

THE COMMON LAW IN CANADA

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The article is an attempt to state the nature of the common law in Canada. It examines briefly the history of the common law, its transformation and partial nationalization in the 19th century and its migration over space and time. The common law, as it has been thought in Canada, is then related to Canadian institutions, Canadian society and ongoing judicial activity.

L'article cherche à saisir la nature de la common law au Canada. Il examine brièvement l'histoire de la common law, sa transformation et sa nationalisation partielle au 19^e siècle, ainsi que sa migration à travers l'espace et le temps. Sont ensuite examinés les liens entre la common law, telle qu'elle a été pensée au Canada, et les institutions canadiennes, la société canadienne, et l'activité jurisprudentielle en cours.

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Introduction

Is there a common law which exists in and beyond Canada? Are there rather common laws of each province? Or should one speak of a Canadian common law? The answers to these questions may at one time have been clear; they are less so today. The appropriate answers for the next century are even less clear. It is important, however, to ask the questions. They are large, but intensely practical. The answers given will greatly influence choice of institutions and judges, jurisdiction of courts, choice of sources of law, legal relations with aboriginal peoples and other States (assuming the continuing existence of States) and relations between the constituent parts of Canada (assuming the continuing existence of Canada).

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I. *The Common Law*

It is useful to start with the common law itself, as it has been understood until now. The history of the common law stretches over a thousand years, approximately the life-span of Roman law.¹ As Roman law finished in a flurry of reforms, including the codification of Justinian and the end of formulary procedure, so have most of the distinctive characteristics of the common law disappeared in the last century and a half. The forms of action are dead, and their graves neglected. The jury is not what it was and neither are the judges. They have become, from a historical perspective, without number. The inherent superiority of first instance courts is increasingly buried in hierarchical court structures, the volume of litigation driving all before it like an incoming tide. There are courts of appeal, a continental graft. There is *substantive* law. In most of the world the barrister is no longer free of structural loyalties, the Q.C. of little consequence. The men of the common law are giving way, without alacrity, to women. Its men and women are increasingly of different colours.

Many definitions of the common law have thus today become irrelevant. It is no longer the law of the Crown's courts, standing distinct, modern and rational over local custom and judges. Its bailiffs compete no more with those of Equity; its conscience no more with that of ecclesiastical authority. It no longer falls from London over a subdued and occasionally welcoming Empire. There have even been — though the word comes from astronomy and politics and not from law — revolutions.

As with Roman law, however, fundamental teachings of the common law remain with us. Recently described as the "underlying basis of doctrine", the "genetic root", the "universal", the common law remaining alive today would be a "habit of [legal] thought" as opposed to a set of particular institutions and rules.² Even here there is ambiguity. The common law as mere habit? Or legal thought itself?

The common law has traditionally defined itself through cases, though the cases have been treated differently over time. Case law is problematical law, however, and this has been recognized both within and without the tradition. "Is the Common Law Law?" asked a prominent U.S. academic recently,³ while the Dean of French lawyers, faced with the continental renaissance of *jurisprudence*, has concluded that cases cannot be an autonomous source of law but rather,

¹ See F. Pringsheim, "The Inner Relationship Between English and Roman Law" (1935) 5 Camb. L.J. 347.

² Lord Oliver of Aylmerton, "Requiem for the Common Law?" (1993) 67 Aust. L.J. 675 at 686.

³ F. Schauer, "Is the Common Law Law?" (1989) 77 Cal. L. Rev. 455 (common law "remains uncommonly puzzling"; allows itself to be remade in the process of application, infusing variable moral, economic, social and political values; common law rules appear to be no more than rules of thumb).

only, the "transparency" of custom or legislation.⁴ Over most of its history, moreover, the judges of the common law have maintained similar views, which must once again, for reasons to be seen, be taken seriously.

How have common law judges traditionally viewed the common law? Historians and legal philosophers, spurred by a sense of contemporary need, have been engaged in a process of reconstruction. Absent a hierarchy of courts, common law judges were engaged in a common, shared exercise. They did not command one another, presently or in the future. Their decisions thus *could not bind*, and this historical reality prevailed well into the nineteenth century. Cases had whatever authority they had because they were part of a body of common experience.⁵ They could not be rules to be followed and were hence examples of the type of reasoning which had thus far prevailed.⁶ As such they did not preclude further argument and reasoning, but invited it, and no case could be seen as identical with another, to be somehow governed by the prior in time. Case reporting was in any event too haphazard for such a concept to prevail. Since cases only exemplified arguments, there was no closure of sources, and great willingness to consider a wide range of possible authority.⁷

This *method* of common law adjudication⁸ assumed much, and most of all the possibility of adjudication in the absence of law formally designated as such. The jury was the main means of accomplishing this, but the decisions of the judges also required legitimation. This appears to have been derived from a combination of circumstance and institutions: the limited role of the judiciary, the contextual nature of the writs (reflective of and faithful to a feudal society), the openness of process and sources, the talent of the judges and their own justificatory efforts. If there was law beyond the judges, it was found largely in

⁴ J. Carbonnier, *Correspondence* (1992) Rev. trim. dr. civ. 342. Civilian criticism of case law has centered on a notion of precedent which is translated often as "*préjugé*" or "*Präjudiz*." Taking a case as decided by a previous one is to preclude the search for justice, particularly as represented by legislative sources. Absent the looming presence of the Codes, the same argument has troubled common law judges. See the discussion in the text, *infra*.

⁵ G.J. Postema, "Roots of our Notion of Precedent" in L. Goldstein, ed., *Precedent in Law* (Oxford: Clarendon Press, 1987) at 22.

⁶ See generally, with references, M. Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford, New York: Oxford Univ. Press, Clarendon Press, 1991); D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, New York: Cambridge Univ. Press, 1989).

⁷ Lobban, *ibid.* at 87, 88 ("... all manner of sources were used to attain a conclusion"). While the learning of the forms of action was highly technical and apparently autonomous in character, the early barristers of the formative era of the common law were very open to the civil law and "not at all unfamiliar" with it. W.R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Oxford, New York: Clarendon Press, Oxford Univ. Press, 1986) at 191. This familiarity with other forms of legal argumentation would have been enhanced by the multiplicity of courts in England, some of which (Equity, Ecclesiastical Courts, Admiralty) were repositories of civilian learning.

⁸ For a contemporary U.S. effort to root the common law in deep adjudicative structures, see M. Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard Univ. Press, 1988).

the society itself. If the judges could not find it, they would not decide.⁹ It is important that law was not presumed to exist, for all cases, beyond the judges. They proceeded on the basis of law they felt they could reasonably articulate, through a "careful working out of shared understandings of common practices."¹⁰ Otherwise, they did not proceed.

This law which gradually became common was thus tentative in method and also largely optional for litigants. It did not abruptly displace local and specialized forms of dispute resolution nor local and customary forms of law. It was tolerant of law and social particularity outside of itself. Moreover, its principal adjudicative instrument, the jury, co-opted local forms of knowledge of right and wrong. Results did not matter. Each case was different and uniformity was not imposed. The commonality was derived from the adjudicative cadre and the (tentative) reasoning which supported it. The method of the common law thus presumed no comprehensive law beyond the judges; its structures looked to the society itself for the means and justification of dispute resolution.

II. *Stare Decisis and Empire*

Stare decisis and Empire are related to one another. They are both essentially nineteenth century phenomena. They are both emanations of the State. They were both preceded by important affirmations of the dominance of human rationality in law and politics.

The movement of the common law to a concept of *stare decisis* was a gradual one. Blackstone was a key figure in the process, though he was preceded by the rationalizing influence of the Inns of Court in the sixteenth century.¹¹ Blackstone was much influenced by the rationality of Roman law and sought to establish a parallel rationality of the common law.¹² In the ongoing debate as to the nature of the common law, he appears to occupy a key transitional position. His structured, rational and national concept of law represented a break with the past, yet maintained key elements of the tradition. The common law of the future was to be rationally justifiable, yet judges still did not make law. Blackstone appears to be the primary source of the declaratory theory of law. Judges did not make law but rather simply declared it. There was now, however, a great deal

⁹ For the judicial refusal to decide in the absence of discernible law, see J.H. Baker, "English Law and the Renaissance" (1985) 44 Camb. L.J. 46 at 58 ("If, after all that, they still had qualms — they did nothing. Judicial inaction was not seen as a dereliction of duty, as it would be today, because it encouraged and helped parties to settle their differences when the merits were balanced").

¹⁰ Postema, *supra* footnote 5 at 31.

¹¹ See Baker, *supra* footnote 9 at 61 (remarkable developments between 1490's and 1540's, which "may have [had] something to do with Renaissance humanism").

¹² See J.W. Cairns, "Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State" (1984) 4 Oxf. J. Leg. Stud. 318.

of law to declare, and it was to be found not only in the hills and hollows of the English countryside, but in a higher level of human rationality.¹³

Blackstone's rationalist ambitions left him vulnerable to withering attack over the next two centuries. No-one in the past had so distanced themselves from the warmth of custom. Yet if law existed beyond custom how could it be established? If there was no other proof than the reasoning of the judges was their reasoning not the law itself? Blackstone's modest and restrained judiciary now found itself in the full glare of renaissance illumination. *Stare decisis* had become possible and its positive construction through the nineteenth and early twentieth centuries was accompanied by a relentless battering of the "brooding omnipresence" of Blackstone's eternal law.¹⁴ In the nineteenth century rush to transform the institutions of the common law, the right of action is created, the need to chose one's writ is abolished, the court of appeal is erected and case reporting is made *official*. The law can now be found written *on the page*. The judgments lengthen.¹⁵ The judges respond, in part at least, to new expectations. There are some indications of conceptual difficulties with the idea of *stare decisis*;¹⁶ they are largely swept aside. The judges must be the equivalent of the new continental legislators. By the end of the nineteenth century, the House of Lords, now a highest appeal court, is bound by its own decisions.¹⁷

¹³ Lobban, *supra* footnote 6 at 12, 13 (Blackstonian view of law "outside the common law view" in assuming an "ideal holistic code"). Blackstone was never entirely clear, however, as to what it was that was being declared. He wrote both "...it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm...." and "...human laws are only declaratory of, and act in subordination to, [divine law and natural law]..." G. Jones, ed., *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* (Toronto: Univ. of Toronto Press, 1973) at 51, 31. The latter statement, more modern in admitting the potential of a humanist natural law, came to be generally taken as his position.

¹⁴ The phrase is that of Holmes, who bombarded bravely from positions secured by Austin and Bentham. See *Southern Pacific Co. v. Jensen*, 244 U.S. 205 at 222 (1917). By the 1860s Bentham's phrase "judge-made law" had come to be widely used. J. Evans, "Change in the Doctrine of Precedent during the Nineteenth Century" in Goldstein, *supra* footnote 5, 35 at 68.

¹⁵ For increase in judgment length from the eighteenth century (cases getting to a full page in length) to the twentieth, see J.L. Goutal, "Characteristics of Judicial Style in France, Britain and the U.S.A." (1976) 24 Am. J. Comp. L. 43 at 58, 61-65.

¹⁶ See Lobban, *supra* footnote 6 at 211-215, 258 on the impossibility of rules being derived from a general verdict and the necessity of maintaining special pleading to produce clear rules. This view was clearly influenced by the role then played by the jury in civil cases. The dominance of fact in trial court decisions has today, however, contributed significantly to the decline in precedential value of those decisions.

¹⁷ See *London Tramways v. L.C.C.*, [1898] A.C. 375; and for the stages of growth of *stare decisis* through the nineteenth century see Evans, *supra* footnote 14. The language of "binding" begins to be used with some frequency from 1800 to 1834. *Ibid.* at 45-54. More generally see R. Cross & J.W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991) at 24, 25 (examples of precedent not being followed as late as 1869); R. Flowers, "Stare Decisis in Courts of Co-ordinate Jurisdiction" (1985) 5 Advocates' Q. 464 at 469, 470.

These developments were English ones, rooted in the rise of the contemporary British State. It was a very successful State, as States went, and by the end of the nineteenth century had acquired a substantial Empire. The notion of empire appears to be derived from the Latin *imperium*, as positive command or authority. *Imperium* was not at the heart of Roman law, but it became the essential underlying idea of both the British Empire and the English judiciary in the nineteenth century. The Empire was acquired through exploration, barter, purchase and, where necessary, force. Lawyers did not have much to do with it. They did become necessary, however, in its administration. Interesting questions then arose as to the nature of the common law, as instrument of Empire.

The territorial expansion of the common law gave a new lease on life to Blackstone's ideas, and to the common law tradition. Blackstone sold well abroad, in many editions, but it was his view of the common law which became vital to the common law of the Empire, and subsequently of the Commonwealth. While Blackstone may have taught the existence of an eternal, "monolithic" law, the idea was a destabilizing one. There was law beyond the courts, and the new concept of *stare decisis* could not eliminate the freedom of a judge to seek to declare this eternal common law. In the Empire and Commonwealth this had three main effects: i) it rendered irrelevant any date of reception of the common law and allowed colonial courts to continue to inform themselves from English cases;¹⁸ ii) it allowed the overstepping of national court hierarchies, once these became established, in cases where external common law authority was more persuasive; and iii) it allowed for local particularity (the "unsuitability" doctrine), since the universal rationality of the common law as demonstrated elsewhere could be met by local versions, themselves entirely rational in the local circumstances.

There was of course much insistence on the need for uniformity of the common law throughout the Empire. A major effort was made to construct lines of *stare decisis* extending out from the Privy Council. The Empire was, however, too far flung for such meagre lines of authority. More law was needed than that which was formally handed down; there was too much attraction in the judgments of non-binding courts (principally English); and too much local particularity. Exported beyond the single State of origin, the common law had to loosen up. The declaratory theory became the code words for this process. There need not, *in fact*, be a demonstrable, eternal and monolithic common law; the declaratory theory could nevertheless be prayed in aid of judicial restraint, recourse to a range of useful sources, and recognition of local particularity.¹⁹ It revived major characteristics of the original common law tradition. The common law began to "speak with accents appropriate to the country in which

¹⁸ J.N. Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth" (1993) 42 I.C.L.Q. 753 at 754, generally for the Commonwealth; P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 30 for Canada.

¹⁹ For explicit Australian judicial support of the theory through the second half of the twentieth century see H.K. Lücke, "The Common Law: Judicial Impartiality and Judge-Made Law" (1982) 98 L.Q. Rev. 29 at 45; P. Wesley-Smith, "Theories of Adjudication and the Status of *Stare Decisis*" in Goldstein, *supra* footnote 5, 73 at 75.

it applie[d]."²⁰ It was undergoing major change in England; uniformity was unlikely abroad.

The work of a new school of Canadian legal historians is now putting to rest the idea, promoted ardently by a number of mid-century Canadian lawyers,²¹ that the reception of the common law in Canada has been a static, mechanical and derivative process.²² It has been an informal and non-instrumental process, in contrast to that of the United States,²³ but at the level of adjudicative method

²⁰ G.W. Bartholemew, "English Law in Partibus Orientalium" in A.J. Harding, ed., *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985) at 39, cited in Matson, *supra* footnote 18 at 779.

²¹ See e.g. G. Kennedy, "Stare Decisis — Five Recent Judicial Comments" (1951) 29 Can. Bar Rev. 92, notably at 93 ("How long will this thing continue?"); H. Read, "The Judicial Process in Common Law Canada" (1959) 37 Can. Bar Rev. 265, notably at 266 ("overly mechanical" application of English cases — no explanation of how decision making is either "mechanical" or "overly mechanical").

²² See e.g. *Essays in the History of Canadian Law* (Toronto: University of Toronto Press) (D. Flaherty, ed., vol. 1, 1981, vol. 2, 1983, P. Girard & J. Phillips, eds., vol. 3, 1990, C. Wilton, ed. vol. 4, 1990); C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Published for the Osgoode Society by Women's Press, 1991); L. Knafla, ed., *Law And Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986); B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 219; B. Baker, "'So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth-Century Upper Canada" (1988) 38 U.T.L.J. 184; D. Bell, "The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick" (1980) 29 U.N.B.L.J. 157; B. Cahill, "'How Far English Laws Are in Force Here': Nova Scotia's First Century of Reception Law Jurisprudence" (1993) 42 U.N.B.L.J. 113; H. Foster, *English Law, British Columbia: Establishing Legal Institutions West of the Rockies* in *University of Manitoba Canadian Legal History Project Working Paper Series* 92-93; P. Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova Scotia*" (1993) 11 Law & Hist. Rev. 101; B.J. Hibbits, "Progress and Principle: The Legal Thought of Sir John Beverley Robinson" (1989) 34 McGill L.J. 454; R. Risk, "A.H.F. Lefroy: Common Law Thought in Late Nineteenth-Century Canada: On Burying One's Grandfather" (1991) 41 U.T.L.J. 307; R. Smandych, "Upper Canadian Considerations about Rejecting the English Poor Law, 1817-1837: A Comparative Study of the Reception of Law" in *University of Manitoba Canadian Legal History Project Working Paper Series* 91-94. Earlier judicial writing had occasionally signalled the distinctive blending of local and distant variants of the common law. See Hodgins J.A., "The Authority of English Decisions" (1923) 1 Can. Bar Rev. 470 at 483 ("thoughtful adoption" of English decisions "so far as they apply"); and more recently W. Morrow, "An Historical Examination of Alberta's Legal System — the First Seventy-Five Years" (1981) 19 Alta. L. Rev. 148, notably at 156 (Alberta jury reduced to six given ranching needs). For general statements of the reception process see J.E. Cote, "The Reception of English Law" (1977) 15 Alta. L. Rev. 29; H.P. Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261; W.R. Jackett, *Foundations of Canadian Law in History and Theory* in O.E. Lang, ed., *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F.C. Cronkite* (Toronto: Univ. of Toronto Press, 1968) at 3.

²³ Reception in the United States differed from that which occurred in Canada in a number of respects. Since the southern colonies were taken to be settled ones, English law had to be formally introduced and the "suitability" doctrine became a reason for adoption of English law rather than for exclusion of it. The formality of the reception process was thus accompanied by adoption of instrumentalist objectives. See generally E. Brown,

it has been distinctive, imaginative and alive to local circumstance. Mixing adroitly the declaratory theory of law with formal concepts of *stare decisis*, Canadian judges kept open their contacts with the rest of the world, developed local law, and maintained a low profile. Blackstone remained, and remains, a cited authority.²⁴ By the late twentieth century there were evident reasons for keeping such options open.

III. *The Decline of Hierarchy*

Stare decisis emerged at a unique moment in the history of the common law tradition. The abolition of the forms of action and the decline of the jury meant that common law judges had begun to judge on the merits, and according to substantive law. The content of the new, substantive common law had to be discovered, or created. In England and the U.S.A. this was done through heavy reliance on Pothier and other continental writers,²⁵ and through a miraculous conversion of old pleading rules into substantive prescriptions.²⁶ In the Empire and Commonwealth the same process occurred, filtered through English case

British Statutes in American Law 1776-1836 (Ann Arbor, Mich.: Univ. of Michigan Law School, 1964). State statutes thus often prohibited citation of post-1776 English decision. J. Langbein, "Chancellor Kent and the History of Legal Literature" (1993) 93 Col. L. Rev. 547 at 568, with references. The notion of a state common law emerged early and naturally from this process as a means of "fitting the common law into an emerging system of popular sovereignty." M. Horwitz, *The Transformation of American Law, 1880-1960* (New York: Oxford Univ. Press, 1992) citing at 20, the 1798 essay of J. Root, "On the Common Law of Connecticut." U.S. exemplars of the European Institutists then emerged, such as Kent and Story, and state case reports were quickly developed to provide sources of the state law presumed to exist. See Langbein, *supra* at 571, for the importance of the emergence of state case reports. Once this initial demonstration of the power of political will over legal sources was accomplished, the way was open to later forms of instrumentalism. See Horwitz, *supra*; W.E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge: Harvard Univ. Press, 1975). This process is easy to exaggerate, however, and traces of the notion of an "Anglo-American law" persist today. See *infra*, text accompanying footnote 123. While Kent did much to nationalize the common law, he nevertheless taught that "The elementary principles of the common law are the same in every state, and equally enlighten and invigorate every part of our country." J. Kent, *Commentaries on American Law* (New York: O. Halsted, 1832) at 445, cited in C. Stychin, "The Commentaries of Chancellor James Kent and the Development of an American Common Law" (1993) 37 Am. J. Leg. Hist. 440 at 456.

²⁴ See, e.g. *Salituro v. R.*, [1991] 3 S.C.R. 654 at 665, Iacobucci J. (statement of Blackstonian view of judges discovering the common law and not changing it, though Blackstone's "static model of the common law has gradually been supplanted by a more dynamic view"); *Edwards v. Edwards*, [1987] 5 W.W.R. 289 (Sask. C.A.) at 297, Bayda C.J.S. (citation of Blackstone in rejecting concept of prospective overruling and declaring retrospectivity of common law as "part of the declaratory theory of law").

²⁵ See the remark of Best J. in 1822 that the authority of *Pothier on Obligations* was "the highest that can be had, next to a decision of a court of justice in this country." *Cox v. Troy* (1822), 5 B. & All. 474, 106 E.R. 1264.

²⁶ If a writ allowed access to a jury, it was at least possible to say that it implied underlying obligations and even, more radically, underlying rights.

law. *Stare decisis* was the starch that gave substance to the process. It provided a quick set. *Stare decisis* was successful, as a transitional vehicle, for two underlying institutional reasons. First, the transition to substantive law rendered much of the volume of previous law obviously irrelevant. It was available for conversion to authority as required, but the abolition of the writs meant that new thinking could occur free of the burden of past cases. Second, the judiciary remained, for many decades, what it had traditionally been — a small corps of centrally-located, ambulatory adjudicators with an exceptional level of shared commitment and understanding. They were now deciding cases, but relatively few, and the decisions could each be seen as normative, worthy of official reproduction.

The institutional changes which led to the articulation of a doctrine of *stare decisis* were not compatible, however, with its long-term survival. Abolition of the writ system opened up the common law adjudicative process; its rules became comprehensible, or at least potentially comprehensible, by citizens; its judges faced the prospect of judging, themselves, *all* of the cases. Gradually, inevitably, there had to be more judges. Gradually, inevitably, the pressure increased for them to become residential. This process is now largely complete in Canada and the United States. If there are many cases, and residential judges, the next step is to assign to them the responsibility for efficient management of cases. This process is now well under way in Canada and the United States, and the North American judiciary increasingly resembles that of the continent. The high court, first instance justice of the Crown, oracle of the common law, is becoming slowly transformed into a local, case managing adjudicator, subject to at least appellate review, as in Canada, if not to a full range of error, appeal and prerogative remedies, as in the United States.²⁷ There is also judicial discipline.

In this new judicial order all decisions cannot stand. Most are best forgotten. The volume of cases extends necessarily to courts of appeal, since decisions at first instance have become only ... decisions at first instance. Courts of appeal become inundated. The normative force of their decisions is in turn slowly eroded. The volume of decision-making in all areas of life renders it vulnerable to multiple forms of appraisal. Judicial pronouncements are deconstructed; their decisions are subjected to economic or other forms of external analysis.

In the common law world *stare decisis* was most fervently embraced in England and the U.S.²⁸ The pace of change has been different in the two countries but in both the decline of *stare decisis* is evident. In England, a quarter century after the House of Lords freed itself from its previous errors,²⁹ the common law process is described as having moved from principle, rooted in

²⁷ See M. Jamal & H.P. Glenn, "Selective Legality: The Common Law Jurisdictional Appeal" (1994) 73 Can. Bar Rev. 142.

²⁸ For the originally stricter U.S. concept of *stare decisis*, based on the single "opinion of the court", see G. Gilmore, *The Ages of American Law* (New Haven: Yale Univ. Press, 1977) at 10, 115.

²⁹ *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234.

stare decisis, to pragmatism — to discretionary dispute resolution with a low level of predictability.³⁰ The judiciary has declined in influence while increasing in size;³¹ *stare decisis* is described as self-destructing, since if all the decisions are correct the bad ones must be drowned with the good in the process of attempting harmonious statements of law.³² More radical results have been reached in the United States. "Anticipatory over-ruling" exists, i.e., the refusal to follow otherwise binding precedent if the judge seized believes the precedent will eventually be over-ruled by a higher court.³³ There is major debate on the process of deliberate non-publication of decisions, as a device for accelerated decision-making.³⁴ The Federal U.S. administration regularly accepts only the force of *res judicata* of Federal court decisions (the doctrine of "intra-circuit nonacquiescence").³⁵ Citation of single cases has been largely replaced by search and citation methods which batch or group large numbers of cases, as indicating the drift of decisional law.³⁶ American observers have commented that there appears to remain a concept of *individual stare decisis*, by which a judge will attempt to adhere to that same judge's prior decisions,³⁷ while academic debate turns on whether there is any justification for precedential

³⁰ P. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Oxford: Clarendon Press, 1978).

³¹ See N. Marsh, "Comparative Law and Law Reform" (1977) 41 *Rabels Zeitschrift* 649 at footnote 13, commenting on the U.K. judiciary ("...the decline in the prestige and authority of the judiciary which makes it less easy for them to effect major economic or social changes").

³² J.A. Jolowicz, "Les décisions de la Chambre des Lords" (1979) *Rev. int. dr. comp.* 521 (law thus found not in single decisions but in many).

³³ P.S. Atiyah & R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987) at 121, 122 (asking "what is left of *stare decisis*?"); and for earlier advocacy of the phenomenon with regard to "obsolete" decisions of the United States Supreme Court see Gilmore, *supra* footnote 28 at 98.

³⁴ See W. Reynolds & W. Richman, "The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals" (1978) 78 *Colo. L. Rev.* 1167; L. Robel, "The Myth of Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals" (1989) 87 *Mich. L. Rev.* 940; and for alleged abuse of the process (winner agreeing, for consideration, to ask for order "vacating" the decision), in both state and Federal courts see G. Kolata, "When Court Decisions Vanish from the Record" *The New York Times* (18 June 1993) D17.

³⁵ S. Estreicher & R. Revesz, "Nonacquiescence by Federal Administrative Agencies" (1989) 98 *Yale L.J.* 679, with ensuing rejoinder (by M. Diller & N. Morawetz) and reply at (1990) 99 *Yale L.J.* 801 and (1990) 99 *Yale L.J.* 83; R. Pear "U.S. Flouts Courts in Determination of Benefit Claims" *The New York Times* (13 May 1984) 1. M. Lavelle "Sometimes the U.S. Just Says 'No'", [1989] *Nat. L.J.* 1.

³⁶ Goutal, *supra* footnote 15 at 51-55, notably at 52 ("...nothing normative in this process, no appeal to hierarchy or formal authority ... without any hint of anything binding"); Atiyah & Summers, *supra* footnote 33 at 129 ("... possible to cite a considerable mass of authorities on both sides of any line that can be drawn").

³⁷ Others see this as an indication of judicial hubris and a decline of collegiality and institutional loyalty, exacerbated by abandonment of decision-writing to clerks, whose "stylistic features reflect the combination of hubris and self-doubt that is the mark of the culture of clerks...." A. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard Univ. Press, 1993) at 345, 347.

decisions.³⁸ A U.S. defender of the common law has written that the common law consists of "the rules that *would be* generated at the present moment by application of the institutional principles of adjudication" and that "[t]he announced rule of a precedent should be applied and extended to new cases if the rule substantially satisfies *the standard of social congruence*..."³⁹

In Canada and elsewhere in the Commonwealth, attitudes towards *stare decisis* have been ambivalent. Loyalty to the reigning, contemporary theory of the common law, and hence to *stare decisis*,⁴⁰ has been tempered by loyalty to the ongoing definition of its content, by the most influential courts within and without Canada. The declaratory theory continues to be invoked⁴¹ and continues to destabilize exclusive resort to binding, national, hierarchical authority. Provincial case reports have been established, abandoned, re-established.⁴² They have been seen as useful for local lawyers, not exclusive repositories. The Supreme Court and most provincial Courts of Appeal have freed themselves from whatever constraint was imposed by their prior decisions.⁴³ Very recently, Canadian academic and judicial commentators have more openly questioned the continuing importance of the concept of binding authority.⁴⁴ If *stare decisis* has run its course, where is the common law to be found?

IV. Canadian Institutions and the Common Law

The decline of the concept of *stare decisis* makes it more difficult to define the common law in terms of binding, judicial norms unique to national or provincial court structures. There are further difficulties, however, with the idea of purely provincial common laws. They relate to Canadian judicial institutions generally and to the underlying concept of law reflected in these institutions.

³⁸ F. Schauer, "Precedent" (1987) 39 Stan. L. Rev. 571; L. Kornhauser, "An Economic Perspective on Stare Decisis" (1989) 65 Chicago-Kent L.R. 63.

³⁹ Eisenberg, *supra* footnote 8 at 154, 75 [emphasis added].

⁴⁰ For early and intense loyalty to a scientific, hierarchical concept of judicial law-making by a leading Canadian lawyer see Risk, *supra* footnote 22 on A.H.F. Lefroy. More generally, demonstrating both adherence and deviance, see G. Curtis, "Stare Decisis at Common Law in Canada" (1978) 12 U.B.C.L. Rev. 1, notably at 8 ("relaxed" and "flexible" concepts of precedent and stare decisis); G. Bale, "Casting Off the Mooring Ropes of Binding Precedent" (1980) 58 Can. Bar Rev. 255; W. Friedmann, "Stare Decisis at Common Law and under the Civil Code of Québec" (1953) 31 Can. Bar Rev. 723; A. Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36 Can. Bar Rev. 175; M. MacGuigan, "Precedent and Policy in the Supreme Court" (1967) 45 Can. Bar Rev. 627.

⁴¹ See *Edwards v. Edwards*, *supra* footnote 24.

⁴² L. Getz, "The State of Law Reporting in Canada" (1979) 37 Advocate 243.

⁴³ *Supra* footnote 40.

⁴⁴ Mackenzie J. of the British Columbia Supreme Court wrote recently that "... already it is clear that the authority of precedent is fading.... The attraction of precedent is waning in common law Canada probably even faster than in England." K. Mackenzie, "Back to the Future: The Common Law and the *Charter*" (1993) 51 Advocate 927 at 929, 930. See also A.W.M., "Editorial — 'The Rules of Evidence'" (1994) 36 Crim. L.Q. 130 ("*Stare decisis* lies more in what the courts do than in what they say.")

There is a relation between courts and the law they apply. The courts of Canada, moreover, are organized differently from those of most other countries in the world. Canadian court structures are multiple, recurring in each province, unlike those of the U.K. More significantly, the basic court structure of each province is unitary, and there is therefore rejection both of the continental division between private and public law courts and of the federal model, notably that of the United States, in which court structures are divided along the lines of legislative authority, with separate judicial structures for both Federal and state matters.⁴⁵ Canadian provincial superior courts are competent in both public and private law matters and in both Federal and provincial law matters. Since there are Federal and provincial levels of government, however, each must collaborate in the administration of the basic court structure. Each province thus administers its courts (and in the past appeals lay directly from provincial appeal courts to the Privy Council) while the Federal government appoints and remunerates superior court judges and provides a Supreme Court of Canada which now acts as an ultimate court of appeal for each province. The Federal Court of Canada, which replaced the earlier Exchequer Court of Canada, is competent only with respect to those "laws of Canada" which have been legislatively entrusted to its authority⁴⁶ and, unless the legislative grant of jurisdiction is exclusive, its jurisdiction does not exclude that of provincial superior courts.

What is the significance of these structures for the definition of the common law? Underlying the preservation of a unitary court structure in a State which is confederal or federal in character is the thesis that neither executive nor legislature merits a corresponding judicial authority. There are neither separate administrative courts nor separate and exclusively competent provincial and Federal courts. The possibility of making or administering law thus is not seen as having any bearing on the judicial authority which may eventually come to apply law or to review its application. Put more affirmatively, the common law and its judges precede legislative authority and retain ultimate authority over its division in the confederation or federation. The possibility (and it is no more than that) of legislative change of the common law does not imply its dependence on legislative authority nor its division according to legislative authority. The political considerations which lead to separate legislative authorities thus do not prevail with respect to courts. This will also be seen with respect to the appointment — as opposed to election — of judges, but it may already be seen that judicial law — the common law — cannot in principle be said to be Federal or provincial because of the Federal or provincial character of the courts and judges. Courts and judges in Canada are in principle both federal and provincial. There is no process of "making a Federal case of it."

⁴⁵ Court structures in the United States thus mirror the image of the common law which prevailed in the reception process in the United States. See the discussion *supra* footnote 23.

⁴⁶ *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, s. 101. On the restrictive definition of the concept of "laws of Canada" which has been adopted by the Supreme Court of Canada, see *infra*, text accompanying footnotes 69, 70.

Canadian court structures were and remain subject to particularly Canadian political considerations, most notably the decentralized nature of Canadian confederal structures in 1867 and the difficulty of imposing a federal court structure on colonial courts which previously saw themselves as free-standing, within the Empire. The structure which emerged was, however, remarkably consistent with the declaratory theory of the common law — as practised in the Commonwealth — and even with the original common law tradition. Commonality and particularity exist within a single, general, collaborative cadre. Judges do not make law but seek it in the sources which best evidence the common law. Local circumstance is an essential feature in the search for the best solution for this problem, in this place, at this time. There is thus no need to divide the common law and the judiciary along federal or confederal lines.⁴⁷ In thus refusing to award it separately to Federal and provincial judiciaries, no “final say” is created in each sphere. A common law of each province cannot be “crafted” by an ultimate common law authority for the common law of each province.

At the apex of the Canadian court structures is the Supreme Canada of Canada, a court administered under federal authority and whose judges are named by the federal government. As has been noted, the Supreme Court acts as the final appellate court for each province. It is also a generalist court, as befitting the final appellate court of a unitary court structure, and exercises judicial review by virtue of the Canadian *Charter of Rights and Freedoms*. The jurisdiction of the Supreme Court of Canada is thus larger than the final courts of the U.K., France or the U.S.A., since in each case the jurisdiction of these courts is limited, either by the absence of judicial review, by the private law/public law distinction, or by the federal court structure.

What is the relation between the structure and jurisdiction of the Supreme Court of Canada and the nature of the common law? It must respond, as did the early courts of the common law, to claims of both particularity and generality. This task has become more difficult, as access to the court has become more restricted and its cases are seen as necessarily national in importance. As will be seen, the Court’s answer to this difficulty apparently lies in the broad range of its choice of sources of law.⁴⁸ Whatever sources are preferred by the Court,

⁴⁷ Suggestions to this effect have been remarkably absent from institutional debate in Canada. Professor Abel once made the argument, however, as a means of accommodating the “differing needs and sentiments of the provinces” and to overcome the view that the common law is “a corpus of uniform prescriptions.” A. Abel, “The Role of the Supreme Court in Private Law Cases” (1965) 4 Alta. L. Rev. 39. The common law would thus necessarily be either a uniform and universal body of substantive law (the Blackstonian ambition) or the positive product of local jurisdictions. The rejection of this view implies the rejection of both concepts of the common law. There has been more debate in Canada as to whether the court structures should be made more federal through an increase in the jurisdiction of the Federal Court, without necessarily eliminating the residual nature of provincial court jurisdiction. Even proposals of this nature have met with resistance. See the discussion of the Federal Court and the notion of a Federal common law, *infra*, text accompanying footnotes 69-76.

⁴⁸ See the discussion, *infra*, text accompanying footnotes 111-115.

however, the question remains as to the importance of its decisions for the common law, or laws. The most radical view of *stare decisis*, and the one most consistent with the existence of provincial common laws, would see the Court notionally divided into ten provincial courts of appeal, its decisions binding in provincial matters only on the provincial common law courts from which the particular case arose. The Court would contribute to provincial common laws, and its power to depart from its own prior decisions would allow it to particularize the common law of each province. There appears, however, to be no support or proposals in favour of such a schizophrenic view of the Court, though a similar view had previously found judicial support with respect to the decisions of the Privy Council.⁴⁹ The bridging effect of Supreme Court decisions has been derived from a concept of *stare decisis* which attached to all decisions of the Court, regardless of the geographical origin of the cases involved.⁵⁰ This larger view of *stare decisis* is not, however, inevitable, and is itself based on an underlying view of the inseparability of the common law, at least within Canada. In common law matters, the decisions of the Court represent the common law everywhere within Canada because it is accepted as the same common law. If there were different common laws, the Court would be seen as pronouncing (differently) on all of them. The normative effect of the decisions of the Supreme Court is thus today the direct effect of the declaratory theory of the common law — as it was applied throughout the Commonwealth. There is no particular common law of each province since there was no particular date for the reception of the common law in each province.⁵¹ Since there is no particular common law of each province, the Supreme Court is accepted as articulating the common law of all of the common law provinces in all of its judgments.

Recent developments at the level of the Supreme Court do not appear likely to change this fundamental perspective. While there has been a sharp decline in the number of private law cases heard by the Court,⁵² it continues to hear some twenty to thirty per year⁵³ and is able to choose the cases it will hear. Provincial

⁴⁹ *Negro v. Pietro's Bread Co.*, [1933] O.R. 112 (C.A.); B. Laskin, *The British Tradition in Canadian Law* (London: Stevens, 1969) at 60. The Privy Council itself came to accept this position. See J. Crawford, *Australian Courts of Law* (Melbourne: Oxford Univ. Press, 1982) at 171 ("The common law had become not one but many"); J. Crawford "The New Structure of Australian Courts" (1977-78) 6 *Adelaide L. Rev.* 201 at 224-230; and generally, H. Marshall, "The Binding Effect of Decisions of the Judicial Committee of the Privy Council" (1968) 17 *I.C.L.Q.* 60.

⁵⁰ See Curtis, *supra* footnote 40 at 13; Friedman, *supra* footnote 40 at 726. The judicial authority cited in support of this proposition is one dealing, however, with federal legislation and not with the common law. See *Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504.

⁵¹ See *supra* footnote 18.

⁵² P. McCormick, "The Supervisory Role of the Supreme Court of Canada: Analysis of Appeals from Provincial Courts of Appeal, 1949-1990" (1992) 3 *Sup. Ct. L. Rev.* (2d) 1 at 7 (decline in private law cases from 62.2% of total in mid-century to 20.3% in 1980's).

⁵³ By comparison, the House of Lords deals with some 30 to 50 appeals per year, in all areas of law.

Courts of Appeal, while less frequently the object of appellate review, are nevertheless subject to potential review in all cases. This in itself is a powerful deterrent to creation of a second level of provincial appeal courts, modelled on that of the United States, which might be seen as a more potent source of provincial common law.⁵⁴ While the Supreme Court provides decisions of equal worth for all of the common law provinces, it does not follow that it can be seen as the source of a distinctly national, uniform and exclusively Canadian common law. The declining force of *stare decisis* plays a role in this, as does the decline in the frequency of Supreme Court private law cases. More significant, however, as will be seen, is the concept of the common law which underlies its own decisions, as evidenced by the pattern of authorities evident in its judgments.⁵⁵

The structure of Canadian courts is closely related to the appointment, tenure and status of Canadian judges. While superior court judges are appointed and remunerated by the Federal government, they are named from the provincial Bars of the jurisdiction in which they will sit. Judges are thus recognizably provincial or regional in origin and function; at the same time they have obligations and loyalties which are Federal in character.⁵⁶ They are not identified with a particular law. Underlying the mixed character of their appointment and functions, there is the underlying importance of the appointment process itself and related guarantees of judicial independence. Canadian judges are neither elected nor subject to popular recall and notions of popular, consensual sovereignty of particular political units have never been seen as relevant to judicial office. As in the United Kingdom, the overriding consideration has been the independence and quality of the judiciary, and not its responsiveness to political forces. This is not necessarily to deny a political dimension to the legal process; it rather posits an independent judiciary as a means of protection against the potential excesses of political life. The same considerations underly antipathy towards any process of public hearings of appointees to the Supreme Court of Canada.⁵⁷ The Canadian judiciary, like all judiciaries, must be broadly representative of the population it serves, but it is not necessary to abandon the pursuit of quality and independence while ensuring representativity.⁵⁸ An

⁵⁴ For as yet unsuccessful recommendations in favour of second provincial appeal courts, in Ontario and Québec, see T. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Ontario Ministry of the Attorney General, 1987) at 119-123; Barreau du Québec, *Rapport sur le fonctionnement des tribunaux judiciaires* (Montréal: Barreau du Québec, 1990) (*Rapport Gilbert*).

⁵⁵ *Infra*, text accompanying footnotes 111-115.

⁵⁶ "...[T]he superior Courts of the Canadian Provinces are not State Courts." in *Interprovincial Co-Operatives Ltd. v. R.* (1975), 53 D.L.R. (3d) 321 at 357, Pigeon J. Judges appointed by provincial governments also play an important role in application of federal legislation, notably in criminal and family law.

⁵⁷ For an attempted explanation of underlying reasons see H.P. Glenn, "Parliamentary Hearings for Supreme Court Appointments?" in M. Charlton and P. Barker, eds., *Contemporary Political Issues*, 2d ed. (Scarborough, Ont.: Nelson Canada, 1994) at 219.

⁵⁸ Hence the growth of judicial nominating commissions and judicial disciplinary commissions in preference to more direct forms of popular control of the judiciary. Judges

independent judiciary is responsive to claims of law derived from beyond the immediate exercise of political power.

V. Canadian Society and the Common Law

The English society which gave rise to the common law was a multi-cultural society. There were Angles, Saxons and Jutes; foreign merchants with ambulatory courts; a French-speaking aristocracy and judiciary. Old English was a combination of Germanic tongues (with declensions) and the dialect of Wessex began to dominate only in the tenth century. What we know as English emerged as the standard only with the decline of Anglo-Norman from the fourteenth century. The common law grew slowly out of all of this. It was common, but compatible with that which was not. Relations between common law lawyers and those of other courts and traditions, in England, were marked by a high degree of civility, collaboration and mutual respect.⁵⁹ Local custom had pride of place.

Where law must accommodate diversity it does so most easily at the level of individual decisions, and next most easily at the level of individual texts of law.⁶⁰ Notions of diversity, change, modernity and efficiency can all be accommodated with relative ease, to the extent that they are all concerned primarily with the immediate. The lasting power of the common law came from its lack of concern with the immediate. It told no-one what they had to do, but provided a forum within which their obligations could be determined, in a way which commanded great respect and which was faithful to multiple contexts. In the multi-cultural society which is Canada the common law must accommodate diversity which is perhaps greater than that of medieval England, though the separate courts and professions of England have been now integrated into a single, secular system. How does an integrated court system function in a non-integrated society, with a law said to be common?

The answer to this question has been seen in part already, in the structure of a multiple, unitary court system staffed by representative judges of multiple and overlapping loyalties. Yet the judges by their decisions also contribute to the definition of the common law and its relation to Canadian society. They must

appointed from different groups of the population are appointed not to represent those groups in the adjudicative process, and be subject to eventual recall by them, but to maintain themselves the ethic of an independent judiciary of quality.

⁵⁹ See W.R. Jones, "Relations of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries" (1970) 7 *Studies in Medieval & Renaissance History* (Old Ser.) 77.

⁶⁰ See, for accommodation of conflicting texts in the Talmudic tradition ("These and these [both] are the words of the Living God"), S.L. Stone, "In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory" (1993) 106 *Harv. L. Rev.* 813 at 828. The Talmudic legal tradition is described as anarchistic and lacking in institutional hierarchy, yet continuing over time in the face of radically inconsistent and plural understandings of the law.

define, notably, the relations which exist between the common law and aboriginal law, between the common law and the civil law and between the common law and the *Charter of Rights and Freedoms*. There remains the patterns of authority within the common law itself — the tolerance of diversity of a common law.⁶¹

A. *The common law and aboriginal law*

Aboriginal law preceded the reception of the civil law and the common law in the territory now known as Canada. Accommodation was therefore necessary in the “middle ground ... the place in between: in between cultures, peoples, and in between empires and the nonstate world of villages....[where] diverse peoples adjust their differences.”⁶² The common law traditionally would have had no difficulty with this process — it had reflected many customs in its time. By the late eighteenth century, however, the common law was becoming less flexible. The century of western reception of the common law in Canada was the century of development of the concept of *stare decisis*. Once again, however, the common law had to loosen up in the process of territorial expansion. There appear to be no reported cases of common law judges applying the common law to aboriginal people in private law cases, in the face of contrary aboriginal law. As it did in the past, the common law has thus implicitly recognized a principle of personality of laws, a principle which preceded the radical territoriality of the contemporary State. Contemporary discussion turns on section 88 of the Federal *Indian Act*,⁶³ which declares aboriginal peoples subject to “all laws of general application from time to time in force in any province....” These laws of “general application” have been judicially stated to include the received laws of England, in language which may be broad enough to include the common law.⁶⁴ Still, the common law is not applied in the face of contrary aboriginal law in private law matters and, in many instances, aboriginal custom has prevailed over provincial legislation.⁶⁵ Laws are thus not of general application because of the generality of their language. In all cases it is a question of whether a law can be said to be of general application given a principle of personality of laws which continues to be recognized and applied for aboriginal peoples. Adequate proof of aboriginal law will generally displace legislation, in private law, in the

⁶¹ On this latter subject, see *infra*, Part VI.

⁶² R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region* (Cambridge: Cambridge University Press, 1991) at x.

⁶³ R.S.C. 1985, c. I-6.

⁶⁴ *R. v. George*, [1966] S.C.R. 267 at 281, Martland J.

⁶⁵ See, most recently, *Casimel v. Insurance Corporation of British Columbia* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.) (aboriginal, customary adoption recognized for purposes of claim for no-fault death benefits, review of prior cases); and *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, notably at 730 (B.C.C.A.), Lambert J.A. (“The introduction of English law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet’suwet’en customary law would be expected to render much of the newly introduced

view of contemporary common law judges. The common law does not require identical solutions throughout the territory.

B. *The common law and the civil law*

The common law also co-exists within Canada with its longtime *interlocuteur*, the civil law. In this respect Canadian legal history parallels that of England within which the civil law long thrived, though in the particular fields of Equity, Admiralty and ecclesiastical law. It is perhaps ironic that in the major nineteenth century reforms of the common law the particular enclaves of civil law in England were eliminated, while at the same time the common law abandoned its most distinctive institutions and became largely adapted to civil law concepts and institutions.⁶⁶ The result of the nineteenth century reforms was a new commensurability between the civil and common laws. There is no possibility here of tracing reciprocal influences. The important phenomenon is that the civil and common law traditions began asking the same questions, though the answers might still differ. The common law has been influential in Québec, though its influence has been controversial.⁶⁷ Less evident, though no less real, has been the influence of the civil law in common law Canada. This has occurred both through the filters of English and American case law, which in the nineteenth century drank deeply from the civil law fountain, and through the influence of the Supreme Court of Canada, where the two traditions are constantly jostling one another.⁶⁸ This permeability of the common law tradition has been maintained in spite of the nationalizing influence of *stare decisis*. The judges of the common law remained, and remain, open to arguments from abroad.

The relations between the common law and the civil law have been the object of more formal discussion at the level of the Federal Court of Canada. The Federal Court's jurisdiction may extend, with appropriate legislative authorization, to all "laws of Canada."⁶⁹ This expression has been given a restricted meaning by the Supreme Court of Canada, which has consistently held that it refers only to actual legislation of the Federal Parliament or, in

English law inapplicable to the Gitksan and Wet'suwet'en peoples, particularly since none of the institutions of English law were available to them in their territory, so that their local circumstances would tend to have required the continuation of their own laws"). The case law relating to aboriginal title is also to this effect, but it is too voluminous to be referred to here. Its contemporary origins lie in *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313.

⁶⁶ *Supra*, text accompanying footnotes 14-16, 25.

⁶⁷ See e.g. P. Azard, "Le problème des sources du droit civil dans la province de Québec" (1966) 44 R. du B. can. 417; J.L. Baudouin, "L'interprétation du Code civil québécois par la Cour Suprême du Canada" (1975) 53 R. du B. can. 715; P.A. Crépeau, "Les lendemains de la réforme du Code civil" (1981) 59 R. du B. can. 625; H.P. Glenn, "Droit comparé et droit québécois" (1990) 24 R.J.T. 341.

⁶⁸ See the discussion of the Supreme Court, *infra*, text accompanying footnotes 111-115.

⁶⁹ *Constitution Act, 1867*, *supra* footnote 46, s. 101.

exceptional and defined cases, to Canadian or Federal common law.⁷⁰ The Federal Court can therefore not be given jurisdiction over the full range of matters falling within federal legislative competence. There is in principle no federal common law. The essentially unitary character of the Canadian court system is thus re-affirmed. The position of the Supreme Court has been criticized but is entirely justifiable from the perspective of both common and civil laws.

It may be recalled that the primary justification of Canada's unitary court system is the concept that a single judiciary should be responsible for application of both federal and provincial laws. Judicial authority, and hence judge-made law, should not be divided along federal-provincial lines.⁷¹ The reverse view was taken in the United States where the concept of state common laws had been developed as early as the eighteenth century.⁷² Since Canada's unitary court system is based on an underlying view of the inseparability, though not necessarily the uniformity, of the common law — a view which also contributes to the authority of Supreme Court decisions everywhere in common law Canada⁷³ — it is entirely consistent to maintain the unitary character of the system and deny in principle the existence of a federal common law.⁷⁴ From the

⁷⁰ *Québec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054.

⁷¹ *Supra*, text accompanying footnotes 45-47.

⁷² The existence of state common laws in the United States suggests a parallel Federal common law and there is less antagonism to this idea in the U.S. than in Canada. Even in the United States, however, the Supreme Court in the famous decision of *Erie v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), decided that there was no Federal common law which could be applied by U.S. Federal judges exercising diversity jurisdiction. Prior to *Erie*, the existence of a Federal common law had been taken to exist in diversity cases since the decision of the Supreme Court in *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (U.S. 1842). In other than diversity cases, Federal common law may exist today in the United States, though there has been considerable restraint exercised in its development. For its exceptional character see M.A. Field, "Sources of Law: The Scope of Federal Common Law" (1986) 99 Harv. L. Rev. 883 at 885, 886, 962, 964, 977; Atiyah & Summers, *supra* footnote 33 at 60, 61.

⁷³ *Supra*, text accompanying footnote 49.

⁷⁴ See also *Alda Enterprises Ltd. v. R.*, [1978] 2 F.C. 106 (T.D.) (no Federal common law even in the Yukon, where Federal legislative competence is exclusive). This position appears also to prevail in Australia, where state courts exercise a general jurisdiction. See Crawford, *supra* footnote 49 at 32 ("The apparently obvious distinction — that deciding a matter of state law is state jurisdiction, a matter of federal law, federal jurisdiction — could not be supported, for several reasons. First, the better view is that the common law is one and the same throughout Australia, and cannot be said to be either federal or state"). Professor Hogg has consistently argued in favour of a Federal common law, on the basis that the common law has a double aspect, provincial and Federal, depending on legislative authority to change it. He also however favours the unitary court system. Hogg, *supra* footnote 18 at 174-182. This position appears to give insufficient weight to the reasons underlying the unitary court system, and to the respective relations of the common and civil laws within Canada. The Supreme Court of Canada also rejected in *Québec North Shore*, *supra* footnote 70, the idea that the civil or common laws could be somehow notionally incorporated into Federal common law, depending on the province of origin. Absent a Federal common law, the common and civil laws apply of their own force.

perspective of the civil law, the position of the Supreme Court has been welcomed, since there appear to be no evident criteria for choosing common law sources, as opposed to civil law ones, as constitutive of a federal common law. This was articulated as early as 1894 by Chief Justice Strong of the Supreme Court, who declared "... the circumstance that the private law of one province, that of Québec, is derived from a different source, makes it impossible to say that there is any system of law, apart from statute, generally prevalent throughout the Dominion."⁷⁵ The common law has historically had no substantive agenda and has co-existed with other legal traditions. The Supreme Court's perspective toward the notion of a Federal common law is entirely consistent with this historical attitude.⁷⁶

C. *The common law and the Charter*

The relation of the common law to the *Charter of Rights and Freedoms* is also dependent on one's view of the nature of the common law. The United States' example is instructive in this regard. There judges have been accepted as making law through a process of *stare decisis*; the notion of a common law of each state was largely accepted in the formative stages of U.S. law; judicial authority is hence divided along the lines of federal and state legislative authority; and the United States Supreme Court has appropriately held that orders of state judges represent a form of state action and are subject to the *Bill of Rights*.⁷⁷ The decision is also supported by the electoral character of judicial office in many states (though the electoral process is undergoing major

⁷⁵ *Québec (City of) v. R.* (1894), 24 S.C.R. 420 at 428.

⁷⁶ The Supreme Court has, however, acknowledged the existence of Federal or Canadian common law in the fields of Crown law (including obligations of the Crown towards aboriginal peoples) and maritime law. Crown law being largely public law, this solution appears generally acceptable. The existence of a Canadian maritime law, rooted in English sources, has been bitterly contested in Québec. See A. Braën, "L'arrêt *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* ou comment écarter l'application du droit civil dans un litige maritime au Québec" (1987) 32 McGill L.J. 386. Once again, the idea of a division of the common law between jurisdictions is controversial and not compatible with the common law itself. English maritime law was not common law but largely civil law, as practised in the Court of Admiralty, and civilian principles were rarely replaced by common law rules. Over the history of English law the influence was rather from the civil law of Admiralty towards the common law. For discussion see H.P. Glenn, Case Comment (1987) 66 Can. Bar Rev. 360. There should therefore exist a presumption in favour of application of civil law in maritime cases, as being the law applied in England in such cases. This would preclude revival of common law defences, abolished by provincial statute, which were never applied by the English Admiralty court and hence never displaced the civil law. Cf. W. Spicer & W. Laurence, "Not Fade Away: The Re-emergence of Common Law Defences in Canadian Maritime Law" (1992) 71 Can. Bar Rev. 700. The Federal Court has also been conciliatory toward the civil law tradition in refusing to adhere to a notion of *stare decisis*. See *Murray v. Canada (Minister of Employment and Immigration)*, [1979] 1 F.C. 518 at 519-20, (C.A.); *Armstrong Cork Ltd. v. Domco Industries Ltd.*, [1981] 2 F.C. 510, (C.A.).

⁷⁷ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

revision). State private law is thus capable of being "constitutionalized" and this has occurred to a considerable extent.⁷⁸

In Canada, however, none of these underlying circumstances is present. *Stare decisis* has not prevailed over a wider range of Commonwealth sources; the common law has never been divided up and allocated out; the judiciary has thus remained a unitary one associated with both provincial and Federal governments; and the Supreme Court has now properly concluded that judicial activity is not state action such that it need be subject to the *Charter*, at least where it resolves disputes between private parties according to the common law.⁷⁹ As independent, non-elected adjudicators in pursuit of the common law, Canadian judges are not the type of political danger against which the *Charter* was meant to provide protection. They are rather the sources of the protection.

Private law relations subject to the common law thus are free from what has been referred to as the "nationalizing process" of the *Charter*.⁸⁰ They are subject to an undivided common law, but both in the past and in the present the common law which has been applied in Canada has been tolerant of diversity, as has the entire common law tradition through most of its history. The common law will clearly evolve in a way which is broadly consistent with the *Charter*,⁸¹ but lock-step provincial uniformity is not required. The general solution also permits some measure of tolerance of the particularity of Québec law. In its codified form it appears obviously legislative in character and therefore to represent state action, subject to the *Charter*. Since the *Civil Code* is the common law of the province, however, applicable to private legal relations by means of judges members of the same multiple, unitary court structure applicable everywhere in Canada, it is not clear that Québec law alone should be object of a constitutionalizing process.⁸² Two reasons suggest that Québec law should be

⁷⁸ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁷⁹ *Retail, Wholesale and Department Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573, [hereinafter *Dolphin Delivery*]. The decision also avoids what might be seen as the peculiar consequence of holding a judiciary responsible to itself. In the United States context, however, it means a great deal to say that state judiciaries are responsible to the Federal judiciary and its interpretation of the *Bill of Rights*.

⁸⁰ P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 30 at 41. See also A. Cairns, "The Past and Future of the Canadian Administrative State" (1990) 40 U.T.L.J. 319 at 333, 334 (*Charter* viewed as "an instrument to counter the centrifugal pressures of provincialism" and as a "device to limit the creation of provincial diversities by the exercise of provincial jurisdictional power"); J. Webber, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms" (1993) 5 Canterbury L.R. 207 at 230 ("the nationalistic aims of Charters of Rights[...] the new vehicle for nationalism's drive for uniformity[...]").

⁸¹ This is explicitly envisaged by the judgment of the Supreme Court in *Dolphin Delivery*, *supra* footnote 79 at 603, McIntyre J. See subsequently *Salituro v. R.*, *supra* footnote 24 (common law changed in order to make spouses who are irreconcilably separated competent witnesses for the prosecution, in accordance with values of the *Charter*).

⁸² See J.E.C. Brierley, "Québec's 'Common-Laws' (Droits communs): How many are there?" in *Mélanges Louis-Philippe Pigeon* (Montréal: Wilson & Lafleur, 1989) at 109.

subject to the same constitutional latitude as that of the common law of the other provinces. First, the *Civil Code* often does no more than declare the civil law. This was indeed the main objective of the codification of the *Civil Code of Lower Canada* in 1866. To attract constitutional scrutiny it should therefore be necessary to show that the impugned provision of the Code effectively represents a change in what would otherwise be the civil law, in the same way that statutes in common law jurisdictions represent a change in the common law. Second, Québec has its own *Charter of Rights and Freedoms*, whose application extends to private legal relations and which is applied by superior court judges of the unitary Canadian court structure. Even if all Québec legislation is state action, including its codes, the appropriate constitutional limitation is already in place at the provincial level.⁸³ Judicial latitude is possible in all of the provinces. The judicial structure and the underlying concept of law give respite from the potential reach of the constitution.

The *Charter* is of consequence not only for its substantive content but for the remedies which may be available for its violation. Section 24 of the *Charter* provides that the courts may provide the remedy which it "considers appropriate and just in the circumstances." Remedies have been the traditional strength of the common law and the question arises whether remedies available under the *Charter*, against the Crown, are or should be distinct from the remedies available at common law. The model for this type of distinctive remedy against the State is provided by France, where in the separate system of administrative courts a distinct set of rules of liability have been created for the French State.⁸⁴ There has been flirtation with the idea in the United States, where the notion of "constitutional torts" has received some currency in the face of a large measure of governmental immunity preserved by the law of torts. There appear to be few convincing reasons for the development of autonomous remedies or rules of substantive law under section 24 of the *Charter*. To the extent that such rules departed from the common law they would place the judiciary in the position of creating and applying rules particular to a given defendant. They could of course do so, but the history of Crown liability has been one of gradually equating the Crown with persons of full age and capacity and subjecting the Crown to the common law of liability, which looks to types of activity as criteria for liability. Nor should it be the case that particular rules develop for holding the Crown more strictly liable than normal defendants. The French example demonstrates that State liability gives rise to a similar range of criteria for liability as has occurred in private law, and strict liability is not appropriate in many cases of state activity. It may be in some cases, but these are cases in which the common law is entirely capable of reaching similar results. Continued reliance on existing private law avoids, moreover, the persistent problem of the respective roles of the common and civil laws in formulation of Federal or

⁸³ See *Daigle v. Tremblay*, [1989] 2 S.C.R. 530 at 571, for the inapplicability of the Canadian *Charter* to a "civil action between two private parties" in Québec.

⁸⁴ *Blanco*, Tribunal des conflits, 8 February 1873, Sirey 1873 III. 153.

Canadian case law.⁸⁵ Existing Crown liability law incorporates by reference provincial law of tort and delict. There is a great deal of flexibility and suppleness in this law. It can be used under section 24; it can produce the most appropriate results; its use does not give rise to complaints of *imperium*.

VI. Patterns of Common Authority

The common law has been open to the particularities of the society around it, open to often distant sources, and tolerant of diversity. There has never been a "monolithic" common law, except possibly in the ambitions of Blackstone or as object of attacks by nationalist adherents to *stare decisis* and federal court structures. Today the common law should, logically, continue to exhibit the same characteristics. To fail to do so would be to abandon the common law tradition—to abandon an identity—and, equally importantly, to fail to respond to contemporary circumstance. How tolerant of diversity is the contemporary common law, within itself? How open is it to a variety of sources of law?

There is a relation between diversity of results and diversity of sources. Uniform results can be brought about only by uniformity of sources. The instrumentalization of law requires a narrowing of sources. To the extent, however, that sources remain freely available, notably over State boundaries, there is less predictability of result, more likelihood of a range of both commonality and diversity. The order may be only the larger one of chaotic structures. If the common law today remains faithful to its tradition it should thus exhibit both commonality and diversity, and ongoing resort to a wide range of sources.

The commonality of the common law is today demonstrable in many respects, and throughout the world of the common law. The most distinguishing feature of the common law is now its adversarial form of civil procedure, and variants of it exist in all common law jurisdictions. There are common ideas, not presently reflected in other legal traditions, in the law of torts (multiple torts, foreseeability, concepts of pure economic loss and negligent misrepresentation), contract (consideration), property (feudal concepts of ownership, trusts) and judicial powers (contempt, injunctions). Commonality here, over the entire breadth of common law jurisdictions, is at an abstract level but can also be demonstrated to exist at the level of concrete results. Canadian legal writing evidences a high level of commonality of result in judicial decisions, from province to province within Canada and amongst Commonwealth jurisdictions. The standard form of propositions of law in Canadian legal writing is that of a general rule or principle, with citation to supporting judicial decisions drawn

⁸⁵ Compare the different perspectives of G. Tremblay, "L'article 24(1) de la Charte des droits et libertés: point de vue d'un civiliste" in G. Beaudoin, ed., *As the Charter Evolves/ Ainsi évolue la Charte* (Cowansville: Yvon Blais, 1990) at 111; M. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517.

from a number of provinces or Commonwealth jurisdictions.⁸⁶ There appears to be no tendency to identify particular jurisdictions as following distinct rules, as is frequently the case in the United States. A common form of title is thus, and it is borrowed at the head of this article, "The Law of in", a formula indicating the common law exists both in and potentially beyond the particular jurisdiction.⁸⁷ The level of commonality means that conflicts of laws are usually confined to conflicts of statute law. Private international law is itself seen as common to common law jurisdictions;⁸⁸ its rules as to proof of foreign law, moreover, allow parties to proceed on the basis of the law of the forum and to bury potential conflicts.⁸⁹

There is no institutional device however, in the world of independent common law judges, to ensure uniform results in decision making. The contemporary diversity of the common law in Canada manifests itself in three different ways. Canadian courts, most notably the Supreme Court of Canada,

⁸⁶ See generally the works cited *infra* footnote 87. A frequent device is the indication "but compare" or "but see", within the same footnote supporting the general proposition of law in the text.

⁸⁷ See e.g. C. Brown & J. Menezes, *Insurance Law in Canada*, 2d ed. (Toronto: Carswell, 1991); P. Cumming & N. Mickenberg, *Native Rights in Canada*, 2d ed. (Toronto: General Pub., 1972); C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Scarborough, Ont.: Carswell 1994); G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1986); E. Meehan & P. Vaartnou, *Creditors' Remedies in Alberta* (Toronto: Carswell, 1987); A.W. Mewett, *An Introduction to the Criminal Process in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1992); E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1992); M.A. Waldron, *The Law of Interest in Canada* (Scarborough, Ont.: Carswell, 1992); D. Waters, *The Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984); B. Welling, *Corporate Law in Canada: The Governing Principles*, 2d ed. (Toronto: Butterworths, 1991). Many contemporary treatises also avoid any jurisdictional identity in their title, while dealing extensively with Canadian, Commonwealth and U.S. authorities. See e.g. P. Maddaugh & J. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990); S.M. Waddams, *The Law of Contracts*, 3d ed. (Aurora, Ont.: Canada Law Book, 1993); S.M. Waddams, *The Law of Damages*, 2d ed. (Aurora, Ont.: Canada Law Book, 1991); R.J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1983). Cf., drawing in many instances however on Commonwealth and U.S. law, B. Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991); L.R. Robinson, *British Columbia Debtor-Creditor Law and Precedents* (Toronto: Butterworths, 1993); D. Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987).

⁸⁸ There is therefore neither Federal private international law nor, given the Federally-appointed judiciary and a unitary court structure, a process of "constitutionalization" of common law private international law. The constitution has been rarely invoked even as a means of controlling interprovincial statutory conflicts of law. See, however, *Interprovincial Co-operatives*, *supra* footnote 56; *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, *Hunt v. T & N plc*, [1993] 4 S.C.R. 289.

⁸⁹ For the basic rule that foreign law is a matter of fact which must be specifically pleaded, see J.G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) at 147. The law of many European jurisdictions exaggerates formal conflicts of laws by requiring obligatory judicial application of choice of law rules and hence of foreign law. See generally, H.P. Glenn, "Harmonization of Law, Foreign Law and Private International Law" (1993) 1 Eur. Rev. Private L. 47.

may choose not to follow English or Commonwealth authority. This has occurred, for example, in relation to recovery in tort for economic loss,⁹⁰ restitution,⁹¹ the exercise of the *parens patriae* power for purposes of sterilization,⁹² hearsay,⁹³ standing⁹⁴ and confidentiality.⁹⁵ Canadian trial and appeal courts may also choose to align themselves with more recent Commonwealth authority and abandon prior decisions of the Supreme Court of Canada.⁹⁶ Finally, trial and appeal courts within Canada may choose not to follow case law of other provinces, though in doing so may frequently use the language of the declaratory theory and thereby explicitly negate the impression of creating particular provincial common law.⁹⁷

The common law may also be diversified by statutory intervention,⁹⁸ but the interplay of statute and common law is complex. The codification of civil procedure effected by provincial Rules of Civil Procedure has led to what has

⁹⁰ See *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [hereinafter *Norsk*], notably McLachlin J. at 1148 using the language of shared differences ("The decisions of the House of Lords in *Murphy* and of this court in *Kamloops* illustrate two different approaches to the problem of defining the legal parameters of common law rules").

⁹¹ See generally Maddaugh & McCamus, *supra* footnote 87, notably ch. 1 and 2 on the tendency of Canadian case law to align itself with U.S. as opposed to Commonwealth authority.

⁹² Compare *Re B (A Minor)*, [1987] 2 W.L.R. 1213 (H.L.), and *Re Eve*, [1986] 2 S.C.R. 388.

⁹³ See *R. v. Smith*, [1992] 2 S.C.R. 590 (reliable hearsay evidence need not be excluded simply because it cannot be tested in cross-examination); P.B. Carter, "Hearsay: Whether and Whither?" (1993) 109 L.Q.R. 573; and see for further divergence between English, Australian and New Zealand case law, Aylmerton, *supra* footnote 2 at 683-685.

⁹⁴ See *Bighetty v. Saskatchewan Power Corp.* (1994), 111 D.L.R. (4th) 83 at 89 (Man. C.A.) (approach to standing "more liberal in Canada than in the United Kingdom").

⁹⁵ See *The Royal Bank of Canada v. Lee and Fishman* (1992), 9 C.P.C. (3d) 199 (Man. C.A.), notably at 204 ("... privilege and confidentiality have merged in some areas of Canada, but appear distinct in England"), discussed by Perell (1993) 72 Can. Bar Rev. 72.

⁹⁶ See notably *Batavia Times Publishing Co. v. Davis* (1978), 20 O.R. (2d) 437 (H.C.J.); *Salzburger Sparkasse v. Total Plastics Service Inc.*, [1988] 6 W.W.R. 408 (B.C.S.C.); *Holub v. Holub* (1976), 71 D.L.R. (3d) 698 (Man. C.A.); and see S.M. Waddams, *Introduction to the Study of Law*, 4th ed. (Toronto: Carswell, 1992) at 86 (where English case law adopted by Supreme Court of Canada is later over-turned in England, lower courts in Canada free to follow earlier or later English decision).

⁹⁷ See e.g. *Spooner v. Ridley Terminals* (1991), 62 B.C.L.R. (2d) 132 (S.C.), notably at 140, Macdonald J. ("I do not perceive that to be the law in British Columbia"); *Alex Duff Realty Ltd. v. Eagle Crest Holdings Ltd.*, [1983] 5 W.W.R. 61, notably at 75 (W.W.R.), (Alta. C.A.) Kerans J.A. ("I would not give effect to this approach").

⁹⁸ The process of statutory diversification has not been overcome by the work of the Uniform Law Conference. See generally R.C.C. Cuming, ed., *Perspectives on the Harmonization of Law in Canada* (Toronto: Univ. of Toronto Press, 1985) notably at 2 ("Even in the unlikely event that all jurisdictions were to enact a uniform act as published, uniformity would soon be destroyed by amendments made after the legislation was in force. Indeed, the Uniform Law Conference amends its own acts, thus producing dissimilarity between jurisdictions which retain the unamended form of an act and those which adopt the act in its amended form").

been called the "provincialization of adjectival law",⁹⁹ yet decisional law continues to be cited from province to province and teaching of Civil Procedure in many law schools is done without limitation to a single province.¹⁰⁰ The autonomy of provincial statute law is further diluted by the common background of common law and the continuing relevance of extra-provincial decisional law in interpreting similar legislative provisions. Provincial legislation is also subject to *Charter* challenge. The common law may thus provide a bridge between islands of provincial legislation. On the other hand it need not do so, and in the uniform legislative field of Federal criminal law the existence of formal, interprovincial rules of *stare decisis* has been explicitly rejected by the Supreme Court of Canada.¹⁰¹

Acknowledgment must also be made of the emergence — or more precisely re-emergence — of the common law in French. Spurred by the existence of francophone communities living outside of Québec, and mirrored by the historical existence of the civil law in English in Québec,¹⁰² the common law is now developing legislative, judicial and doctrinal expression in the French language. The linguistic roots of much of the common law (torts, *torts*; trespass, *trépasser*; mortgage, *gage mort*; fee simple, *fief simple*) have thus re-surfaced in reflecting Canada's linguistic diversity. The *franci* and the *anglici* were there at the origins of the common law; they are still there a millenium later. The common law is inextricably linked to both of them.

Contemporary citation patterns in common law Canada indicate a continuing diversity of sources in the adjudication process. An examination of citations patterns in the first volume of ten recent years of the Dominion Law Reports indicates widespread resort to extra-provincial authority.¹⁰³ Provincial courts

⁹⁹ R.B. White, *The Art of Discovery* (Aurora, Ont.: Canada Law Book, 1990) at 1, and see A.J. Black, "Pretrial Discovery in Scotland, England and Canada" (1992) 39 *Netherlands Int. L. Rev.* 267 at 283, pointing out the absence of any comprehensive and generally applicable work on pleadings or procedure in Canada.

¹⁰⁰ See G. Watson, *et al.*, *Civil Litigation: Cases and Materials*, 4th ed. (Toronto: Emond Publications, 1991), dealing with Canadian common law jurisdictions. At the Faculty of Law of McGill University the civil procedure of the common law provinces and of Quebec is taught in a single course.

¹⁰¹ See *Wolf v. R.*, [1975] 2 S.C.R. 107; and the discussion of Flowers, *supra* footnote 17 at 486-490. For different provincial perspectives on Federal criminal law, influenced in part by common law and civilian traditions, see L. Arbour, "Comparative Judicial Styles: The Development of the Law of Murder in the Quebec and Ontario Courts of Appeal" (1980) 11 R.D.U.S. 197; N. Kasirer, "The Annotated Criminal Code en version québécoise: Signs of Territoriality in Canadian Criminal Law" (1990) 13 Dal. L.J. 520.

¹⁰² See J.E.C. Brierley, R.A. Macdonald, *et al.*, *Québec Civil Law* (Toronto: Emond Montgomery Publications, 1993).

¹⁰³ The years examined were those of 1984-1993 and the volume numbers of the Dominion Law Reports were 150 (3d) and 11, 24, 30, 40, 51, 63, 73, 84 and 96 (4th). The total number of cases searched was 644 and the total number of citations was 4930, yielding an average number of 7.66 citations per case. All citations of all cases reported were grouped in 13 categories, including those of jurisdiction-specific and legislative fields such as taxation. The categories used and number of cases per category were Family (35), Administrative (54), Property (76), Labour (69), Civil Procedure (86), Taxation (12),

(high courts and courts of appeal) refer to case law of their own province in a proportion ranging from only 4% to 40% of their total citations, with citations to Supreme Court decisions, representing a law taken to be common and not purely provincial in character,¹⁰⁴ representing another 18% to 28%. Provincial variations are as follows:

	Own	SCC	Other Can	Foreign
ALBERTA	28.7	17.7	34.0	19.6
BRITISH COLUMBIA	32.0	19.3	19.6	29.1
MANITOBA	19.7	26.3	37.4	16.6
NEW BRUNSWICK	26.2	27.2	34.0	12.6
NEWFOUNDLAND	4.3	28.3	43.5	23.9
NOVA SCOTIA	25.8	26.3	32.8	15.2
ONTARIO	40.4	21.7	15.2	22.7
PRINCE EDWARD ISLAND	15.3	23.5	45.9	15.3
SASKATCHEWAN	25.7	26.9	32.3	15.0
Avg (1)	24.2	24.1	32.7	18.9
Avg (2)	31.9	22.1	24.2	21.8

- (1) Average: total of column divided by 9; this calculation treats each province as equal regardless of how many cases were cited by that particular province.
- (2) Average: total cases cited to a column divided by the grand total of cases cited; this calculation gives greater weight to provinces that cited more cases.

Criminal (29), Insurance (40), Constitutional and International (137), Corporations (15), Torts (33), Debtor-Creditor (19) and Contracts (39). For a more detailed analysis of results, by category, see H.P. Glenn, "The Use of Comparative Law by Courts" in *Contemporary Law 1994 Droit contemporain* (Cowansville, Qué.: Yvon Blais Inc., 1995) 85. The statistics in the text closely parallel those produced by Professor McCormick in his studies of annual decisions of the Saskatchewan and Manitoba Courts of Appeal. See P. McCormick, "Caseload and Output of the Saskatchewan Court of Appeal: An Analysis of 12 Months of Reported Cases" (1989) 53 Sask. L. Rev. 341 at 356; P. McCormick "Caseload and Output of the Manitoba Court of Appeal, 1990" (1992) 21 Man. L.J. 24 at 42; and more generally P. McCormick, "The Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citations of Judicial Authority, 1922-92" (1994) 32 Osgoode Hall L.J. 272.

¹⁰⁴ *Supra*, text accompanying footnote 49.

These patterns are substantially different from those which exist in the United States, where citation patterns are affected by the absence of Supreme Court jurisdiction in private law matters, itself a product of a divided concept of the common law. In the United States, out-of-state citations represented 57% of all citations in the period 1870-1900; 43% in the period 1905-1935; and only 33% in the period 1940 to 1970. In some states out-of-state citations constituted less than 20% of citations from 1940 to 1970.¹⁰⁵ Transposed to the above graph, these figures would show a first vertical column ("Own") which averaged 67% and was over 80% in some cases. In 1950, 1960 and 1970 the California Supreme Court cited itself and California Courts of Appeal approximately two-thirds of the time; a further 10% to 20% of citations were to federal courts; only some 10% of citations were to other state or English courts.¹⁰⁶

Canadian citation patterns evidence an underlying concept of the common law, which thus dominates court structures,¹⁰⁷ the precedential effect of Supreme Court decisions¹⁰⁸ and common law sources. The common law in Canada today is not limited to Canadian, English and Commonwealth authorities; U.S. law is frequently influential in developing areas of law.¹⁰⁹ The arrival of computer research in decisional law does not appear likely to change these patterns; while searches can be directed to purely provincial sources, computer speed allows searches through all potentially relevant jurisdictions with only a relatively minor increase in time. A contemporary commentator has thus observed that "The inspiration for the common law now comes from many sources."¹¹⁰

The Supreme Court of Canada's use of sources is entirely consistent with this open view of the common law, and the decline of national notions of *stare decisis* has enhanced the Court's use of trans-national authority. Its references to foreign law more than doubled from the 1950's to the 1970's,¹¹¹ a full third

¹⁰⁵ L.M. Friedmann, *et al.*, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stan. L. Rev.* 773 at 801, 802.

¹⁰⁶ J.H. Merryman, "Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970" (1977) 50 *Cal. L. Rev.* 381 at 394-400. Citations to English authorities represent less than one-half of one per cent of citations; the rest of the world is absent.

¹⁰⁷ *Supra*, text accompanying footnote 47.

¹⁰⁸ *Supra*, text accompanying footnote 49.

¹⁰⁹ See *e.g.* *Caratun v. Caratun* (1987), 9 R.F.L. (3d) 337 (Ont. H.C.J.) (marital property includes spouses' "career assets"); *Canadian Pacific Air Lines Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233 (H.C.J.) (Bank constructive trustee of money derived from travel agent selling airline tickets under agreement imposing trust in favour of airline); *Suncor Inc. v. Canada Wire and Cable Ltd.*, [1993] 3 W.W.R. 630 (Alta. Q.B.) (liability in tort of successor corporation).

¹¹⁰ D.M.M. Goldie, "The Supreme Court of Canada and the Common Law — A Future Consideration" in G.A. Beaudoin, ed., *La Cour suprême du Canada/The Supreme Court of Canada* (Cowansville: Y. Blais, 1986) 115 at 121.

¹¹¹ D. Casswell, "Doctrine and Foreign Law in the Supreme Court of Canada: A Quantitative Analysis" (1981) 2 *Sup. Ct. L. Rev.* 435 at 441 (from .43 references to foreign law per judgment in the late 1950's to 1.15 references to foreign law per judgment in the late 1970's). In this regard the Court is returning to an earlier pattern, in which U.S. and

of its citations are now to foreign, persuasive authority.¹¹² Most significantly, its use of foreign authority now extends fully to constitutional law and the application of the Canadian *Charter of Rights and Freedoms*¹¹³ and it has increasingly looked to the civil law in its ongoing search for the common law.¹¹⁴ It has also, however, greatly increased the attention it pays to indigenous, Canadian doctrinal writing, while its use of broad, general standards ("real and substantial connection")¹¹⁵ allows wide latitude to provincial courts in implementing its decisions.

VII. Recycling the Common Law

Law in the last two centuries has been powerfully impressed with political and national objectives. Legal theory in the western world has been almost entirely captured by the idea of national legal systems. The model of exclusive, national legal systems appears, however, to have now played out. National political orders are both fragmenting and coalescing into larger and looser regional forms of organization. These may entail some

foreign authority was more frequently used than in the period 1900-1950. See J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1966) 2 U.B.C.L. Rev. 478.

¹¹² This figure is derived from the analysis described in footnote 103 above. The citations of the Supreme Court divide almost equally in thirds to its own decisions; other Canadian courts; and Commonwealth and foreign authority.

¹¹³ R. Harvie & H. Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the *Charter*" (1990) 28 Osgoode Hall L.J. 729 at 738, 739 (approximately half of *Charter* cases including at least one reference to U.S. law); C. Manfredi, "The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms" (1990) 23 Can. J. Pol. Sc. 499 at 503 (quadrupling of rate of reference to U.S. law from 1950's to 1980's — 1.8% of total citations in the period 1949 to 1953, 7.9% in the period 1984-1988). Recent cases also indicate increasing openness to international human rights law. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056, 1057; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 753.

¹¹⁴ See *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at 43, (constructive trust and unjust enrichment); *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 203-204, (alternative claims in tort and contract); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1993] 1 W.W.R. 1 at 35 (privacy of contract); *Norsk*, *supra* footnote 90. The *Norsk* decision is particularly instructive, with all three judgments of the Court debating the significance of civilian authority. The civilian authority cited is not limited to Québec law and the Supreme court's own Québec case law, but also to French and Belgian law. The civil law, like the common law, is not confined by national boundaries. The Supreme Court's expansive view of civil law authority has in recent years greatly contributed to the reception its decisions have received in Québec. See H.P. Glenn, "Le droit comparé et la Cour suprême du Canada" in *Mélanges Louis-Philippe Pigeon*, *supra* footnote 82 at 197; and for the ongoing membership of Québec law in a larger civil law family, which has both influenced and been influenced by the common law, see H.P. Glenn, *Droit québécois et droit français: communauté, autonomie concordance* (Cowansville, Québec: Y. Blais, 1993).

¹¹⁵ See *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077 (criterion for recognition of jurisdiction of foreign court for purposes of recognition of its judgment).

measure of formal legal harmonization (as in Europe) or may not (as in North America). In both instances, however, such new structures blur national concepts of law and facilitate the flow of legal ideas, and judgments, across political boundaries.¹¹⁶ At the same time contemporary communications technology facilitates informal groupings of people bound together more by interests, work or professional objectives than by national identity. These are the new "epistemic communities" whose boundaries follow not geography but optic fibre. In law the most immediate manifestations of new political alignments and modern technology is the inter-jurisdictional law firm, which represents a major legal development. For the first time in legal history units of legal practice exist whose organizational structure extends beyond immediate political authority and within which law can be thought in inter-jurisdictional terms.¹¹⁷ Already the ethical groundwork for inter-jurisdictional practice has had to be established.¹¹⁸

Law in the next century will continue to face many of the old challenges, but we are now becoming aware of the complexity, and limits, of legal regulation of technology, race relations, population flow, environmental protection and gender equality. It is unlikely that definitive solutions will immediately present themselves in these fields. There is little belief that there are eternal solutions, brooding omnipresently, awaiting discovery. There are therefore more reasons than in the last two centuries for legal, and judicial, modesty. There are more reasons for remaining open to other voices and other solutions. There are more reasons, faced with universal hardware, "global culture" and international markets, to be aware of social particularity. Systems today must therefore be thought of flexibly; the notion of "fuzzy law" has emerged in discussion of the new law of Europe.¹¹⁹

¹¹⁶ For the immediate influence of these concepts on the case law of the Supreme Court of Canada see *De Savoye v. Morguard Investments Ltd.*, *ibid.* (liberalization of criteria for recognition of foreign judgments); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (restrictions on injunctive restraint of foreign actions).

¹¹⁷ For discussion, see H.P. Glenn, "Private International Law and the New International Legal Professions" in *Mélanges von Overbeck* (Fribourg, Switzerland: Presses Universitaires Fribourg, 1990) 31.

¹¹⁸ In Canada see the Federation of Law Societies of Canada Draft Protocol of the Inter-Jurisdictional Practice Implementation Committee, and in Europe the Code of Conduct for Lawyers in the European Community, in Conseil des barreaux de la Communauté européenne, *Cross Border Practice Compendium* (Deventer: Kluwer, 1991) at c. 4-15.

¹¹⁹ See M. Delmas-Marty, *Le flou du droit* (Paris: Presses Universitaires de France, 1986); and on the underlying mathematical model, see B. Kosko, *Fuzzy Thinking: The New Science of Fuzzy Logic* (New York: Hyperion, 1993). Already in the common law world Sir Thomas Holland had spoken of "chaos with a full index." Cited by N. Marsh, Review (1981) 30 I.C.L.Q. 486 at 488. Savigny had also taught that adjudication is entirely compatible with a multiplicity of sources; it is rather political or instrumental objectives which dictate a narrowing of sources.

These are circumstances in which the methods of the common law have demonstrated their relevance. Moreover, these methods have not been forgotten in the common law world, though there have been varying levels of suppression. Recycling does not here involve revivification.¹²⁰ In the contemporary Commonwealth, the common law floats freely¹²¹ and the experiences of both the Supreme Court of Canada and the contemporary United Kingdom are indicative of the new commensurability between common and civil laws.¹²² In spite of the vivisection of the common law practised internally in the United States, the notion of an Anglo-American legal tradition continues.¹²³ Australia and New Zealand were recently said to be "somewhat in advance" of the United Kingdom in accepting greater diversity of sources.¹²⁴

Historians, linguists and internationalists teach the necessity of distance as a means of understanding. Distance promotes, though can never guarantee, objectivity. In distancing themselves from immediate sources, through

¹²⁰ The notion of recycling has not been invented by contemporary environmental lawyers. The aboriginal legal tradition, alive in Canada, teaches that it is not time that passes, but the world, which is constantly re-born. E. Goldsmith, *The Way: An Ecological World View* (Boston: Random House, 1992) at 108. It is thus understood that "the behaviour of successive generations ... is critical to cosmic continuity and the prevention of a reversion to the original chaos."

¹²¹ See e.g. J. Matson, *supra* footnote 18 (referring largely to Africa and the Far East); G.L. Peiris, "Patent Error of Law and the Borders of Jurisdiction: The Commonwealth Experience Assessed" (1984) 4 Leg. Studies 271; K.M. Hogg, "Negligence and Economic Loss in England, Australia, Canada and New Zealand" (1994) 43 I.C.L.Q. 116, notably at 117 ("divergence in the common law" [emphasis added]); A. Watson, "The Future of the Common Law Tradition" (1984) 9 Dal. L.J. 67 at 84 ("... many of the rules have a common origin which still influences the understanding of them, even if they have come to diverge from one another in the different jurisdictions").

¹²² For the United Kingdom, see Aylmerton, *supra* footnote 2 at 679-683, notably at 680 ("... a revolutionary change in the law and the legal system"); J. Levitsky, "The Europeanization of the British Legal Style" (1994) 42 Am. J. Comp. L. 347 and generally B. Markesinis, ed., *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (New York: Oxford Univ. Press, 1994). At the same time the Practice Statement of 1966 has allowed the House of Lords to be more open to other jurisdictions and there is generally increased citation in the United Kingdom of overseas (non-continental) material. See R.J.C. Munday, "New Dimensions of Precedent" (1978) 14 S.P.T.L. 201 at 203-207.

¹²³ See R.A. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930* (New York: New York Univ. Press, 1987) (period of U.K.-U.S. rapprochement 1870-1930, though subsequent decline under political and social perspectives of Maitland, Pound, Frankfurter, Laski; title drawn from Sir Frederick Pollock's 1911 lectures at Columbia University); cf. review by P.V. Baker (1988) 104 L.Q. Rev. 153 at 155 (Anglo-American legal community as vigorous as before; "reports of its demise are exaggerated"); J.H. Langbein, "Chancellor Kent and the History of Legal Literature" (1993) 93 Col. L. Rev. 547 at 567 ("... we still for many purposes think of the English and American legal systems as comprising an inseparable entity called Anglo-American law"); Atiyah and Summer, *supra* footnote 33 (commensurability of English and American law though profound differences).

¹²⁴ Aylmerton, *supra* footnote 2 at 686.

openness to distant ones, common law judges distance themselves from local, instrumental objectives. They become more than enforcers. In opening the debate to different solutions there must inevitably be reconciliation of differences. This means that different traditions are maintained, but co-exist. In these circumstances it is not the commonality of answers which matters, but the commonality of questions. If enough people can ask the right questions, perhaps there can be agreement on the right answers. The common law has long taught, and continues to teach, how to go about this. It is a method of legal thought found in and beyond Canada. Where it is practised there is also common law.