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# Bijuralism: A Supreme Court of Canada Justice's Perspective

*The Honourable Claire L'Heureux-Dubé\**

I consider it an honour to have been invited to deliver the Rubin Lecture at the Louisiana State University Law Center. I had the privilege and good fortune to know Judge Alvin Rubin. I am delighted to have an opportunity to pay tribute to this great jurist whose "intellect, scholarship and judicial leadership," in the words of one of his colleagues, "place him in a select group" including Holmes, Brandeis, Cardozo, Learned Hand, and Henry Friendly, all judicial icons.<sup>1</sup> Alvin Rubin was a giant among jurists and, most importantly, one with a pronounced social conscience. The family tradition of excellence is shared by his wife Janice, his sons Michael and David, and his grandchildren.

Life sometimes gives you presents. For me, my initial encounter with Janice and Alvin was a precious gift. It was purely fortuitous that Alvin and I were members of the faculty together—way back in the 1970s—at judicial education summer seminars for superior court judges in Canada. I became an admirer of the Rubins, and we have deepened this friendship to this day. This lecture on bijuralism thus has great personal significance for me.

## I. INTRODUCTION

Professor William Tetley of Montréal's McGill University, who recently published a brilliant paper in the *Louisiana Law Review* on mixed jurisdictions, wrote that "outside of Europe and such places as Québec, Louisiana and South Africa, there is little discussion of mixed jurisdictions; in fact the subject is usually met with indifference."<sup>2</sup> I am glad, in light of his remarks, to be in front of this receptive audience, but I am also confident that the subject of my lecture today will not be relegated to the shadows of international legal affairs for long. Although it is not a household word outside jurisdictions with dual legal systems, bijuralism is likely to be a prominent subject of discussion on the international scene in the years to come. This is because bijural states provide valuable examples of

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\* Justice of the Supreme Court of Canada. I would like to thank my law clerk, Christopher Rickerd, for his assistance in the research and preparation of this paper.

1. See Fred J. Cassibry, *Personal Glimpses of an Honest Judge*, 52 La. L. Rev. 1397, 1403 (1992).

2. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 La. L. Rev. 677, 680 (2000).

the manner in which legal systems can co-exist harmoniously. They exemplify the very same elements of convergence and cross-pollination that we see taking place in the global arena when transnational legal encounters occur, especially those in commercial law, with NAFTA<sup>3</sup> and the EU as prime examples.

Indeed, because mixed jurisdictions of common law and civil law include Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia, the Philippines, Sri Lanka, and Scotland, there are strongholds of bijuralism throughout the world ready to teach theoretical and practical lessons to their monoglot counterparts. Nevertheless, I do recognize that with civil-law jurisdictions representing forty-six percent of the world's jurisdictions and common-law jurisdictions representing twenty-six percent, the six percent with mixed systems are a distinct minority.<sup>4</sup> It is not majority rule that leads to legal ideas triumphing, however, but their relevance to contemporary problems and, in this field especially, to the vastly increasing number of cross-cultural interactions that implicate private law. In this sense, I propose to offer the following observations on Canadian bijuralism in the spirit lying behind the words of New York University Law School Dean John Sexton, who stated last year that "perhaps the most profound impact of globalization on the enterprise of legal education can be captured in the word 'humility.' Discovering a premise that unconsciously shaped one's thinking is a dramatic moment intellectually, and the repetition of such discoveries should instill intellectual humility and a reluctance to assume that there is a single right answer."<sup>5</sup>

## II. LEGAL EDUCATION

In this most appropriate setting, I would like to begin by considering the foundation of any bijural system—legal education. Several Canadian universities offer law degrees based on bijuralism, namely the "national program" that allows students to pursue a program of studies in both legal systems at the University of Ottawa; the integrated studies program in common law and civil law at

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3. For a description of one example of transnational convergence, see Jay L. Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 *Brook. J. Int'l L.* 7, 21 (1997).

4. Dean Louis Perret, University of Ottawa Faculty of Law (Civil side), *Challenges Facing Legal Education in the Americas Over the Next Century*, Speech Before the Association of American Law Schools Conference in New Orleans, Louisiana (Jan. 7, 1999) (on file with author).

5. John Sexton, *Thinking About the Training of Lawyers in the Next Millennium*, NYU Law School Magazine, Autumn 2000, at 34, 41.

McGill University in Montréal; and programs that promote the teaching of the common law in French at the Universities of Ottawa and Moncton. Other universities have established inter-faculty exchange programs that occur during school terms, and the federal Department of Justice sponsors a Student Mobility Program that permits students to complete one term of study at a law school teaching the other legal system. Students who take advantage of these opportunities to learn about both legal systems of Canada have a magnificent comparative legal education to offer their country and the wider world. In this respect, your fine institution is a shining example of the potential for innovative education based on two legal systems.

### III. BILINGUALISM

Canada not only faces the challenge of educating lawyers in the intricacies of two legal systems but also must consider the role of two languages. In Canada, there are 22.5 million anglophones representing seventy-five percent of the population and 7.5 million francophones accounting for the remaining quarter. Canada still has to make progress before becoming a truly bilingual country in the legal field as in all others. Within the province of Québec, it is remarkable, as one commentator has noted, that "[e]ven the accepted interpretations of statutes, codal articles and cases have frequently been dual. Secondary-source materials . . . have tended to be deployed by those who practice law primarily in the language in which these doctrinal sources were composed."<sup>6</sup>

This linguistic divide is especially relevant because, according to Professor Tetley, "the long-term survival of a mixed jurisdiction is greatly facilitated by (and perhaps even contingent upon) the presence of at least two official (or at least widely-spoken) languages in that jurisdiction, each mirroring and supporting the legal systems there."<sup>7</sup> The first Canadian Official Languages Act was passed in 1969, requiring federal government institutions to provide government services in the official language of choice. In 1982, the Canadian Charter of Rights and Freedoms entrenched the constitutional language rights of Canadians. The Supreme Court of Canada has played an important role in ensuring that the legal system operates in a comfortably bilingual manner. As an institution, it has made considerable progress in becoming bilingual; for example, of my

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6. Roderick A. Macdonald, *Legal Bilingualism*, 42 McGill L.J. 119, 154-55 (1997). Professor Macdonald is a law professor at McGill University and past president of the Law Commission of Canada, an independent federal law reform agency that advises Parliament on how to improve and modernize Canada's laws.

7. Tetley, *supra* note 2, at 681.

eight colleagues, now only one speaks just English. With the appointment of my colleague Louise Arbour in 1999, the Court for the first time had a francophone majority. But the Court's real impact on national bilingualism comes, of course, from its jurisprudence.

One of the Court's early decisions in the post-Charter era exemplifies this commitment to bilingual legal practice in Canada. Two years before I was appointed, in its 1985 decision in *Re Manitoba Language Rights*,<sup>8</sup> the Court considered the legality of unilingualism in the written law of Manitoba. Since 1890, the Manitoba Legislature had enacted almost exclusively unilingual (English) statutes and regulations despite the existence of an 1870 federal statute, the Manitoba Act, which requires the province to publish in both French and English. This mandate to use two languages has important jurisprudential implications because under the "equal authenticity rule," Canadian courts have consistently affirmed that the English and French versions of a statute are equally authoritative. Interpretation thus necessitates reading the two texts in light of one another.<sup>9</sup>

In *Re Manitoba Language Rights*, the Court ruled that all the unilingual laws were invalid but suspended this declaration temporarily to avoid an anarchic legal vacuum. In so doing, the decision emphasized the constitutive role of language and its inextricable ties to the law:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.<sup>10</sup>

Despite this type of pronouncement, however, there is still much work to do. Canada's Commissioner of Official Languages, Dr. Dyane Adam, has made it one of her top priorities to follow up on the recommendations of a 1995 study entitled "The Equitable Use of English and French Before the Courts in Canada."<sup>11</sup> She has recently mentioned the beneficial impact of our Court's decision in *R. v.*

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8. [1985] 1 S.C.R. 721 (Can.).

9. See generally Michael Beaupré, *Litigating the Meaning of Bilingual Legislation*, 9 Advoc. Q. 327 (1988).

10. *Re Manitoba Language Rights*, 1 S.C.R. at 744.

11. Dyane Adam, Giving French and English Their Due Place in the Administration of Justice, Speech Before the Association des Civilistes (Nov. 30, 2000) (on file with author).

*Beaulac* in 1999,<sup>12</sup> which cited the study. In *Beaulac*, the accused was charged with first-degree murder in British Columbia. In his third trial, which followed a mistrial and a conviction overturned by the Court of Appeal, the accused renewed his prior requests for a trial before a judge and jury who speak both official languages, as provided for by the federal Criminal Code. A judge dismissed this application, based on the accused's passable English, and the trial proceeded in English to convict him. Our Court ordered a new trial to be held before a bilingual judge and jury.

Our judgment observed that:

Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.<sup>13</sup>

We held that "[t]his Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada."<sup>14</sup> It was not until his fourth trial that Jean Victor Beaulac was given a bilingual judge and jury, but his case has set an appropriately permissive standard for future defendants to employ.

In concluding this section on bilingualism and Canadian law, I would like to deploy Roderick Macdonald's distinction between legal dualism and legal bilingualism, namely that the former is the two solitudes model while the latter is the cooperative model to which we should aspire. Professor Macdonald cautioned that:

Numerous factors contribute to the apparently inexorable decay of legal bilingualism into legal dualism: intellectual laziness among legal professionals; rampant unilingualism among legal elites; a proliferation of mediocre translations of texts; an educational system that privileges information over understanding; and, not least, a plethora of secondary sources and computerized finding tools.<sup>15</sup>

My colleague Justice Michel Bastarache also has noted the disturbing perception that "decisions of Québec courts that are rendered in

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12. [1999] 1 S.C.R. 768 (Can.).

13. *Id.* at 788.

14. *Id.* at 789.

15. Macdonald, *supra* note 6, at 156.

French are not fully heeded in other jurisdictions, undoubtedly due to the language barrier. [‘M]uch of Québec Civil law and Québec French unilingual commentary and many judicial decisions, even on non-Civil law matters, remain a closed book to those outside Québec.[’]”<sup>16</sup>

Because effective Canadian bijuralism depends on a firm bilingual underpinning, these concerns merit sustained attention and corrective action. Macdonald concluded,

Legal bilingualism would ultimately require bilingualism in all its practitioners. Rather than encouraging or even allowing two distinct official legal cultures to form around two languages, the practice of legal bilingualism would draw on both languages to construct *one official legal culture*. In Canada today, that official legal culture is neither French nor English, neither civil law nor common law; it is all these together, with the ambiguity that such complexity implies.<sup>17</sup>

### III. HISTORY

Having sketched the context of two vital components of contemporary Canadian bijuralism, legal education, and legal bilingualism, I would like now to go back in time in order to outline the origins of our bijural nation.<sup>18</sup> Following the defeat of French forces by the British at the Plains of Abraham, located in Québec City, and the subsequent peace Treaty of Paris in 1763, “there was an initial period of confusion as to the applicable law, during which the French population generally boycotted the newly-established English courts and settled private law disputes according to the old law (*ancien droit*).”<sup>19</sup> The British Parliament soon passed the Québec Act of 1774, preserving the “laws of Canada” (civil law) for “Property and Civil Rights” in Québec, while requiring adherence to English criminal law.

The first codification took place almost a century later, with the promulgation of the Civil Code of Lower Canada of 1866, drafted in

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16. The Honourable Mr. Justice Michel Bastarache, *Bijuralism in Canada*, Unpublished Address (Feb. 4, 2000) (quoting John E.C. Brierley, *Bijuralism in Canada*, in *Canadian Reports to the 1990 International Congress of Comparative Law* 22, 39 (Institute of Comparative Law, McGill University, 1990), *reprinted in* Department of Justice Canada, *Bijuralism and Harmonization: Genesis*, in Booklet 1 of *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* 20 (Second Publication, 2001), *available at* <http://canada.justice.gc.ca/en/dept/pub/hfl/booklet1.htm>).

17. Macdonald, *supra* note 6, at 165 (emphasis added).

18. I draw in this section on Professor Tetley’s historical summary, *supra* note 2, at 693.

19. *Id.* at 694.

French and English, with both versions official,<sup>20</sup> and the Code of Civil Procedure of 1867. These were in force when the province of Québec became part of the Dominion of Canada at our country's Confederation on July 1, 1867. By virtue of section 92(13) of Canada's Constitution Act, 1867, each provincial legislature was guaranteed the power to legislate in private law matters relating to property and civil rights.

Professor Tetley noted that:

Unlike the French Civil Code of 1804, with its revolutionary ideals, and the Italian or German codes, aimed at consolidating a newly-achieved national unity, the Civil Code of Lower Canada reflected the conservative, family-oriented values of the largely rural (and mostly francophone) society of nineteenth-century Québec, as well as the economic liberalism of the burgeoning commercial and industrial (and primarily anglophone) élites concentrated in Montreal. In structure and style, the Code reflected the French Civil Code of 1804 very closely. Nevertheless, it rejected major elements of the French Code which were . . . socially unacceptable to most Québécois (notably divorce), while maintaining elements of the pre-revolutionary French law . . . It also added certain local elements.<sup>21</sup>

The leading English language treatise on the civil law in Canada states, the Code:

[S]uperimposed elements of English and commercial law, as well as local variations on received Civil law, all woven together into a synthetic whole. Substantively, it reflects a blending of institutions and values of the ancien droit (particularly in marriage, filiation, and inheritance) with the rationalistic and liberal values of the enlightenment (particularly in contract, civil liability, and property).<sup>22</sup>

It took a century before comprehensive reform of this Confederation-era Code took place. McGill University Professor Paul-André Crépeau in 1966, at the height of Québec's modernizing "Quiet Revolution," became the head of the Civil Code Revision Office ("CCRO"), created in 1955. By the time his work was finished, in 1978, he could reflect on the fact that the 1866 Code had

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20. The original Article 2615 (renumbered as Article 2714 in 1974) directed the interpreter to the language version most in accord with the existing law on which the article concerned was founded.

21. Tetley, *supra* note 2, at 695.

22. J.E.C. Brierley & R.A. Macdonald, *Québec Civil Law: An Introduction to Québec Private Law* 35 (Toronto: Emond Montgomery Publications, 1993).



“ceased to be a symbol of permanence, and ha[d] instead become one of rigidity, the reflection of a static, even stagnant, conception of a certain social order.”<sup>23</sup> In 1980, a portion of the new Civil Code of Québec dealing with family law was enacted, based on the recommendations of the CCRO’s Report. I had served as President of the Family Law and Family Court Committees from 1972 to 1976.

Québec therefore had two civil codes in force at the same time. From 1983 to 1991, eight measures were adopted, including sections on the law of persons, successions and property. The whole of the present Civil Code of Québec was enacted in December 1991 and came into force on January 1, 1994, replacing nearly eighty percent of the Civil Code of Lower Canada<sup>24</sup> and incorporating modern notions including human rights. It has been hailed as the “world’s most sophisticated and modernized Civil law regime of commercial transactions.”<sup>25</sup>

#### IV. FEDERAL HARMONIZATION

Throughout this period of development of the civil law in Québec, the federal government faced the challenge of enacting legislation that respected the bijural nature of provincial law.<sup>26</sup> Because there is no federal code of private law, statutes enacted by the Canadian Parliament depend on the laws of each province and territory for their effective operation. The provincial laws have what is called a suppletive role. This forces greater reflection on the part of the federal legislator because:

[F]ederal law [must] be grounded in generic concepts that clearly identify the finalities desired by the Parliament of Canada in a language that respects equally all provincial and territorial legal traditions. Federal statutes . . . evolve towards a goal-driven expression of their aims and regulatory

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23. Paul André Crépeau, “Foreword” to the Report on the Québec Civil Code, vol. 1, Draft Civil Code xxiii (Éditeur officiel du Québec, 1978).

24. Mario Dion, “Preface” to Department of Justice Canada, *Bijuralism and Harmonization: Genesis*, in Booklet 1 of The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism at vii (Second Publication, 2001).

25. Roderick A. Macdonald, *Bijuralism in Canadian Law—Towards a Model for the 21st Century*, Address at the Symposium “The Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism” (Nov. 24, 1997) [hereinafter Macdonald, *Bijuralism in Canadian Law*] available at <http://www.lcc.gc.ca/en/pc/speeches/s241197.html>.

26. In 1977, in *Québec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054 (Can.), the Supreme Court decided that there is no general “federal judicially-created common law” which fills the gap if Parliament has not legislated on a certain matter.

ambition . . . Federal law [cannot] simply take an inventory of different provincial concepts as defining its scope, but must imagine its own policy strategies, and develop the functional definition by which these may be implemented coherently across Canada.<sup>27</sup>

Thus, the enactment of the new Québec Civil Code in 1994 forced a review of the more than 700 federal statutes in existence, 300 of which were found to be affected by changes in the Code. Of the approximately 60 new laws adopted annually by Parliament, half are estimated to be candidates for harmonization.<sup>28</sup> The Minister of Justice stated in June 2000 that she hopes that "the process of going back and ensuring that existing legislation is in keeping with the principles of the Civil Code [will be completed] over the next eight years."<sup>29</sup> The Minister went on to emphasize that:

This has significant practical application for, for example, those who practise law in Québec or les notaires who are responsible for dealing with house transactions and dealing with what we call mortgages in English, and in terms of bankruptcy and insolvency. This is, perhaps, not glamorous, but it is the bread and butter of a lot of practising lawyers and notaries. They will be able to serve their clients better and, therefore, the residents of Québec better when our federal laws that apply in Québec reflect the principles, the concepts and the language of the civil law. I do not want people to think that this is some erudite exercise that we are embarking on only because all these good people need a job. In fact, we have lots of work to do in the Department of Justice. This is actually about facilitating lawyers and notaries and the people of Québec in understanding their rights and obligations and exercising them in areas where we, the federal government, touch upon the private law of Québec.<sup>30</sup>

To give one example of the way in which this massive effort to achieve harmonization will operate, I note that the review exercise identified conflicts between the Federal Income Tax Act and the Civil

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27. Macdonald, *Bijuralism in Canadian Law*, *supra* note 25.

28. Mario Dion, *Harmonization of Federal Law with Québec Civil Law: Canadian Bijuralism and Its Actualization* (2000), *reprinted in* Department of Justice Canada, *Bijuralism and Harmonization: Genesis*, in Booklet 1 of The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism 27 (Second Publication, 2001).

29. The Honourable Anne McLellan, Testimony to the Standing Senate Committee on Legal and Constitutional Affairs (June 14, 2000) [hereinafter McLellan Testimony] (on file with author).

30. *Id.*

Code. The approach that the federal government will take will be to first "determine if there is an equivalent concept in civil law in Québec. If not, [the Department of Justice] will attempt to develop a consensus . . . to see if [it] should create a new institution or . . . use a neutral term that would not be offensive to civil or common law."<sup>31</sup>

The *Federal Law-Civil Law Harmonization Act, No. 1*,<sup>32</sup> came into force on June 1, 2001. Its provisions are of interest because the bill's purposes are integral to the preservation of bijuralism in Canada. The overriding purpose of the proposed Act was stated as being to "ensure that all existing federal legislation that deals with private law integrates the terminology, concepts and institutions of Québec civil law."<sup>33</sup> It also contains this important rule of interpretation for courts to follow:

Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Québec and the common law terminology or meaning is to be adopted in the other provinces.<sup>34</sup>

The legislation, therefore, attempts to enhance the effectiveness of the civil law by making federal legislation more compatible with it. As the Minister of Justice emphasized,

I want to make it absolutely clear that this bill is the reverse of assimilation. For example, we have passed federal bankruptcy and insolvency legislation in the past that reflected common law principles only. One might argue that that was assimilative, in that we did not acknowledge principles such as surety and others on bankruptcy and insolvency as expressed in the Civil Code and the civil law.<sup>35</sup>

The Act also addresses the legal anomaly created by the fact that at Confederation the federal Parliament assumed jurisdiction over certain provisions of the Civil Code of Lower Canada. Despite adopting a new Code in 1994, Québec has been unable to repeal these laws because they are in the federal sphere. One critic noted that:

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31. Alain Bisson, Testimony to the Standing Senate Committee on Legal and Constitutional Affairs (June 14, 2000) (on file with author).

32. Federal Law-Civil Law Harmonization Act, No. 1, First Session, Thirty-seventh Parliament, 49-50 Elizabeth II, 2001.

33. See the News Release: Re Bill C-50, released June 12, 1998.

34. Interpretation Act, No. 1, R.S.C. 1985, c. I-21, § 8.2 (Can.).

35. McLellan Testimony, *supra* note 29.

These provisions were part of one Code and one whole system. Since the demise of that Code, they have been isolated from the system to which they belonged. They express a law frozen in wording more than a century old, and their relationship with the current civil law has become imbued with conflict.<sup>36</sup>

The *Federal Law-Civil Law Harmonization Act, No. 1*, is only the latest effort by the federal government to protect bijuralism. An earlier initiative was meant to ensure that federal legislation emerges from a truly bijural drafting process. In 1978, the Department of Justice made a momentous decision to have two lawyers assigned to each government bill, one anglophone common lawyer and one francophone civilian lawyer. This system, called co-drafting, has survived despite some experimentation with a bilingual single drafter approach. As Lionel Levert, who has served as Chief Legislative Counsel at the Department of Justice, has observed, the government believes that:

[I]t is virtually impossible for any person to be fluent enough in any language other than his or her mother tongue to be completely comfortable in drafting, with all the necessary nuances, a bill in that language . . . it is [also] almost impossible for the drafter to be completely objective in his or her preparation of the second language version.<sup>37</sup>

Co-drafting is meant to ensure that the four distinct audiences for federal legislation, namely anglophone and francophone common-law lawyers and civilian lawyers, are all included. Levert noted that:

The bilingual and bijural tools now available to drafters of statutes and regulations and jurilinguists are the product of work done by POLAJ—the Program for the Integration of Both Official Languages in the Administration of Justice, the objectives of which are essentially to improve access to justice in both official languages by promoting, among other things, the creation of tools for the people who draft legislation in this country. This network involves most of the organizations involved in the administration of justice in both of Canada's official languages. It brings together the centres for jurilinguistics, the associations of French-speaking

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36. André Morel, *Harmonizing Federal Legislation with the Civil Code of Québec: Why? and Wherefore?*, in Booklet 1 of *The Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism* 11 (Dep't of Justice, Canada, 1999).

37. Lionel A. Levert, *Bilingual Drafting in Canada*, Address to the 10th Commonwealth Law Conference (May 1993) (on file with author).

lawyers and their national organization, government institutions and the universities active in training lawyers either in the common law in French or in the civil law in English.<sup>38</sup>

I have strayed from my judicial perspective to highlight the innovations in legislative harmonization because that is the most significant development in Canadian bijuralism today. Some have, moreover, predicted that the federal government may in the future have "a preoccupation with harmonizing federal law with aboriginal law."<sup>39</sup> That is a fascinating story but best left for a future lecture on trijuralism.

#### V. PRECEDENT IN QUÉBEC

I would like now to embark on a case study of Canadian bijuralism in operation. My chosen topic is the role of precedent in the decisions of Québec courts.<sup>40</sup> The definitional intertwining of the common law with adherence to precedent is a legal truism. More colourfully, Lord Justice Cooper, once Lord President of the Court of Sessions in Scotland, wrote in the 1950 *Harvard Law Review* that in adjudication civil-law judges silently ask themselves "What should we do this time?" whereas their common-law counterparts ask aloud "What did we do last time?"<sup>41</sup> The true story, as is often the case, is less formalistic than these absolute distinctions lead one to believe.

To set the stage for my discussion, I note that Québec has three levels of courts: the Court of Québec (an inferior court with provincially-appointed judges); the Québec Superior Court (with general jurisdiction); and the Court of Appeal of Québec, the latter two having federally appointed judges. These judges decide civil cases arising under both federal and provincial law. The Supreme Court of Canada, the highest court of appeal in both civil and criminal cases, always has three justices from Québec, who generally write the

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38. Lionel A. Levert, *The Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?* (May 1999), reprinted in Department of Justice Canada, *Bijuralism and Harmonization: Genesis*, in Booklet 1 of *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* 8 (Second Publication, 2001).

39. Macdonald, *Bijuralism in Canadian Law*, *supra* note 25.

40. This section draws on Claire L'Heureux-Dubé, *By Reason of Authority or By Authority of Reason*, 27 *University of British Columbia Law Review* 1 (1993). See generally Albert Mayrand, *L'autorité du précédent au Québec*, 28 *La revue juridique Thémis* 773 (1994).

41. Thomas M. Cooper, *The Common and the Civil Law—A Scot's View*, 63 *Harv. L. Rev.* 468, 471 (1950) (quoted in Wolfgang Oehler, *Working with a Code: Is There a Difference Between Civil-Law and Common-Law People?*, 1997 *U. Ill. L. Rev.* 711, 715 (1997)).

leading decisions in cases involving Québec civil law. Unlike the professionalized judicial system of many civil-law countries where one trains to be a judge, practising lawyers are appointed to be judges in Québec.

In this institutional context, a former Chief Justice of the Supreme Court of Canada once remarked that the decisions of the courts in civil-law jurisprudence were determined by authority of reason rather than by reason of authority. This is consistent with civilian legal theory, exemplified by Planiol's treatise:

Judicial Interpretation is free in principle. Every tribunal may adopt the solution which it considers the most just and the best. It is bound neither by decisions which it may have rendered previously in analogous cases nor by those of a higher court.<sup>42</sup>

However, in 1932, the aforementioned Chief Justice Anglin's last year on the bench, he also wrote: "In my opinion, the doctrine of *stare decisis* must equally apply in the determination of any case which comes before this court, whatever may be the province of its origin."<sup>43</sup> This is the seemingly irreconcilable tension between the civil law and the use of precedent that I wish briefly to explore.

Interestingly, the early posture of Québec courts generally, and the Québec Court of Appeal in particular, was to ignore the decisions of the Supreme Court of Canada in matters governed by the civil law. The principle of *stare decisis* was expressly formulated by the Supreme Court of Canada in 1909, when the Court stated that previous decisions should not be disregarded other than in "very exceptional cases."<sup>44</sup> Yet, even after this strong statement, the Québec Court of Appeal systematically contradicted certain Supreme Court of Canada decisions for three decades. Moreover, the authority of the Supreme Court in matters of civil law suffered an additional setback because many Québec scholars and practitioners severely criticized its judgments.<sup>45</sup>

The Supreme Court did have an early predisposition to unifying certain aspects of Canadian private law. In the words of France Allard, the "judgments supported a unidirectional comparative analysis of the law, from common law to civil law."<sup>46</sup> The case most

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42. 1 Marcel Planiol, *Traité Élémentaire de Droit Civil*, § 204, at 152 (La. St. L. Inst. trans., 12th ed. 1959).

43. *Daoust v. Ferland*, [1932] S.C.R. 343, 351 (Can.).

44. *Stuart v. Bank of Montreal*, [1909] 41 S.C.R. 535 (Can.).

45. See L'Heureux-Dubé, *supra* note 40, at 11.

46. France Allard, *The Supreme Court of Canada and Its Impact on the Expression of Bijuralism*, in Booklet 3 of *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism*

frequently cited for this tendency is *Canadian Pacific Railway v. Robinson* of 1887.<sup>47</sup> There, the issue was whether damages by way of *solatium doloris* could be claimed in an action under Article 1056 of the Civil Code of Québec, a provision which had English origins. The Supreme Court of Canada answered in the negative. Justice Taschereau wrote: "It cannot [be] intended by this legislation, that if a man was killed in Upper Canada, no *solatium* should be granted . . . but that if he was killed in Lower Canada such *solatium* [should] be given."<sup>48</sup> Justice Ritchie expressed a similar concern: "I think it 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 [might] run."<sup>49</sup>

This attempt to unify was criticized as ousting the civil law through a reasoning and interpretive process that was inspired by common-law principles. Present-day Québec Court of Appeal judge Jean-Louis Baudouin, who recently presented the Tucker lecture at the Paul M. Hebert Law Center, cogently criticized the late nineteenth century Court for the *Robinson* decision:

[T]he solution may not be bad at all since it is extremely difficult to evaluate the tears and suffering of a wife, of a father, or of a child for the loss of a loved one. However, the reasoning process is entirely wrong. [Just] because the common-law courts have chosen to bar recovery for purely moral damages . . . the common-law interpretation [does not have to be] given to Article 1056. In other words, when one borrows a rule from another jurisdiction it does not necessarily mean that one wants to borrow as well the foreign interpretation of that rule.<sup>50</sup>

By 1920, however, the "fear of common law's power to assimilate civilian culture greatly contributed to the movement for the defense of the integrity of civil law. One of the pillars of this movement was Mignault, a justice of the Supreme Court."<sup>51</sup> In the

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5 (Second Publication, 2001), available at <http://canada.justice.gc.ca/en/dept/pub/hfl/table.htm>.

47. [1887] 14 S.C.R. 105 (Can.), *rev'd on other grounds*, [1892] A.C. 481.

48. *Id.* at 124 (Taschereau, J.) (emphasis added).

49. *Id.* at 111 (Ritchie, C.J.).

50. Jean-Louis Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Québec*, in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 19-20 (Joseph Dainow ed., 1974).

51. Allard, *supra* note 46, at 9. See generally Jean-Gabriel Castel, *Le Juge Mignault Défenseur de L'intégrité du Droit Civil Québécois*, 53 Can. Bar Rev. 544 (1975).

case of *Desrosiers v. Canada*,<sup>52</sup> he applied a different approach in arguing forcefully against the use of common-law precedents in civil-law cases:

With respect, it seems to me that it is time to react against the habit, in cases from the province of Québec, of resorting to English common law precedents, on the ground that the Civil Code contains a rule which is in accordance with a rule of English law. On many points . . . the Civil Code and the common law do have similar rules. However, the civil law is a complete system in itself and must be interpreted in accordance with its own rules. If, whenever the legal principles are the same, the courts can resort to English law in order to interpret French civil law, the monuments of French jurisprudence might equally be cited to throw light upon the rules of English law.<sup>53</sup>

This equanimity was a harbinger of a more positive era to come. Professor Patrick Glenn of McGill University has commented that:

Since at least the middle of the century, it has become clear that the Supreme Court has definitively renounced that idea of national unification of the law and the idea that comparative law must serve to establish new rules that are exclusive and imperative. This change came about initially through a new recognition of the sources of civil law, notably Québec and French doctrine, and by an acknowledgment of the impossibility of systematically discounting an entire corpus of rules of which the quality and coherence does not suffer in any way from a comparison with the common law.<sup>54</sup>

In 1975, the Court overturned the holding in *Robinson*. In *Pantel v. Air Canada*, Justice Pigeon wrote that "Article 1056 must . . . be interpreted, not as reproducing a statute of English inspiration, but as a new provision forming part of a codification in which some fundamental principles are radically different from those of the common law . . . ."<sup>55</sup> Professor Glenn rightly emphasized the

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52. [1920] 60 S.C.R. 105 (Can.).

53. *Id.* at 126.

54. H. Patrick Glenn, *Le droit comparé et la Cour suprême du Canada*, in *Mélanges Louis-Philippe Pigeon, Ouvrages collectifs 211* (1989) (translation taken from Louise Lavallée, *Bijuralism in Supreme Court of Canada Judgments Since the Enactment of the Civil Code of Québec*, in Booklet 3 of The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism 2 (Second Publication, 2001), available at <http://canada.justice.gc.ca/en/dept/pub/hfl/table.htm>).

55. [1975] 1 S.C.R. 472, 478 (Can.). See also *Augustus v. Gosset*, [1996] 3



important role of Justice Pigeon in making amends for the Supreme Court's self-imposed early insularity from civil law:

This old tradition of comparative law is simply an attempt to find a better solution, the discovery of which can never stop the further search for an even better solution. In this search, no source can be ruled out, as the Supreme Court did to a certain extent in the first half-century of its existence. And since sources cannot be excluded in creating a new law, they cannot be excluded any more in the continuation of one's own law. Sources must be judged on their merits. This was one of the leitmotifs of Mr. Justice Pigeon, who constantly showed in his work how the civil law and common law traditions need each other, while respecting each other's integrity.<sup>56</sup>

In 1992, I added my own words to this long conversation: "Québec private law includes a wealth of rules of law drawn from foreign sources . . . The common law principles cannot simply be applied to these rules, in my opinion, without first directly addressing the question of whether those principles are even compatible with the recipient law . . . ."<sup>57</sup> In another case, I noted in a unanimous judgment that:

[T]he courts have a duty to ensure that insurance law develops in a manner consistent with the rest of Québec civil law, of which it forms a part. Accordingly, while the judgments of foreign jurisdictions, in particular Britain, the United States and France, may be of interest when the law there is based on similar principles, the fact remains that Québec civil law is rooted in concepts peculiar to it, and while it may be necessary to refer to foreign law in some cases, the courts should only adopt what is consistent with the general scheme of Québec law.<sup>58</sup>

With this less imperialist stance, the Supreme Court has greatly enhanced the authority of its civil-law decisions among Québec judges, academics, and practitioners.<sup>59</sup> Civil-law decisions are now binding in practice, although in theory they remain only persuasive.

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S.C.R. 268 (Can.).

56. Glenn, *supra* note 54, at 213.

57. *Vidéotron Ltée v. Industries Microlec Produits Électroniques, Inc.*, [1992] 2 S.C.R. 1065 (Can.) (L'Heureux-Dubé, J., dissenting).

58. *Caisse populaire des deux rives v. Société mutuelle d'assurance contre l'incendie de la vallée du richelieu*, [1990] S.C.R. 995, 1004 (Can.).

59. See generally H. Patrick Glenn, *La Cour suprême du Canada et la tradition du droit civil*, 80 *La Revue du Barreau Canadien* 151 (2001).

Another important factor in the attention given by Québec courts to precedent was pointed out by Judge Baudouin:

In Québec and in Louisiana, the principle of the supremacy of legislation over other sources of law seems to be accepted as a premise. However, it would be futile to argue that this principle carries the same impact as it does in France, unless one forgets that both Québec and Louisiana adopted . . . common-law procedure, most of the common-law rules of evidence, . . . common-law trial techniques, and, most important of all, the common-law respect and attitude towards the judiciary and the judicial function as a whole.<sup>60</sup>

Justice Mignault himself had written in the 1925 Canadian Bar Review about Québec's legal tradition that:

[O]ur civil law being French, our commercial law partly English and partly French, our procedure and mode of conducting trials a mixture of the two, and our criminal law entirely English, it is natural that, in so far as the authority of decided cases is concerned, we should be nearer to the English than to the French system.<sup>61</sup>

Proximity is a long way from uniformity, however, and the history of the attitude of Québec courts towards the civil-law decisions of the Supreme Court of Canada shows that, as in all fields of law, we justices have to earn the respect of our colleagues. Justice Robert Jackson of the United States Supreme Court wrote in 1953 that "[w]e are not final because we are infallible, but we are infallible because we are final."<sup>62</sup> In Québec, the absence of theoretical justification for strict adherence to our civil-law precedents serves as a subtle reminder of the Supreme Court's responsibilities as guardian of the Canadian bijural tradition.

## VI. CONCLUSION: BIJURALISM AND TRANSNATIONAL COMMERCIAL LAW

In conclusion, I would like to emphasize the benefits that accrue to Canada from the herculean efforts by legislators, lawyers and judges to accommodate the two legal systems. The Deputy Minister of Justice recently stated that:

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60. Baudouin, *supra* note 50, at 8.

61. Pierre-Basile Mignault, *The Authority of Decided Cases*, 3 Can. Bar Rev. 1, 11 (1925).

62. *Brown v. Allen*, 344 U.S. 443, 540, 73 S. Ct. 397, 427 (1953) (Jackson, J., concurring).

[A] bijural culture can be a huge advantage for Canada, both within our country and abroad, as a concrete demonstration of respect and tolerance in both official languages, for all four legal audiences . . . . [it] places Canadian jurists in a privileged position in the world to encourage the progress of law and the harmonious coexistence of legal traditions and, therefore, to be active participants in shaping globalization.<sup>63</sup>

Roderick Macdonald notes how:

[T]he exercise of negotiating legal bijuralism and legal bilingualism in the federal legal order will make Canadian law more attuned to emerging trends in the international trading regime and will give Canada an important leadership role in finding the vocabulary, concepts and institutions of law needed to generate a new transnational *lex mercatoria* that respects the genius of both the Romano-Germanic and Anglo-American legal traditions.<sup>64</sup>

As the preamble to the *Federal Law-Civil Law Harmonization Act, No. 1* states, one of the important fruits of bijuralism is that "the full development of our two major legal traditions gives Canadians a window on the world and facilitates exchanges with the vast majority of other countries."<sup>65</sup> I close with the hope that my observations have presented a window on Canadian bijuralism and that Louisiana and Québec long continue to give North America a distinctly bijural legal complexion.

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63. Morris Rosenberg, *Bijuralism and International Trade*, Address at the University of Ottawa Conference, *Evolution of Legal Systems* (Oct. 20, 2000), reprinted in Department of Justice Canada, *Bijuralism and Harmonization: Genesis*, in Booklet 1 of *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* 33 (Second Publication, 2001).

64. Macdonald, *Bijuralism in Canadian Law*, *supra* note 25.

65. *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, Preamble (Can.).