, *supra* note 32, at 682-683.

38. Normand, *supra* note 3.

39. *Id.* at 562-564.

40. Howes, *supra* note 2, at 552-553.

V. THE CONTEMPORARY POSITION

The unification trend of the Taschereau years and the diversification model that followed at the time of Mignault's tenure on the Supreme Court represent two opposing ends of the spectrum. However, neither movement is confined to one specific time in history nor, indeed, to one jurist, and one can discern evidence of both trends in Canada today.

The unification mentality, while largely replaced by one of diversification, can still be found in decisions rendered many decades later, particularly in instances where the relevant legal concepts at issue had been transplanted from the common law into the civil law. For example, as recently as 1975, in a case emanating from Quebec dealing with the remedy of specific performance, the Supreme Court declared that, "the principles established in common law jurisdictions [must apply in Quebec] since this is a remedy taken from them."⁴¹ Similarly, in a 2007 decision of the Quebec Court of Appeal dealing with judicial recusation, the Court condoned recourse to Canadian and foreign precedent, even going so far as to state it was incumbent to do so when Quebec law was silent on the subject, on the ground that the principles in question in the common law were similar to those in Quebec law.⁴²

Moreover, elements of the unification philosophy have recently surfaced in cases where the Supreme Court has explicitly noted the advantages of reconciling civil and common law principles. In a very recent set of cases on appeal from Quebec, the Court has remarked that the "natural convergence in principles and outcomes

41. *Trudel v. Clairol Inc. of Can.*, [1975] 2 S.C.R. 236, 246 (Can.). This is no longer the interpretation given to the remedy of specific performance in Quebec law. See *Royal Bank of Canada v. Propriétés Cité Concordia Ltée*, [1983] R.D.J. 524 (Can. Que. S.C.); *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*, [1988] R.J.Q. 716 (Can. Que. S.C.); *Varnet Software Corp. v. Varnet U.K. Ltd.*, [1994] R.J.Q. 2755, 2758 (Can. Que. C.A.).

42. *Wightman v. Widdrington (Succession de)*, 2007 QCCA 1687, para. 58 (Can. Que.). See also *Droit de la famille – 1559*, [1993] R.J.Q. 625, para. 11 (Can. Que. C.A.).

[between the civil and common law] is generally desirable,”⁴³ and that the approach it adopted in a particular case, “[had] the advantage of being compatible with the most recent developments in the North American law”⁴⁴ In a parallel to Taschereau’s claim regarding the consistency of damage awards across Canada in the 1887 case of *Canadian Pacific Ry. Co. v. Robinson*, the Court, in 2013, has even noted the advantages of assessing compensation for bodily harm on a similar scale in Quebec as in common law Canada on the premise that it “should not vary greatly from one part of the country to another.”⁴⁵

On the other hand, the diversification model has also endured and continued to develop well after Justice Mignault’s time on the Supreme Court. In 2014, the Supreme Court explicitly reaffirmed this approach, writing that, “the common law and the civil law [should] evolve side by side, while each maintains its distinctive character.”⁴⁶ This model has even found a modern champion in Justice Louis LeBel, a judge of the Supreme Court from 2000 to 2014. LeBel, like his forerunner, Mignault, continued to stress the importance of prioritizing civilian sources in civil law decisions, focusing particularly on the unique position of the Civil Code in Quebec law. Several of his judgments reaffirm that “the starting point is

43. *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, para. 52 (Can.) [hereinafter *Jean Coutu Group (PJC) Inc.*].

44. *Caisse populaire Desjardins de Val-Brillant v. Blouin*, 2003 SCC 31, para. 22 (Can.) [hereinafter *Caisse populaire Desjardins de Val-Brillant*].

45. *Cinar Corporation v. Robinson*, 2013 SCC 73, para. 85 (Can.); *Canadian Pacific Ry. Co.*, *supra* note 14.

46. Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, para. 93 (Can.) [hereinafter *Supreme Court Act, 2014*]. This idea is also supported in the Federal Law-Civil Law Harmonization Act, a statute aimed at making federal law more compatible with the law of Quebec. The Act states:

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

Federal Law-Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, § 8.1 (Can.).

not the common law but the Civil Code of Quebec, which is the basic general law in Quebec, as provided for in the preliminary provision of the *Civil Code*,⁴⁷ and that, “the *Civil Code* is the *jus commune* of Quebec.”⁴⁸

Like Mignault, LeBel has cautioned against the dangers of importing common law principles into the civilian tradition without a careful consideration of how the principles in question would fit into a civilian framework.⁴⁹ According to LeBel, “it would be extremely unwise to import, *holus bolus*, legal concepts that were developed in another system of law without first determining whether they are compatible with the rules that apply to civil liability in Quebec.”⁵⁰ He, too, believed that indiscriminate importation could cause contradictions and thus undermine the coherence of the civilian tradition.⁵¹ Justice LeBel is not alone in expounding this idea. Caution against wholesale importation of common law principles permeates the discourse of civilian decisions penned by other Supreme Court justices, as well as those rendered by lower courts in Quebec.⁵²

47. Gilles E. Néron *Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, para. 56 (Can.) [hereinafter Gilles E. Néron].

48. Doré *v. Verdun (City)*, [1997] 2 S.C.R. 862, para. 15 (Can.) [hereinafter Doré *v. Verdun*].

49. Gilles E. Néron, *supra* note 47, para. 53 (“Courts should avoid needlessly importing or applying common law rules in a matter which, subject to the principles of Charter law, is governed by the procedure, methods and principles of the civil law.”).

50. Prud’homme *v. Prud’homme*, 2002 SCC 85, para. 54 (Can.).

51. *Id.* para. 58 and para. 63:

[T]he defence of qualified privilege cannot be incorporated in that form into the civil law rules which are based on a presumption of good faith, without disturbing the coherence of its application in the area of public authority liability. . . . It is not only unjustified, but pointless, to import that defence into the civil law.

52. For an example of a Supreme Court decision, *see* Farber *v. Royal Trust Co.*, [1997] 1 S.C.R. 846, para. 30 (Gonthier, J.) (Can.) (“Caution must be exercised in adopting unreservedly common-law concepts of contract into cases arising under the Civil law, except where there is useful necessity and authoritative precedent.”); for an example of a lower court decision, *see* Anglo Pacific Group PLC *v. Ernst & Young, Inc.*, [2013] R.J.Q. 1264, para. 36 (Can. Oue. C.A.) (“The civil law is a complete system and one must guard against adopting principles that come from foreign legal systems without questioning their compatibility with our law.”).

Despite evidence of both philosophies in contemporary Canadian jurisprudence, the predominant trend is that of diversity. Without question, the civilian tradition has not only survived but has enjoyed a “renewal of [its] distinct legal culture.”⁵³ Moreover, while the efforts of jurists such as Mignault and LeBel have been crucial in maintaining the distinctiveness of the civil law tradition, one cannot ignore the social and political factors that have also contributed to this outcome.

One reason that Quebec civil law has continued to remain distinct is that the civilian tradition in Quebec is inextricably linked to the French language. William Tetley has argued that the linguistic separation of traditions is one of the most important factors in keeping legal traditions in mixed jurisdictions distinct.⁵⁴ At the very least, a different language serves to ensure that jurists are aware of a tradition’s distinctiveness and separation from the other applicable tradition in the same jurisdiction. This linguistic separation is somewhat nuanced in Canada since both linguistic versions of the Civil Code are equally official, as are both English and French versions of Supreme Court decisions.⁵⁵ However, Quebec civil law is linguistically delineated from Canadian common law in the sense that the former is typically associated with the French language and the latter with English.⁵⁶ While most Quebec jurists are bilingual, law is prac-

53. John E.C. Brierley, *The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Québec*, 42 U. TORONTO L.J. 484 (1992).

54. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 676, 727-728 (2000).

55. *Doré v. Verdun*, *supra* note 48; Constitution Act, 1867, *supra* note 7, § 133 para. 2; *Administration of the Court*, SUPREME COURT OF CANADA, <https://perma.cc/LUV9-5JKH>.

56. There are exceptions to this rule. McGill University in Quebec teaches the Civil Law in English, while the University of Moncton in New Brunswick, as well as the University of Ottawa in Ontario, teach the Common Law in French.

ticed primarily in French in Quebec, and today the majority of judgments are rendered in French.⁵⁷ The bilingual nature of Quebec jurists also enables them to engage with civilian sources in either their original French or English, particularly the French sources that inspired many principles in Quebec's Civil Code. There exist, of course, civil law jurisdictions in the world that are characterized by the English language such as Scotland, Jersey, and Louisiana, where even the Louisiana Civil Code is published in English only.⁵⁸ While this is not fatal to the continued viability of these civilian traditions, in addition to detracting from their linguistic distinctiveness, the reliance on translations of the tradition's most important French sources makes it more difficult to maintain their autonomy.⁵⁹

Legal education in mixed jurisdictions with a civil law presence also plays an important role in preserving legal traditions and Quebec's civilian tradition has remained distinct, in part, due to the legal education offered in the province.⁶⁰ Jurists in Quebec must hold a civil law degree, or its equivalent, in order to be eligible to write the Quebec Bar exams and practice law in the province. Unlike some

57. This is only natural given that the majority of Quebeckers are franco-phone with 79.7% listing their mother tongue as French, and 87% of the population speaking French at home in 2011, see Statistics Canada, *French and the francophonie in Canada—Language, 2011 Census of Population*, 2 (2011), <https://perma.cc/4K55-7CVY>.

58. There is, however, a recent translation of the Louisiana Civil Code making it available in French. See CODE CIVIL DE LOUISIANE ÉDITION BILINGUE (Olivier Moréteau ed., Société de législation comparée 2017). See also Olivier Moréteau, *The Louisiana Civil Code Translation Project: An Introduction*, 5 J. CIV. L. STUD. 97 (2012).

59. For example, in Jersey, jurists are predominantly Anglophone but frequently cite the works of the French author Pothier, often relying on a translated edition. See Timothy V.R. Hanson, *Comparative Law in Action: the Jersey Law of Contract*, 16 STELLENBOSCH L. REV. 194, 202 (2005) ("French has become a foreign language in the Channel Islands, thereby making a perusal of the old French texts that bit more onerous . . ."); The Jersey Law Commission, *Report: The Law of Contract*, 6 (2004) ("[T]he majority of Jersey residents are insufficiently fluent in French to be able to consider the relevant case law and text books . . ."). See also Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1284 (1997) for a discussion of this phenomenon in Louisiana.

60. William Tetley, *Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)*, 78 TULSA L. REV. 175, 189 (2003-2004).

other mixed jurisdictions, such as Louisiana, all Quebec law faculties offer civil law degree programs, even if some offer the possibility of also obtaining a common law degree if students opt to pursue additional studies.⁶¹ At McGill University, all students graduate with both civil law and common law degrees, and its program, which is built on an integrated, or transsystemic, study of both civil and common law, offers a solid grounding in both legal traditions.⁶²

A very important factor in the survival of the civil law as a distinct legal tradition is Quebec's Civil Code itself. Its successful modernization and recodification in 1991 has contributed greatly to the stature of the civilian tradition. The Civil Code of Quebec is not merely a modernization of the laws contained in the previous Code, the Civil Code of Lower Canada, which had been in place since 1866 and which had grown less coherent over time with the addition of updates and amendments.⁶³ The new Code also reflects a modernized and distinctive view of Quebec's civilian tradition, visible in its "substance, language and symbolism."⁶⁴ Both its tone and content offer an image of Quebec law that John Brierley has called "self-sufficient," presenting Quebec's law as entirely autonomous from external influence.⁶⁵ Brierley maintains that for this reason, the

61. For example, the Université de Montréal in Quebec and the University of Ottawa in Ontario offer their civil law students the possibility of completing an extra year and obtaining a common law degree. This is in contrast to, for instance, Louisiana, where students typically receive a common law education with some civil law courses in the curriculum and the option of obtaining a certificate in civil law. See Olivier Moréteau, *De Revolutionibus, The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 51 (2012).

62. See Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Program*, 52 J. LEGAL EDUC. 12, (2002). See generally *Navigating the Transsystemic*, 50 MCGILL L.J. (SPECIAL ISSUE) (2005).

63. Sophie Morin, *Quebec: First Impressions Can Be Misleading*, in A STUDY OF MIXED LEGAL SYSTEMS: ENDANGERED, ENTRENCHED OR BLENDED 165, 171 (Susan Farran, Esin Örucü, & Seán Patrick Donlan eds., Ashgate Publ'g 2014).

64. Brierley, *supra* note 53, at 484.

65. Brierley argues that the Code presents this image by breaking explicit ties to the origins of its provisions that were derived from, or inspired by, other traditions or legal systems. *Id.* at 498-499.

Code is in fact an expression of “the philosophy of Quebec as a distinct society,” and a declaration of Quebec’s legal sovereignty over itself.⁶⁶ This legal nationalism complements the political nationalism present in the province of Quebec and underscores its recognition, by the rest of Canada, as a distinct society.⁶⁷

The new Code’s preservation of the civil law as a distinct and autonomous tradition is reinforced by the inclusion of a Preliminary Provision that proclaims the Code to be “the *jus commune*” of Quebec law and “the foundation of all other laws.”⁶⁸ Brierley remarks that the Preliminary Provision indicates that the Code is “a reservoir of fundamental juridical precepts and essential legal values,” which makes it a valuable source not because it derives its authority from any external or antecedent legal source, but because it is inherently valuable.⁶⁹

The Preliminary Provision’s declaration that the Code is the “foundation of all other laws” and the “*jus commune*” of Quebec is entirely consistent with the approach advocated by proponents of the diversification model.⁷⁰ In the opinion of Louisiana scholar Olivier

66. *Id.* at 496, 502.

67. See Adrian Popovici, *Libres propos sur la culture juridique québécoise dans un monde qui rétrécit*, 54 MCGILL L.J. 223 (2009); Roderick A. Macdonald, *Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies*, 39 MCGILL L.J. 761, 810 (1994); Patrice Garant, *Code civil du Québec, Code de procédure civile et société distincte*, 37 CAHIERS DE DROIT 1141 (1996).

68. Civil Code of Québec, S.Q. 1991, c. 64, Preliminary Provision (Can.):

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

69. Brierley, *supra* note 53, at 500. See also H. Patrick Glenn, *La Disposition préliminaire du Code civil du Québec, le droit commun et les principes généraux du droit*, 46 CAHIERS DE DROIT 339 (2005).

70. See, e.g., Doré v. Verdun, *supra* note 48, paras. 15-16:

[T]he *Civil Code* is the *jus commune* of Quebec. Thus, unlike statute law in the common law, the *Civil Code* is not a law of exception, and this must be taken into account in interpreting it. It must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved. . . . [T]he Code is also the foundation of all other laws dealing with matters to which the Code relates

Moréteau, the Preliminary Provision has successfully “re-center[ed] private law on the Civil Code” by reaffirming the Code’s primary importance in the civilian tradition.⁷¹ Moréteau views this approach as all-important in a society in which there are numerous legal sources that may compete with a code, and he has advocated for the adoption of such a preliminary provision in other codes, specifically Louisiana’s.⁷²

Finally, we cannot ignore the significance of the civilian judicial presence on Canada’s final appellate court. With three of the nine Supreme Court justices hailing from Quebec, “[t]he two legal traditions . . . continue to be living realities in the highest court of the land.”⁷³ For all of these reasons, rather than being absorbed by the common law as was once feared, the civilian tradition has continued to thrive as a distinct and autonomous legal tradition in Canada.

VI. THE INSPIRATION MODEL

While the distinct nature of the civilian tradition is well accepted today, we are currently witnessing a new trend, from one of staunch diversification to one of inspiration. In recent years, we have begun to see a greater willingness among judges to look to the other legal tradition in their reasoning, with the result that comparative law between the two traditions has become a more important part of judicial methodology in Canada. Unlike the earlier unification model, however, this trend is based on the premise that there is value in looking across legal traditions, not to unify them but, rather, to borrow ideas from one to inform the other. The inspiration model is perhaps most clearly articulated by Justice Stevenson as follows:

This Court has the benefit of being the final court of appeal in a country that has two legal traditions: the English common law and the French civil law. Our two legal traditions

71. Moréteau, *supra* note 61, at 59.

72. *Id.*

73. Tetley, *supra* note 54, at 735. Tetley also notes the lack of any similar tradition in the United States of having Louisiana judges on its Supreme Court.

are independent and should not be confused. Concepts and solutions found in one tradition should not be imposed on the other tradition. But this does not mean that there is no place for comparative law on this Court.⁷⁴

As this passage indicates, this new trend of inspiration maintains the distinctiveness and integrity of the two legal traditions while, at the same time, acknowledging the mutual influence they can have on each other. It demonstrates that a comparative approach has the potential to encourage the cross-fertilization of ideas between the traditions while not detracting from the distinctive character of either.⁷⁵

There is, however, a legitimate concern that this use of comparative law may, in fact, cause a reversion to the nineteenth century trend of unification, with all the potential dangers to the civilian tradition that this trend presented at the time.⁷⁶ While one must acknowledge this as a serious potential danger, the inspiration trend can, nonetheless, be seen as a positive movement provided it does not repeat the mistakes of unification and builds upon the principles developed by jurists who have insisted on the importance of diversification over the past century. An examination of recent cases demonstrates that there are three major reasons these dangers are indeed being mitigated.

74. *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 1174 (Can.). *See also* Louis LeBel & Pierre-Louis Le Saunier, *L'interaction du droit civil et de la common law à la Cour suprême du Canada*, 47 CAHIERS DE DROIT 179 (2006).

75. In *White v. Central Trust Co.* (1984), 7 D.L.R. 236, para. 27 (Can.), Supreme Court Justice LaForest J., as he then was, spoke of the judicial use of comparative law as a way to achieve “cross-fertilization.” This passage is cited in a discussion of the growing use of comparative law in the Supreme Court of Canada by another Supreme Court Justice, Gonthier J., *see* Gonthier, *supra* note 2, at 21.

76. Daniel Gardner, *L'harmonisation des solutions en droit privé canadien : regard sur quelques arrêts de la Cour suprême portant sur le droit civil at the 15e Conférence Roger-Comtois at l'Université de Montréal, Montreal, Quebec* (Apr. 27, 2017).

A. *The Use of “Caution” in Cross-Fertilization*

Judges who look to the common law to inspire their civil law decisions have insisted on using caution in this approach and have established limitations on the application of the common law in Quebec cases. First, there is a methodological limitation pursuant to which judges acknowledge that civilian sources and methodology are to be prioritized.⁷⁷ Secondly, there is a recognition that any residual role played by the common law will not apply where it would contradict civil law sources, particularly the Code and the Quebec Charter.⁷⁸ Finally, there is a translational limitation because today, Quebec judges are mindful of the need to adapt or translate borrowed common law principles to fit within the particular context and contours of Quebec civil law.⁷⁹ As a result, contemporary judges have demonstrated that the common law can provide inspiration in civilian cases when appropriate and when done in a manner consistent with the civil law tradition.

This cautious use of inspiration is evident in many judgments written by Justice LeBel who, as previously explained, was an advocate of the diversification approach. However, notwithstanding his general philosophy of prioritizing the civilian legal tradition, he recognized the potential usefulness of looking to the common law. As he stated in the 2010 Supreme Court decision of *Globe and Mail*, “if the ultimate source of a legal rule is the common law, then it would be only logical to resort to the common law, in the process of interpreting and articulating that same rule in the civil law.”⁸⁰ He therefore found it acceptable to look to a common law doctrine to provide a framework for creating a journalist source privilege in Quebec. He did likewise in *Union Carbide* by using the common

77. *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, paras. 37, 39 (Can.).

78. *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, para. 45 (Can.) [hereinafter *Globe and Mail*].

79. Baudouin, *supra* note 14, at 731.

80. *Globe and Mail*, *supra* note 78, para. 45.

law as inspiration for the creation of a settlement privilege in Quebec civil law.⁸¹ In both these cases, Justice LeBel looked to the common law to fill *lacunae* in Quebec law. This does not, however, indicate an endorsement of the wholesale importation of common law principles since, as LeBel pointed out, “this [common law inspiration] is, of course, premised on the fact that the interpretation and articulation of such a rule would not otherwise be contrary to the overarching principles set out in the *C.C.Q.* and the Quebec Charter.”⁸² Similarly, in a 2014 decision, LeBel examined the commonality requirement in class action authorizations in common law cases, noting that the understanding of this common law framework was helpful in order “to clarify the relevance and scope of the principles in question in the context of Quebec procedural law,” but stressed that “caution must be exercised.”⁸³ This approach is not limited to the Supreme Court, nor to Justice LeBel. In a recent Quebec Court of Appeal decision, for example, Justice Dutil noted that even though a common law decision may not have any legal force in the civilian tradition, its spirit may be applicable in Quebec civil law as long as judges look to it with caution.⁸⁴

Even in cases where the Court has expressly emphasized the desirability of harmonization between the legal traditions, it is careful to ensure that its judgments are consistent with civilian sources. For

81. *Union Carbide Can. Inc. v. Bombardier Inc.*, [2014] 1 S.C.R. 800, paras. 27-37 (Can.).

82. *Globe and Mail*, *supra* note 78, para. 45.

83. *Vivendi Can. Inc. v. Dell’Aniello*, [2014] 1 S.C.R. 3, para. 48 (Can.).

84. *P.L. v. J.L.*, 2011 OCCA 1233, para. 36 (Can. Que.) (drawing inspiration from the Supreme Court case *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, which established flexibility in the start date of prescription for incest cases in common law jurisdictions) (as followed in *Tremblay v. Lavoie*, 2014 OCCS 3185, (Can. Que.)). *See also* *Struthers v. Régie des marchés agricoles et alimentaires du Québec*, 2015 QCCS 5992, paras. 70-71 (Can. Que.) (where the Quebec Superior Court cites the common law Supreme Court decision of *Hvrniak v. Mauldin*, 2014 SCC 7, which had interpreted the parameters of the motion for summary judgment, even though that particular procedure is not available in Quebec. Nonetheless, the Court drew inspiration from that case, justifying its decision to dismiss by citing the common principle of proportionality in procedure as the basis of its decision).

example, in the recent *Jean Coutu* decision, which concerned a request by contracting parties to have the court rectify their agreement, the Supreme Court looked to the common law's equitable doctrine of rectification and declared that the harmonization of laws between common law Canada and Quebec was "generally desirable."⁸⁵ Nonetheless, the decision itself, which refused rectification, is based on an analysis of articles dealing with the interpretation of contracts found in the Civil Code of Quebec and refers to a prior interpretation of these codal articles in an earlier Supreme Court case from Quebec.⁸⁶ Similarly, in *Caisse Populaire Desjardins de Val-Brillant v. Blouin*, a decision dealing with security on property, the Supreme Court noted that the decision had the benefit of "fostering a degree of uniformity in this area, one that is crucial to the conduct of numerous business activities, while remaining faithful to the letter and spirit of the Civil Code of Québec and the civil law origins of the concept of pledge."⁸⁷ These cases indicate that while the Court has, of late, been willing to praise harmonization as a beneficial outcome or consequence of certain rulings, it continues to look first and foremost to the civilian tradition's sources and seeks to avoid importing ideas that would be contrary to the civilian tradition.

B. Divergence Where Appropriate

While the courts have been willing to use the spirit of the common law to inform civilian cases in certain circumstances, it is important to note that they have also refused to do so in situations where a divergent result was necessary to maintain the distinctive character of Quebec law and culture. This idea was expressly invoked in the *Supreme Court Reference*, in which the Court's interpretation given to the statute governing the appointment of Supreme Court justices resulted in different rules for the appointment of

85. *Jean Coutu Group (PJC) Inc.*, *supra* note 43, para. 52.

86. *Id.* para. 25.

87. *Caisse populaire Desjardins de Val-Brillant*, *supra* note 44, para. 24 (emphasis added).

judges from Quebec. In particular, the resulting interpretation meant that while a judge of the Federal Court of Canada could be appointed to fill one of the six non-Quebec seats on the Supreme Court, such judge could not be appointed to fill one of the three Quebec seats. The majority of the Supreme Court justified this difference by explaining that the wording of the statute was due to a historical compromise intended to “guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture,” and that the law must remain as such since, “the objective of ensuring representation from Quebec’s distinct juridical tradition remains no less compelling today.”⁸⁸

The same attitude towards the province’s distinct history and culture was expressed in a 2013 case dealing with the constitutionality of certain aspects of Quebec’s marriage laws, in particular, those governing spousal support and division of family assets for *de facto* spouses. A *de facto* spouse challenged these provisions alleging that they contravened the equality provision in the Charter of Human Rights and Freedoms because in Quebec, *de facto* spouses were not entitled to claim spousal support or a division of family assets, whereas their married counterparts in Quebec, and fellow *de facto* spouses elsewhere in Canada, were so entitled. Here, Justice LeBel provided a lengthy analysis of the historical and cultural backdrop to marriage laws in the province stating that, “the entire history of societal and legal changes that have led to the *de facto* union becoming an accepted form of conjugality in Quebec . . . is essential if we are to understand the constitutional issue before us and consider it in its context.”⁸⁹ Chief Justice McLachlin, who also endorsed the constitutionality of these laws, argued that while they were vastly divergent from the laws in other provinces, they were

88. Supreme Court Act, 2014, *supra* note 46, para. 93.

89. Quebec (Attorney General) v. A, 2013 SCC 5, para. 262 (Can.). In upholding the constitutionality of these laws, Justice LeBel wrote on behalf of four of the nine Supreme Court justices. Chief Justice McLachlin wrote a decision concurring in the result and thus, this outcome was endorsed by the majority of the Supreme Court.

part of a “policy goal [that] is important to Quebec,” stating that “the fact that Quebec has chosen a different policy than other provinces in keeping with its own history and social values does not make the law unconstitutional.”⁹⁰

These cases indicate both an awareness of Quebec’s legal and historical distinctiveness and a conscious desire not to undermine it, even if this results in a significant difference between Quebec law and the law in the rest of Canada. Thus, even while the Court moves towards a greater use of comparative law, and even lauds the harmonization of law across Canada, it remains resistant to such approaches in situations where the distinctiveness of Quebec’s legal situation is at the core of the issue in question.

C. Reciprocity in Cross-Fertilization of Ideas

Perhaps one of the clearest signs that a new trend is emerging is that we are now seeing reciprocity in the use of comparative law. There are an increasing number of common law decisions that make reference to, and are inspired by, Quebec civil law. The Supreme Court failed to use the civil law as inspiration in common law decisions even once during the nineteenth century unification period.⁹¹ This is in contrast to today’s inspiration trend, which is a bilateral movement where the traditions serve as mutual influences on each other rather than as a tool to impose one tradition on the other. Two recent Supreme Court decisions are notable examples of this. In a 2012 decision on appeal from the common law province of Ontario, the Court sought to clarify the “real and substantial connection” test for determining court jurisdiction in the private international law context. Justice LeBel, writing for the Court, rejected wide judicial discretion in favour of the creation of an appropriate framework to establish such connection based on “a set of relevant presumptive

90. *Id.* para. 415.

91. Baudouin, *supra* note 14, at 719.

connecting factors,” an approach that mirrored the regime established in the Civil Code of Quebec.⁹² In order to develop this new approach, LeBel relied heavily on codal articles and discussed their interpretation in Quebec case law throughout the decision.⁹³ This examination of the civil law clearly inspired the development of a new approach applicable in a common law jurisdiction.

The second notable example is the 2014 case of *Bhasin v. Hrynew*, a decision that expanded the principle of good faith in contract performance in Canadian common law, elevating it to the status of a general organizing principle.⁹⁴ While the robustness of the common law duty of good faith created by the Supreme Court falls short of its broad and encompassing counterpart that has been developed in Quebec law, the decision is noteworthy given the historic reluctance of the common law to recognize such a duty at all. In creating what Justice Cromwell called an “incremental advance”⁹⁵ in this area of law, he found “comfort”⁹⁶ in the Quebec experience, where a legally imposed duty of good faith has not “impeded contractual activity or contractual stability.”⁹⁷

One finds common law cases relying on the civil law for inspiration in lower court decisions as well. For example, the reasoning in *Opron Construction Co. v. Alberta*, a first instance decision from the common law province of Alberta, drew heavily on an earlier Supreme Court decision emanating from Quebec, *Bank of Montreal v. Bail Ltée*.⁹⁸ The *Bail* decision had been based on the civilian principle of good faith in the formation of contracts, which creates a pre-contractual duty of disclosure, a principle that does not explicitly exist in the common law. Nonetheless, the Alberta court found that

92. *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, para. 78 (Can.).

93. *E.g., id.* paras. 107-108.

94. *Bhasin v. Hrynew*, 2014 SCC 71 (Can.).

95. *Id.* para. 29.

96. *Id.* para. 82.

97. *Id.* para. 85.

98. *Opron Construction Co.*, *supra* note 4, paras. 536-547.

there had been a failure to make adequate disclosure in the defendant's invitation to tender and that this failure amounted to misrepresentation. It justified its use of the civilian decision as inspiration by pointing to the behaviour of the Supreme Court itself, noting that the Court "has recently emphasized the benefits of a comparative law approach between the two legal systems in Canada."⁹⁹ The Alberta Court found that the examination of the civilian case, the history of good faith in Quebec, and the articles of the Civil Code were informative since, "while the [*Bail*] decision is based upon the Civil Code of Lower Canada, its reasoning finds common ground in the common law."¹⁰⁰

Common law cases relying on the civil law for inspiration are not as prevalent as those where the inspiration moves in the other direction. One reason is that the majority of Quebec civilian decisions, at the first instance and appellate levels, are drafted in French, making them less accessible to common law jurists from other regions of the country who may be less comfortable with French decisions than are their Quebec counterparts with decisions drafted by common law judges in English. The exception to this is Supreme Court decisions, which are published simultaneously in both official languages, and therefore it is not surprising that most of the civilian decisions being relied upon by common law judges are those from the Supreme Court.

Nonetheless, we are witnessing an increasing willingness on the part of common law judges to reach out to the civil law for inspiration. Moreover, in cases where this is done, the common law courts do not simply adopt the approach taken in the civil law. Rather than transplanting the civilian principles in their entirety into common law decisions, the courts use these principles as sources of inspiration that help "nourish the [applicable] common law principles."¹⁰¹

99. *Id.*

100. *Id.* para. 537.

101. *Id.* para. 598.

This represents a parallel with the civilian cases that use the common law for inspiration, indicating that jurists in both traditions feel there is educational value in looking across traditions, while acknowledging that each tradition should, ultimately, remain governed by its own framework.

VII. CONCLUSION

This paper has presented three major trends that exemplify the interrelationship between Quebec civil law and Canadian common law. The initial trend of unification of the late nineteenth century had the benefit of creating consistency in the laws across the country, but it carried a serious risk of emasculating the Quebec civilian tradition. The opposite trend of diversification that emerged in the early twentieth century had the advantage of preserving and protecting the autonomy of the civilian legal tradition, but carried with it the risk of creating a narrow-minded and parochial vision of legal interpretation and development.

The new inspiration trend, identified in this paper, also has advantages and risks. Its polyjural approach has the benefit of creating a rich cross-fertilization of ideas through the “encounter between legal traditions”¹⁰² and “horizontal transjudicial communication.”¹⁰³ This has allowed both traditions to borrow and learn from the other in order to shape new legal principles. Of course, while we may recognize the positive effects of such an enlightened approach to judicial methodology, we must always be alert to the risk of reverting back to the philosophy of unification. But as long as jurists are attuned to this risk, and due regard is paid to maintaining the distinctiveness and integrity of Canada's civil and common law traditions, a sophisticated and careful comparative approach can yield positive

102. Nicholas Kasirer, *Legal Education as Métissage*, 78 TULSA L. REV. 481, 482 (2003).

103. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 104 (1994).

results through the mutual influence that legal traditions may have on each other.