

THE IMPACT OF LEGAL TRADITIONS ON QUEBEC PROCEDURAL LAW: LESSONS FROM QUEBEC'S NEW CODE OF CIVIL PROCEDURE

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The adoption of a new Code of Civil Procedure in Quebec provides an opportune moment to consider the reasons for, and consequences of, a new direction in adjectival law. Moreover, it is an appropriate time to reflect on the influence of legal traditions on civil procedure, and the role played by such traditions in the legislative evolution and judicial interpretation of procedural law. This paper analyzes the current trends in civil procedure in Quebec, from both legislative and judicial standpoints, and seeks to relate these trends to tradition-based influences. Ultimately, this study demonstrates that Quebec's procedural law has experienced great swings of the pendulum – originally inheriting continental civilian procedure from the French, gradually evolving towards a very common law/adversarial notion of procedure, and now reverting back in a civiliste direction.

L'adoption du nouveau code de procédure civile du Québec s'avère une étape favorable pour examiner les raisons et les conséquences d'un nouvelle approche du droit procédural. Elle constitue en outre un moment propice pour réfléchir sur l'influence exercée par les traditions juridiques sur la procédure civile, et sur le rôle joué par ces traditions dans leur évolution législative et leur interprétation judiciaire. Le présent article analyse les tendances actuelles de la procédure civile québécoises tant sur le plan législatif que judiciaire, et cherche à trouver un lien entre ces tendances et les influences provenant de ces diverses traditions.

En fin de compte, l'article démontre que le droit procédural québécois a connu des fluctuations considérables avec, à l'origine, une procédure civile héritée de la France ayant progressivement évolué vers

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la common law et la notion de procédure contradictoire, et qui maintenant retrouve son caractère civiliste

1. Introduction

Quebec, the only jurisdiction in Canada to adhere to the civilian legal tradition in the realm of private law, has been characterized as a mixed legal system primarily by virtue of its bijurality.¹ As is typical of many civil law jurisdictions, Quebec's private law is codified, governed by both a *Civil Code* and a *Code of Civil Procedure*.² Yet the legal landscape is about to shift as Quebec currently stands on the brink of procedural change. On February 20, 2014, the National Assembly adopted a new *Code of Civil Procedure*, scheduled to come into force in 2016.³ Unlike Quebec's substantive law which, unsurprisingly given the enormity of the task, has been codified only twice,⁴ the 2014 *Code of Civil Procedure* represents the fourth project of complete recodification of procedural law in the province's history, over and above several instances of substantial revision to existing codes.⁵ It is, accordingly, an opportune moment to consider the reasons for, and consequences of, yet another new direction in adjectival law. Moreover, it is an appropriate time to reflect on the influence of legal traditions on civil procedure, and the role played by such traditions in the legislative evolution and judicial interpretation of procedural law.

At first glance, it may seem odd to focus on procedural law, which may be thought less consequential when compared to substantive law, as an object of tradition-based inquiry. However, as many distinguished

¹ See generally William Tetley, "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified)" (1999) 60:3 La L Rev 677; H Patrick Glenn, "Quebec: Mixité and Monism" in Esin Örtücü, Elspeth Attwooll and Sean Coyle, eds, *Studies in Legal Systems: Mixed and Mixing* (The Hague: Kluwer Law International, 1996); Rosalie Jukier, "Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec" (2011) 6:1 J Comp L 54 at 55-57.

² In addition to the codes, Quebec law is supplemented by statutes, judicial decisions, and the quasi-constitutional *Charter of Human Rights and Freedoms*, RSQ, c C-12 [*Quebec Charter*].

³ Bill 28, *An Act to Establish the New Code of Civil Procedure*, 2nd Sess, 39th Leg, Quebec, 2014 (assented to 20 February 2014) [2014 Code].

⁴ The first *Civil Code of Lower Canada* dates to 1866 and the second *Code*, the *Civil Code of Quebec*, was enacted in 1991 and came into force in 1994. Regarding the enormity of the task of codification, see John EC Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec" (1992) 42 UTLJ 484 at 488.

⁵ To date, there have been three codifications of civil procedure in Quebec with *Codes of Civil Procedure* dating from 1866, 1897 and 1965 as well as a substantial revision of the 1965 *Code* in 2002 and 2009.

thinkers in the field have aptly pointed out, procedural law is often the best reflection of the legal culture of a given society. According to Stephen Goldstein, “societies may see their basic values reflected more in their procedural systems than in their substantive law.”⁶ This paper will, therefore, seek to analyze the current trends in civil procedure in Quebec, from both legislative and judicial standpoints, and seek to relate these trends to tradition-based influences.⁷ Ultimately, this study will demonstrate that Quebec’s procedural law has experienced great swings of the pendulum – originally inheriting continental civilian procedure from the French, gradually evolving towards a very common law/adversarial notion of procedure, and now reverting back in a *civiliste* direction.

Before, however, a proper reflection of procedural law and tradition-based evolution in Quebec can be undertaken, two preliminary matters should be addressed. First, it is important to set out the principal differences in the conception of procedure within the major occidental legal traditions of the civil and the common law. Second, it is necessary to trace the historical evolution of civil procedure in the province of Quebec, in particular the tradition-based changes that have occurred over time.⁸ This distinct and culturally-rich background is essential to appreciate and analyze, in a third part, recent trends occurring on both the legislative and jurisprudential fronts.

2. *Tradition-based Differences in Procedural Law*

Tradition-based differences in procedural law have often been crudely, or stereotypically, labelled as “adversarial,” to define the common law procedural system, and “inquisitorial,” to describe the continental civilian approach to civil procedure.⁹ There are, of course, many reasons why such

⁶ Gerald Goldstein, “The Odd Couple: Common Law Procedure and Civilian Substantive Law” (2003) 78 Tul L Rev 291 at 293. See also Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France* (Paris: Odile Jacob, 2003) and Daniel Jutras, “Culture et droit processuel: le cas du Québec” (2009) 54:3 McGill LJ 273 at 275 [Jutras, “Culture”].

⁷ Note that other authors have related aspects of civil procedure to tradition-based influences. See e.g. H Patrick Glenn, “Le recours collectif, le droit civil et la justice sociale” (1998-99) 29 RDUS 39; Catherine Piché, “La proportionnalité procédurale: une perspective comparative” (2009-2010) 40 RDUS 551.

⁸ On the importance of historical experiences in the systemic differences between common law and civil law procedural systems, see Goldstein, *supra* note 6 at 294; and H Patrick Glenn, “The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards of Adjudication?” (2004) 9 Unif L R 829 at 830 [Glenn, “Transnational”].

⁹ See e.g. JA Jolowicz, *On Civil Procedure* (Cambridge, UK: Cambridge University Press, 2000) at 175-82; Roscoe Pound, *The Spirit of the Common Law* (New

a clichéd and non-nuanced differentiation is misleading. First, common law procedural systems do not have a monopoly on the “adversarial quality” of litigation and all systems are, to some extent, adversarial by virtue of the nature of litigious interaction.¹⁰ Second, the very appellation of the continental civilian procedural system as “inquisitorial” is both “unfortunate and misleading because it conjures up [images such as] the Spanish Inquisition [and] Kafka’s castle,”¹¹ not to mention the “closed and secretive Star Chamber proceedings.”¹² Designations such as “investigative”¹³ or “judge-centred”¹⁴ are both more benign and more accurate and, as such, will be preferred in this paper. Third, although there are differences between the common law and civil law conceptions of procedure, these differences should not be exaggerated,¹⁵ and rather than viewing the systems as “polar opposites,” the variances may more properly be understood as differences “in degree rather than in kind.”¹⁶ Indeed, without tempering the differences and focusing on fundamental similarities, it would have been impossible to have conceived of the ALI/UNIDROIT *Principles of Transnational Civil Procedure*, the goal of which is to harmonize procedural law in transnational cases.¹⁷ Fourth, and finally, as in all areas of comparative law, one must be cognizant of the dangers of over-generalization. It is important to note that significant variances exist in the procedural rules and principles amongst legal systems that belong to the same legal tradition. As an example, while both the UK and the US belong to the same legal family of the common law,

Hampshire: Marshall Jones Company, 1921) at 13, 20, where Pound identifies the doctrine of “contentious procedure” as one of the common law’s principal distinguishing characteristics; and Edward F Sherman, “Transnational Perspectives Regarding the Federal Rules of Civil Procedure” (2006) 56:4 J Legal Edu 510.

¹⁰ Yves-Marie Morissette, “Gestion d’instance, proportionnalité et preuve civile : état provisoire des questions” (2009) 50 C de D 381 at 395 [Morissette, “Gestion d’instance”], citing Jolowicz, *supra* note 9 at 175. See also Goldstein, *supra* note 6 at 296; and Geoffrey C Hazard Jr and Angelo Dondi, “Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits” (2006) 39 Cornell Int’l LJ 59 at 64.

¹¹ Hein Kötz, “The Role of the Judge in the Court-Room: The Common Law and Civil Law Compared” (1987) J of S Afr L 35 at 37.

¹² Goldstein, *supra* note 6 at 293.

¹³ Glenn, “Transnational,” *supra* note 8 at 830.

¹⁴ Geoffrey C Hazard Jr *et al*, “Introduction to the Principles and Rules of Transnational Civil Procedure” (2000-2001) 33 NYU J Int’l L & Pol 769 at 779.

¹⁵ Glenn, “Transnational,” *supra* note 8 at 830.

¹⁶ Goldstein, *supra* note 6 at 296.

¹⁷ The American Law Institute, *ALI/UNIDROIT Principles of Transnational Civil Procedure* (adopted by The American Law Institute at Washington, DC, May 2004 and by UNIDROIT at Rome, April 2004).

these two legal systems have developed along different procedural lines in key areas such as costs, discovery and fact versus notice pleading.¹⁸

With the preceding provisos in mind, this paper will, nonetheless, proceed to identify major tradition-based differences in the civil and common law as such differences will be important to the central thesis of the paper, namely, that legislative and judicial trends in civil procedure in Quebec are moving in a civilian direction.

A) The Role of the Judge

The major characteristic differentiating civilian and common law conceptions of procedure focuses on the role of the judge. The traditional common law judge has been described as “passive, receptive, and detached,”¹⁹ an umpire who plays the role of “passive moderator between presentations organized and directed by rival advocates”²⁰ and who “views the case from a peak of Olympian ignorance.”²¹ The judge of the civilian tradition is, by contrast, much more vocal and dominant, who some have described as “activist, outspoken or even paternalistic,”²² others calling him “the director of an improvised play”²³ or even a “priest [where] the advocates act as the acolytes – deferential assistants in a ceremony controlled thoroughly by the judge.”²⁴ However poetic, metaphorical and perhaps exaggerated these descriptions may be, the essence of the distinction lies in the fact that the civilian judge controls the evidentiary process and performs the critically important function of exploring and sifting evidence.²⁵ The civilian judge engages experts, examines witnesses, develops the case, asks questions, clarifies issues and builds the file.²⁶ In contrast, in the adversarial system, the parties, through their

¹⁸ For an overview of the differences between English and Anglo-American civil procedure see e.g. Pound, *supra* note 9 at 56-57, 104-105, and 120-30.

¹⁹ Kötz, *supra* note 11 at 40.

²⁰ Hazard and Dondi, *supra* note 10 at 61.

²¹ Marvin E Frankel, “The Search for Truth: An Umpireal View” (1975) 123 U Penn L Rev 1031, at 1042, cited in Sherman, *supra* note 9 at 511.

²² Kötz, *supra* note 11 at 41.

²³ Wolfgang Zeidler, “Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure” (1981) 55 Aus LJ 390 at 394 cited in Sherman, *supra* note 9 at 511.

²⁴ Hazard and Dondi, *supra* note 10 at 61.

²⁵ Geoffrey C Hazard Jr, “Discovery and the Role of the Judge in Civil Law Jurisdictions” (1997-1998) 73 Notre Dame L Rev 1017 at 1022.

²⁶ See Kötz, *supra* note 11 at 38 (description of the German judge).

lawyers, take charge of the process, frame the issues, investigate the evidence and select what will be presented at trial.²⁷

B) The Role of Evidence and Conception of Truth

The different roles of the judge and the parties in the two traditions may be linked, at least theoretically, to a differing conception of truth, or at least how to attain truth. As concerns the law, the civilian system is premised on the principle that the court knows the law (*jura novit curia*) and that the parties need not plead or prove the law that applies to their case. And as concerns the facts, it is predicated on the premise that there exists an objective, scientific truth²⁸ – “une vraie vérité.” Common law procedure is not constructed on similar principles. Procedural fairness, rather than the establishment of truth, is at the crux of the adversarial system and while there is an assumption that truth will be teased out by examination and cross-examination of parties and witnesses, the judge’s role is simply to choose between the contentions of the opposing parties, rather than to seek truth.²⁹

The differences in the two traditions also have an impact on the type of evidence that they privilege and the role they accord to expert evidence. In the common law, the emphasis is placed on oral evidence and oral argumentation whereas in the continental civilian tradition, sometimes referred to as the “dossier system,”³⁰ proof is essentially written, with little or no examination or cross-examination of witnesses in open court.³¹ The two traditions also part ways where expert evidence is concerned. In the civilian procedural world, experts are not called by the respective parties or examined in open court. It is the judge who appoints the expert, in a sense delegating the evidentiary work of which she is in charge, and such

²⁷ *Ibid* at 38, citing Marvin E Frankel, *Partisan Justice* (New York: Hill & Wang, 1991) at 43.

²⁸ See e.g. Jean-Marc Le Masson, “La recherche de la vérité dans le procès civil” (1998) 38 *Dr et Soc* 21 at 21-24.

²⁹ Glenn, “Transnational,” *supra* note 8 at 832, citing *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, [1983] 1 All ER 161 (HL). At para 438, Lord Wilberforce stated, “There is no higher or independent duty to ascertain some independent truth ... if the decision has been in accordance with the available evidence and the law, justice will have been fairly done.” See also Kötzt, *supra* note 11 at 37; Hazard, *supra* note 25 at 1019; and Luc-Marie Augagneur, “De la preuve et des systèmes judiciaires en France et au Québec” (2003) 63 *R du B* 401 at 410.

³⁰ Sherman, *supra* note 9 at 514.

³¹ Augagneur, *supra* note 29 at 406-409. Speaking of the French judge, Augagneur says at 408, “Tout témoignage lui est suspect” [Loosely translated as “the judge is generally distrustful of oral testimony”].

expert is neutral between the parties.³² While common or joint expertise is slowly gaining ground in some common law jurisdictions,³³ the traditional adversarial system is predicated on each party's right to bring forth their own experts and trials often amount to a battle between the parties' respective experts.

C) The Role of the Trial

The continental civilian and common law traditions again part ways on the very concept of what constitutes a trial. Largely as a result of the historical existence of the jury, whose members could not be "assembled, dismissed and reconvened from time to time,"³⁴ the common law trial presents as a single, continuous event. The net result is that there is a clearly-demarcated pre-trial period. This model contrasts sharply with the continental procedural system where there is no clear distinction between pre-trial and trial, as the trial itself is segmented, consisting of a series of isolated conferences or short hearing sessions at which evidence is received by the investigating magistrate.³⁵ The entire process is aimed at accumulating one integrated file from which a decision can be made and while hearings are scheduled before the court, they are often very short, sometimes just fifteen to thirty minutes in duration.³⁶

The reality of a demarcated pre-trial period in the adversarial system, together with counsel's role in developing the case, is a key reason for the development of discovery. Discovery developed as a method of helping counsel in their active role of gathering and analyzing evidence during the distinct pre-trial period. The concept of party-initiated pre-trial discovery is unavailable in jurisdictions which apply civilian procedural law because, after all, there is no need for it – it is the court, rather than the parties, that is in charge of the development of evidence. Perhaps because of the negative reputation of overly-broad discovery which has, in some instances, become equated with "fishing expeditions," discovery is not only unavailable in civilian jurisdictions but it is even regarded as improper.³⁷

³² See e.g. *ibid* at 411; James Beardsley, "Proof of Fact in French Civil Procedure" (1986) 34 Am J Comp L 459 at 459.

³³ Notably in the UK where the changes to the rules of civil procedure in 1999 included introducing common expertise; see *Civil Procedure Rules 1998* (UK), SI 1998/3132, r 35.7 [*UK Civil Procedure Rules*]. See also 2014 *Code*, *supra* note 3 at art 159(2).

³⁴ Kötz, *supra* note 11 at 40; see also Hazard, *supra* note 25 at 1020.

³⁵ Sherman, *supra* note 9 at 513; Goldstein, *supra* note 6 at 297.

³⁶ Augagneur, *supra* note 29 at 406.

³⁷ Hazard, *supra* note 25 at 1017; Hazard *et al*, *supra* note 14 at 776.

D) The Role of Appellate Review

The respective traditions also have different conceptions of appellate review and finality of first-instance decisions. In general, civilian conceptions of appeal are much broader, both in their availability and in the nature of the reconsideration.³⁸ In particular, reconsiderations at the Court of Appeal level are *de novo* and include questions of fact as well as law, even allowing parties to produce new evidence.³⁹ By contrast, in the common law tradition appeals are generally limited to questions of law, extending to questions of facts only where lower courts make palpable and overriding errors.⁴⁰

The frequency of appeals in the two traditions is strikingly different as well. According to the 2013 statistics of the Cour de Cassation in France, this final court of appeal handled a total of 28,207 “dossiers jugés” (20,049 in civil matters and 8,158 in criminal matters).⁴¹ These numbers are nothing short of astonishing in the common law context. For example, the latest statistics of the UK Supreme Court indicate that between 1 April 2012 and 31 March 2013, 83 appeals were heard and 77 judgments were rendered,⁴² similar to the statistics of the Supreme Court of Canada where according to its 2013 report, 75 appeals were heard and 48 dispositions were made.⁴³ The appellate volume alone indicates the enormous disparity that exists with respect to the finality, or lack thereof, of first-instance decisions in the two legal traditions. Moreover, it is worth noting that the concept of appellate dissent, so prominent in the common law tradition, is absent in civilian jurisdictions.

³⁸ For a thorough analysis of the appeal and its historical development in English and French law, see Yves-Marie Morissette, “Aspects historiques et analytiques de l’appel en matière civile” (2014) 59:3 McGill LJ 1.

³⁹ *Ibid* at 32-33.

⁴⁰ The leading Supreme Court of Canada decision on this matter is *Housen v Nikolaisen* 2002 SCC 33, [2002] 2 SCR 235. The standard of appellate review is observed equally by the Quebec Court of Appeal; see e.g. *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) c Comité provincial des malades*, 2007 QCCA 1068 at para 55, [2007] RJQ 1753.

⁴¹ See Cour de Cassation, *2013 Statistiques* (Paris: Cour de Cassation, 2013), online: <www.courdecassation.fr/IMG//CC-STATISTIQUES-2013-HD-A4.pdf>.

⁴² See Supreme Court of the United Kingdom, *The Supreme Court Annual Report and Accounts 2012-2013*, (London: The Stationery Office, 2014), online: <www.supremecourt.uk/docs/annual-report-2012-13.pdf>.

⁴³ See Supreme Court of Canada, *Statistics 2003 to 2013* (Ottawa: Supreme Court of Canada, 2014), online: <www.scc.csc.gc.ca/case-dossier/stat/cat3-eng.aspx>.

E) The Role of Judicial Appointments and Judgment Style

Not only is the role of the judge in the actual judicial proceedings very different in the two legal traditions, but so is their education, nomination and even status. There are different conceptions of how to become a judge – via education in specialized schools for judges such as the *École de la Magistrature* in the French model versus appointment from amongst members of the practicing bar in the English system. The result is that continental civilian judges are “juges de carriers” and occupy a primarily bureaucratic role as compared to the high status and moral authority enjoyed by their common law counterparts.⁴⁴

Written judgments also take on very different styles. As pointed out by Hein Kötz, the involvement of the continental judge and the detachment of the common law judge are, ironically, reversed when it comes to their judgment styles.⁴⁵ The vocal civilian judge writes anonymous, impersonal and syllogistic judgments whereas the reserved English umpire of a judge prepares signed, opinionated and discursive judgments.

These distinct aspects of the judicial role have had an impact on the judicial methodology that ensues, in particular, the role of precedent, *de jure* or *de facto*, in that judicial methodology. The moral authority of the common law judge, which results from the nomination process and the judge’s position in the larger legal hierarchy, lends credibility to their judgments and imbues them with authority. As a result, common law judges tend to be looked to with great respect by subsequent generations of judges and scholars. The judgment writing style of the common law judge, with its discursive reasoning that attempts to provide rationality and consistency to the law, also contributes to the respect for prior decisions. On the other hand, the “motivation succinte” of the anonymous civilian judgment does not naturally lend itself in the same way to use as precedent.⁴⁶

3. Historical Evolution of Quebec Procedural Law

If one were to compare the major characteristics of the procedural systems described above with the reality in Quebec today, it would not take too long to conclude that Quebec’s current procedural and judicial systems accord more closely with that of the common law. Despite Quebec being a

⁴⁴ Pierre-J Dalfond, “Le style civiliste et le juge: le juge québécois ne serait-il pas le prototype du juge civiliste de l’avenir?” in Nicholas Kasirer, ed, *Le droit civil, avant tout un style?* (Montreal: Thémis, 2004) 81; Goldstein, *supra* note 6 at 297.

⁴⁵ Kötz, *supra* note 11 at 41.

⁴⁶ Jukier, *supra* note 1 at 64-66; see also Noël-Jean Mazen, “Le juge civil québécois (Approche comparative d’un système de droit mixte)” (1982) 34:2 RIDC 375 at 399.

civil law jurisdiction in private law matters, and notwithstanding the fact that its procedural law is presented in a civilian format, namely in a *Code of Civil Procedure*, Quebec procedure can best be described as adversarial in nature, as having “un air de common law en pays de droit civil.”⁴⁷ Contemporary Quebec procedure is party-driven, characterized by oral advocacy and adversarial trial techniques, and includes pre-trial processes such as discovery. As a result, it is not unusual to find long, complex trials, with a multitude of expert evidence, resulting in lengthy judgments.⁴⁸ With the cost to the taxpayer of each day of trial estimated at \$10,000,⁴⁹ not to mention the cost to the parties which runs from tens to even hundreds of thousands of dollars,⁵⁰ it is no wonder that this model of civil justice is being questioned, not only in Quebec, but around the world, motivating large-scale procedural reforms and monumental shifts in legal culture.⁵¹

Before, however, canvassing the latest array of procedural changes suggested by the 2014 *Quebec Code of Civil Procedure*, it is necessary to examine how Quebec arrived at its current destination. For this, a historical examination is needed to understand the evolution of Quebec’s procedural law from its French origins to its contemporary adversarial status.

⁴⁷ Jutras, “Culture,” *supra* note 6 at 285; see also *Foster Wheeler Power Co v Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc*, 2004 SCC 18 at para 25, [2004] 1 SCR 456 [*Foster Wheeler*].

⁴⁸ See e.g. *Laflamme v Groupe TDL ltée*, 2014 QCCS 312, [2014] QJ No 683 (QL) [*Laflamme*] where very simple facts (a woman ingesting a spoonful of excessively hot soup at Tim Hortons sued for \$2 million in damages) resulted in a 10-day trial, oral testimony of 9 experts (with other experts submitting written reports) and a 77-page (426 paragraphs) decision giving judgment for the plaintiff for \$69,000, \$33,000 of which was to reimburse the cost of expert witnesses.

⁴⁹ Pierre-Claude Lafond, *L’Accès à la Justice Civile au Québec* (Montreal: Éditions Yvon Blais, 2012) at 59. This estimate is limited to the internal and infrastructure costs of the civil justice system and does not include the cost of judges.

⁵⁰ A 7-day trial in Canada costs on average between \$38,296 - \$124,572: see Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: October 2013), online: <://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [2013 *Report on Access to Civil and Family Justice*].

⁵¹ See especially The Right Honourable Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Westminster, UK: Her Majesty’s Stationery Office, 1996), online: <://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm> [Woolf *Report*]. In a similar vein in Quebec, see Comité de Révision de la Procédure Civile, *Rapport – Une nouvelle culture judiciaire* (Quebec: Ministère de la Justice, 2001) [Ferland *Report*].

A) *The Régime Français*

A proper historical perspective begins with the Régime Français of 1534 to 1759.⁵² Of particular importance during this period is the *Ordonnance sur la procédure civile* of 1667,⁵³ often referred to as being Quebec's first code of procedure.⁵⁴ Not surprisingly, since it was an ordinance of French origin, it represented a procedural system very much characterized by the French civilian tradition as described in Part 2 of this paper. By way of example, testimony of witnesses was done in writing,⁵⁵ there was no examination or cross-examination in open court,⁵⁶ experts were court-appointed and their testimony was in writing⁵⁷ and procedure in general followed what is known as the "enquête,"⁵⁸ a process whereby a judge or commissioner interviews witnesses and reduces their testimony to writing.

This *Ordinance* of 1667 demonstrates that the origins of Quebec's civil procedure are firmly embedded in the French civilian tradition.

B) *The Régime Anglais*

The Régime Anglais is defined by the period of 1759 to 1867, the latter being the date of Canadian Confederation. Following the British conquest in 1759, Quebec was ceded to Britain by the *Treaty of Paris* in 1763. This was followed by the enactment of the *Royal Proclamation* in October 1763, which had the effect of imposing British law across the territory, replacing the French civil law that had heretofore prevailed.⁵⁹ In 1774,

⁵² 1534 is the year of Jacques Cartier's first voyage to the New World when he discovered and claimed the territory that now includes Quebec in the name of the King of France. 1759 is the year of the British conquest over the French in the Battle of the Plains of Abraham following which, pursuant to the Treaty of Paris of 1763, Quebec was ceded to Britain.

⁵³ *L'Ordonnance de Louis XIV, Roi de France et de Navarre, du mois d'Avril 1667* reprinted in *Édits, ordonnances royaux, déclarations et arrêts du Conseil d'État du Roi, concernant le Canada, mis par ordre chronologique, et publiés par ordre de Son Excellence Sir Robert Shore Milnes, Baronet, en conséquence de deux différentes Adresses de la Chambre d'Assemblée, en date des 5^e et 7^e mars 1801*, vol 1 (Quebec: PE Desbarats, 1801) [1667 *Ordonnance*]. This ordinance was sometimes dubbed the "Code Louis" as it was an edict of King Louis XIV of France.

⁵⁴ *Bourdon v Cité de Montréal* (1918) 54 CS 193 at 202, 24 R de Jur 543 (QCCS).

⁵⁵ 1667 *Ordonnance*, *supra* note 53 at Titre XVI, art IX.

⁵⁶ *Ibid* at Titre XXII, art XV.

⁵⁷ *Ibid* at Titre XI, arts VIII, XII.

⁵⁸ *Ibid* at Titre XXII, art XVII.

⁵⁹ See e.g. Jean-Gabriel Castel, *The Civil Law System of the Province of Quebec: Notes, Cases and Materials* (Toronto: Butterworths Press, 1962) at 20.

however, Britain passed the *Quebec Act*⁶⁰ which had significant ramifications in Quebec; it restored to the population its French language, its Roman Catholic religion and its civilian legal tradition in private law matters. Notwithstanding the return to French procedural law, various English law elements began to infiltrate in the latter part of the eighteenth century.⁶¹ There are four major examples of such English law influence. First, in 1764, Governor Murray's *Ordinance* established a judicial system in Quebec modeled on the English administration of justice and court system.⁶² As a result, the operating system of adjudication in civil matters became that of the English tradition. Second, in 1777, an ordinance instituted the application of English rules of evidence in commercial matters.⁶³ Of primary importance in such rules of evidence is the ability to make proof by oral testimony which paved the way for the prioritization of oral evidence, characteristic of the English common law system, over written evidence preferred by the civilian tradition.⁶⁴ Third, in 1785, an ordinance instituted the jury in civil matters. So alien is the jury to the French conception of procedure and court process that its creation has been cited as causing "un divorce quasi-complet avec la procédure française."⁶⁵ Finally, in 1787, an Ordinance was passed enabling the courts to write their

⁶⁰ *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo III c 83 (1774) [*Quebec Act*].

⁶¹ For a discussion of the fate of the 1667 *Ordonnance* following the *Quebec Act*, see Jean-Maurice Brisson, *La formation d'un droit mixte : l'évolution de la procédure civile de 1774 à 1867* (Montreal: Thémis, 1986) at 36-44.

⁶² See *Governor Murray's Ordinance of 17 September 1764, Ordonnance établissant des cours civiles*. In fact, the reformed judicial system was so foreign to the province's Francophile inhabitants that ninety-five colonists addressed a petition to the King of England, seeking the restoration of the French system of civil procedure. See on this matter « *Pétition des habitants français au roi au sujet de l'administration de la justice*, 7 janvier, 1765 » (1765) DCI at 195. In *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 27, [2010] 2 SCR: "...Quebec's rules of procedure and evidence are nevertheless applied by a court system that reflects the British common law tradition, and is largely similar to the court organization in the common law provinces of Canada."

⁶³ *Ordonnance qui établit les Cours civiles de Judicature en la Province de Québec*, 17 Geo III c 1 (1777). For additional discussion on these Ordinances, see Sylvio Normand, "La culture juridique et l'acculturation du droit: le Québec," in Jorge A Sanchez Cordero, ed, *Legal Culture and Legal Transplants – La culture juridique et l'acculturation du droit*, Reports to the XVIIIth International Congress of Comparative Law (Washington, DC: International Academy of Comparative Law, 2010) at 825 [Normand, "Culture"].

⁶⁴ The Civil Code of Quebec continues to allow proof by oral testimony in commercial matters. See *Code civil du Québec annoté*, 1999, c 64, art 2864.

⁶⁵ Louis Marceau, "Exposés sur les articles 332 à 381 du Code de 1965" in Barreau de la Province de Québec, *Conférences. Le Code de procédure civile* (Montreal: Barreau de la Province de Québec, 1966) at 39, cited in Brisson, *supra* note 61 at 49.

own rules of practice, a judicial power characteristic of the English system of judicature.⁶⁶

As a result of these common law incursions of the latter part of the eighteenth century, Quebec's procedural system began to adopt what is known today as its "mixed character."⁶⁷ And despite the purported reinstatement of civil law in private law matters prescribed by the *Quebec Act*, the pendulum began to swing in a common law direction toward an English conception of procedural law. This was due both to the activity of the legislature, through the enactment of the aforementioned ordinances, and to the courts, through the rules of practice they themselves created, which have been characterized as being "véritablement imprégnées de l'influence du droit Anglais."⁶⁸ Given that many of these English law elements sat uneasily with the 1667 *Ordonnance*,⁶⁹ there also developed a sense that codification was needed and in 1857, the Legislator mandated the creation of both a civil code and a code of civil procedure.⁷⁰

C) *Quebec's First Code of Civil Procedure: 1866*⁷¹

The explicit goals of this first codification were to consolidate, compile and reconcile all the diverse existing sources of procedural law. The commissioners appointed to formulate a code did not feel "called upon to frame a new code of procedure" but rather to "[state] the procedure such as it appears to be at present."⁷² Not surprisingly, the result was a code encapsulating elements of procedure that emanated from both legal traditions.

⁶⁶ *Ordonnance qui continue pour un temps limité une ordonnance passée dans la vingt-cinquième année du règne de sa majesté, intitulée, "Ordonnance qui règle les formes de procéder dans les cours civiles de judicature, et qui établit les procès par jurés dans les affaires du commerce, et d'injures personnelles qui doivent être compensées en dommages,"* 27 Geo III, c 4 (1787). See also Normand, "Culture," *supra* note 63 at 825.

⁶⁷ Normand, "Culture," *ibid* at 835. See also *Foster Wheeler*, *supra* note 47 at para 23: "Quebec civil law and procedure ... traces its origins to diverse sources in legislation and case law, in both the French and English common law traditions."

⁶⁸ Brisson, *supra* note 61 at 61.

⁶⁹ John EC Brierley and Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at para 14.

⁷⁰ *Acte pour pourvoir à la codification des lois civiles du Bas-Canada qui se rapportent aux matières civiles et à la procédure*, S Prov C 1857 (20 Vict), c 43, art VII, cited in Normand, *supra* note 63 at 832.

⁷¹ *Act respecting the Code of Civil Procedure of Lower Canada*, S Prov C 1866 (29-30 Vict), c 25 [1866 Code].

⁷² The Commissioners Appointed to Codify the Laws of Lower Canada, *Eighth Report of the Commissioners appointed to codify the Law of Lower Canada* at IX, reprinted in *Code of Civil Procedure of Lower Canada* (Ottawa: GE Desbarats, 1866)

Reminiscent of French procedural law, the 1866 *Code* continued the tradition of judicial involvement in the collection of evidence, enabling judges to call and question the parties and witnesses and reduce their evidence to writing.⁷³ It also adhered to the French tradition regarding the court appointment of expert witnesses.⁷⁴ But the *Code* retained many existing elements of English law, including the ability of the court to make its own rules of practice,⁷⁵ and the parties' right to opt for a trial by jury,⁷⁶ the latter opening the door to the presentation of evidence in open court and cross-examination.⁷⁷

Despite the overt goal of simply bringing "scattered elements together in one place,"⁷⁸ the commissioners' report was not value-neutral. Rather, the commissioners expressed an underlying preference for the superiority of the adversarial system, labelling the French judge-centred system replete with "inconveniences."⁷⁹ As was the case in many other jurisdictions, this attitude would prevail in Quebec for more than a century until the recognition, at the close of the twentieth century, that perhaps the abuses of the adversarial system were to blame for the crisis of the civil justice system.⁸⁰

*D) Quebec's Second Code of Civil Procedure: 1897*⁸¹

Quebec's first *Code of Civil Procedure* lasted but thirty years. Its replacement, in 1897, is largely responsible for creating Quebec procedure's uncanny resemblance to the English adversarial system. Perhaps most importantly, the 1897 *Code* abolished the French process of the "enquête" and explicitly adopted the open court principle which

[*Eighth Report*]. In *Anjou (Town of) v CAC Realty Ltd et al.*, [1978] 1 SCR 819 at 835, the Supreme Court of Canada noted that: "The codifiers of the 1867 Code had been instructed to incorporate into the Code only those provisions considered to be truly in force [at the time], citing the authorities on which they were relying. They could suggest amendments, but separately and distinctly, with supporting reasons."

⁷³ See generally 1866 *Code*, *supra* note 71, arts 221-226, 250, 263, 266 and 397.

⁷⁴ *Ibid.*, arts 322 *et seq.*

⁷⁵ *Ibid.*, art 29. Note that while judges continue to make rules of practice in Quebec, given the reality of codification, the main normative powers with respect to procedural law remain in the hands of legislative actors as opposed to judges.

⁷⁶ *Ibid.*, arts 348 *et seq.*

⁷⁷ *Ibid.*, art 272.

⁷⁸ *Vidéotron Ltée v Industries Microlec Produits Électroniques Inc.*, [1992] 2 SCR 1065 at 1080.

⁷⁹ *Eighth Report*, *supra* note 72.

⁸⁰ *Woolf Report*, *supra* note 51.

⁸¹ *Code of Civil Procedure*, SQ 1897, c 48 [1897 *Code*].

decreed publicity of court hearings.⁸² The Commissioners were aware of the importance of such a drastic change stating it to be “la principale réforme apportée à l’instruction.”⁸³ Moreover, they declared that “[l]a publicité de l’examen des témoins et des procès est, à nos yeux, un principe de la plus haute importance”⁸⁴ and, as a result, the concepts of examination in chief and cross-examination were introduced.⁸⁵

An important evidentiary innovation introduced in the 1897 *Code* also served to entrench its greater resemblance to the common law. This *Code* repealed the French law notion that it was generally not possible for parties to testify on their own behalf, and in support of their own case, and enabled them to testify and be cross-examined like other witnesses in their own trial.⁸⁶ Moreover, while the common law inventions of discovery and injunction had been introduced in 1888 in the form of amendments to the 1866 *Code*,⁸⁷ both these concepts were embedded into the 1897 *Code* in extended form. In the case of discovery, it was expanded to apply to the production of documents and the rules were broadened to allow depositions to become part of the court record.⁸⁸ With respect to the injunction, the 1897 *Code* dedicated an entire Chapter to developing a new system of injunction, creating the three types of injunctive relief with which we are familiar today: provisional, interlocutory and permanent.⁸⁹

⁸² *Ibid.*, art 16.

⁸³ La Commission chargée de reviser et de modifier le Code de procédure civile du Bas-Canada, *Quatrième rapport de la Commission chargée de reviser et de modifier le Code de procédure civile du Bas-Canada* in *Code de procédure du Bas-Canada* (Quebec: Léger Brousseau, 1896) at xx.

⁸⁴ *Ibid.*

⁸⁵ 1897 *Code*, *supra* note 81, arts 328- 329.

⁸⁶ This position was based on the belief that parties would always testify in their own interest; see Brierley and Macdonald, *supra* note 69 at para 823.

⁸⁷ Discovery was introduced as an amendment to the 1866 *Code* by way of art 5879 of the *Revised Statutes of Quebec* of 1888, which enshrined it under art 251(a). The injunction, in limited form, was introduced in 1878 in the *Act to provide for the issue of the Writ of Injunction in certain cases, and to regulate the procedure in relation thereto*, SQ 1878, (41 Vict), c 4, and formally inserted in the 1866 *Code* by amendment in the *Revised Statutes of Quebec*, 1888, s 5991.

⁸⁸ See *Lac d’Amiante du Québec Ltée v 2858-0702*, 2001 SCC 51 at paras 44-49, [2001] 2 SCR 743 [*Lac d’Amiante*].

⁸⁹ See 1897 *Code*, *supra* note 81, arts 1030 *et seq.*

*E) Quebec's Third Code of Civil Procedure: 1965*⁹⁰

Described as “a complete revision of the old [1897] *Code*,”⁹¹ this *Code*’s major achievement is the decrease in formalism that it advocated.⁹² The spirit of this *Code* is expressed in its article 2, namely that procedural law should be seen as auxiliary to substantive law – its “handmaid” and not the “mistress.”⁹³ As such, it should be facilitative and procedural defects should normally be remediable.

Many changes were introduced into this *Code*⁹⁴ but as most are not tradition-specific, they will not be emphasized in this paper. Suffice it to say that by this time, and largely as a result of the previous *Code*, procedure in Quebec had taken on a very common law orientation, made all the stronger in 1978 when Quebec introduced the class action into the *Code*, a procedure borrowed primarily from the US adjudicative system.⁹⁵ Somewhat ironically, Quebec, a civil law jurisdiction, was the first province in Canada to introduce what has come to be a quintessentially common law phenomenon.

A synopsis of the 1965 *Code* would be incomplete without drawing attention to the very beginnings of a move towards making the judge more active in the litigious process. This *Code* introduced the pre-trial conference, empowering the judge to call the parties’ attorneys to discuss possible means of simplifying the suit and shortening the hearing.⁹⁶ And while the calling of expert witnesses remained within the discretion and control of the parties, the *Code* gave the judge the power to designate, a

⁹⁰ *Code of Civil Procedure*, RSQ, c C-25 [1965 *Code*] (formerly SQ 1965, c 80), which came into force on September 1, 1966.

⁹¹ *Québec (Communauté urbaine) v Services de santé du Québec*, [1992] 1 SCR 426 at para 11.

⁹² Hubert Reid, “Le nouveau Code de procédure civile: une étape?” (1965) 6:2 C de D 29. See also Bill 20, *Code of Civil Procedure*, 4th Sess, 27th Leg, Quebec, 1965, at Iva; *Hamel v Brunelle*, [1977] 1 SCR 147 at 153-54; *Duquet v Town of Sainte-Agathe-des-Monts*, [1977] 2 SCR 1132 at 1140-42.

⁹³ *Re Coles and Ravenshear Arbitration* (1906), [1907] 1 KB 1, 4 Collins J (UKCA). See also Bill 20 *supra* note 92; and *Frenette v Metropolitan Life Insurance Co*, [1992] 1 SCR 647 at 656: “... the Commissioners sought to remove the excessive formalism and complexity [...] and proposed, in their place, new provisions designed to simplify the procedure and to create a more expeditious system of procedure in order to bring the latter back to its true role of ‘servant of the substantive law.’”

⁹⁴ See e.g. 1965 *Code supra* note 90, arts 453, 163-168 (the introduction of the declaratory judgment in art 453 and the rationalisation of preliminary motions).

⁹⁵ SQ 1978, c 8, s 3.

⁹⁶ 1965 *Code, supra* note 90, art 279.

proprio motu, an expert to investigate or verify any fact.⁹⁷ Several decades would elapse, however, before Quebec would open the door much wider to a more judge-centred conception of civil procedure.

F) Important Amendments to the 1965 Code at the Beginning of the Millennium

As the new millennium approached, a unanimous opinion emerged in a multitude of jurisdictions that the civil justice system faced a veritable crisis. In 1996, the seminal *Woolf Report* was published in the UK, forming the basis of considerable procedural reform that came into force in 1999.⁹⁸ In Quebec, a similar report was made public in 2001 – the *Ferland Report* entitled “Une nouvelle culture juridique.”⁹⁹ It too formed the basis of important codal amendments. In essence, both reports bemoaned the same ills of the civil justice system: its high cost, its complexity and its delays.¹⁰⁰

The reaction of the Quebec legislature was to introduce significant amendments into the existing *Code of Civil Procedure* in an attempt to change the culture and improve the system. Three major philosophical changes were introduced in 2002. First, judges were given a much more active role in the pre-trial process by making them “case managers,” mandated to ensure the orderly progress of the proceedings and proper management of the case.¹⁰¹ Second, the *Code* crystallized the concept of proportionality, attempting to balance the costs and time of the proceedings used with the nature, purpose and complexity of the dispute.¹⁰² Third, a

⁹⁷ *Ibid*, art 414.

⁹⁸ See *Woolf Report*, *supra* note 51; *UK Civil Procedure Rules*, *supra* note 33. The province of Ontario also underwent significant review of its system of civil procedure: see Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review and Ministry of the Attorney General for Ontario, 1996).

⁹⁹ *Ferland Report*, *supra* note 51.

¹⁰⁰ Note that the 2013 *Report on Access to Civil and Family Justice*, *supra* note 50 focuses on the same three problematic issues stating, at iii, that the system is “too complex, too slow and too expensive.”

¹⁰¹ 1965 *Code* *supra* note 90, art 4.1. In particular, pursuant to arts 151.1 *et seq*, parties were required to prepare an agreement as to the conduct of the proceedings and present it before a judge in motions court.

¹⁰² *Ibid*, art 4.2. According to Deschamps J in *Marcotte v Longueuil (City)*, 2009 SCC 43 at para 68, [2009] 3 SCR 65: “...if the principle of proportionality is now set out explicitly in Quebec’s *Code of Civil Procedure*, the principle itself is not new. Before the reform, even though the principle was not formally spelled out, judges applied it in determining whether a given action or application was reasonable: *Boutique Linen Chest (Phase II) Inc v Wise*, (1997) 80 CPR (3d) 540 (QCCA).”

policy promoting settlement of disputes was explicitly favoured and a new process of judicial settlement conferences was established.¹⁰³

In addition to these major shifts, the 2002 amendments also introduced tougher rules designed to keep parties in line. The prime example is the “180 day rule” which required the parties to complete the entire pre-trial process (from service of the motion to institute action to inscription for proof and hearing) within six months.¹⁰⁴ The amendments also curtailed the use of discovery to cases where the amount claimed exceeded \$25,000.¹⁰⁵

The philosophy of limiting the parties’ unbridled autonomy to manage their case as they see fit continued with further amendments in 2009 designed to impose sanctions for improper use of proceedings.¹⁰⁶ These amendments gave courts extensive powers to dismiss actions and pleadings, strike out submissions, make provisions for costs and even order damages if parties abused their procedural rights by instituting unfounded or frivolous claims, using procedures that were excessive and unreasonable or instituting a “SLAPP” – a strategic lawsuit against public participation aimed at restricting freedom of expression in public debate.¹⁰⁷

Although the precise efficacy of these amendments has been questioned,¹⁰⁸ they undoubtedly caused the pendulum to begin its swing away from a civil justice system characterized by the hallmarks of the adversarial common law, namely, a passive judge and a case whose rhythm is led by the parties. This shift away from the common law tradition, which had defined Quebec procedure for so long, would only continue in the present-day codal reform.

¹⁰³ 1965 Code *supra* note 90, arts 4.3, 151.14 *et seq.*

¹⁰⁴ *Ibid.*, arts 110.1, 274.3 (the time limit was set at one year in family matters).

¹⁰⁵ *Ibid.*, art 396.1.

¹⁰⁶ *Ibid.*, arts 54.1 *et seq.*

¹⁰⁷ For a more detailed discussion of SLAPPs, see Roderick A Macdonald, Pierre Noreau and Daniel Jutras, *Rapport du comité au ministre de la Justice: Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)* (Quebec : Ministère de la Justice, 2007) at 78, online: <www.justice.gouv.qc.ca/francais/publications/rapports/pdf/slapp.pdf>.

¹⁰⁸ Ministère de la Justice, *Le Rapport d'évaluation de la Loi portant réforme du Code de procédure civile*, LQ 2002, c 7 (Quebec : Ministère de la Justice du Québec, 2006), online: <www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crcp-rap-4.pdf> [*Le Rapport d'évaluation*].

4. *Quebec Procedural Law – The Present Day*

As alluded to earlier, Quebec procedural law currently stands on the brink of substantial change with the adoption, in February 2014, of yet another new *Code of Civil Procedure*. Added to this legislative innovation is a considerable body of recent judicial decisions, many of them at the Supreme Court level, dealing with a variety of important issues on procedural law. Together, these legislative and judicial developments are moving civil procedure in Quebec further away from the adversarial process typical of the common law and closer to procedure more aligned with the philosophy and methodology of the civilian tradition. This movement may be discerned by examining two noticeable trends. The first reflects the adoption of a number of features of civilian continental procedure with a concomitant limitation on the availability of some traditional common law procedures. The second demonstrates the adoption of a civilian methodology in the interpretation and application of procedural law in Quebec cases. The first trend emanates primarily from the legislature through the changes adopted in the 2014 *Code of Civil Procedure*. The latter trend is owed to the judiciary and its recent ideological pronouncements in several key appellate level cases.

*A) Legislative Developments: Quebec's Newest Code of Civil Procedure of 2014*¹⁰⁹

The purposes behind the newest slate of procedural changes are explicitly laid out in the *Code's* Explanatory Notes and its Preliminary Provision. In essence, paragraph 2 of the Preliminary Provision explains that the reformed *Code* was designed to ensure the accessibility of justice, the promptness of justice, the proportionate and economical application of procedural rules and the inculcation of a spirit of cooperation in the exercise of parties' rights. In other words, the reform was designed, yet again, to mitigate the perennial problems with which contemporary justice systems are plagued – cost, complexity and delay.¹¹⁰

The macro changes proposed by this codal reform include:

- 1) a much stronger encouragement of, and obligation to consider, alternative forms of dispute resolution (ADR) before a dispute may be referred to the courts;¹¹¹

¹⁰⁹ 2014 *Code*, *supra* note 3.

¹¹⁰ See e.g. *Ferland Report* and *Woolf Report*, *supra* note 51.

¹¹¹ 2014 *Code*, *supra* note 3, arts 1-7. Art 1 states that “parties must consider private prevention and resolution processes before referring their case to the courts”.

- 2) a reinforced principle of proportionality that applies to parties' actions, pleadings and means of proof;¹¹²
- 3) a more robust system of judicial case management and oversight via the obligation of the parties to create for the court a detailed case protocol;¹¹³
- 4) limitations on the availability of discovery;¹¹⁴
- 5) a reconceptualization of the role of, and rules regarding, expert evidence;¹¹⁵
- 6) revisions with respect to costs;¹¹⁶ and
- 7) a broadening of the means of notification of court documents (including technological means).¹¹⁷

Admittedly, not all of these changes relate to procedural rules or philosophy based on any specific legal tradition. For example, there is no particular civilian or common law orientation regarding ADR, notification of court proceedings or cost awards. As the focus of this paper is on the role legal traditions play in civil procedure, the macro changes that will be explored relate to those that have been implemented in case management, discovery and expert evidence. The new *Code's* developments in these areas unmistakably reflect a shift that is tradition-based.

1) *Judicial Case Management*

Until recently, Quebec judges would not have thought of themselves as anything other than adjudicators, and certainly not case managers.¹¹⁸ After all, the hallmark of the adversarial process to which Quebec adhered

¹¹² *Ibid*, art 18.

¹¹³ *Ibid*, arts 9(2), 19, 148, 158.

¹¹⁴ *Ibid*, art 229.

¹¹⁵ 2014 *Code*, *supra* note 3, arts 148(4), 158(2), 234.

¹¹⁶ *Ibid*. Although the general rule that the losing party pays costs is retained in the new *Code* except in family matters (art 340), the *Tariff* that had previously established the amount of costs (the *Tariff of Judicial Fees of Advocates*, c B-1, r. 22) has been repealed, and there are more reasons for which a court may award extra-judicial fees (namely lawyer's fees) as costs (see e.g. art 341).

¹¹⁷ *Ibid*, art 110.

¹¹⁸ For example, in *Technologie Labtronix inc c Technologie Micro contrôle*, [1998] RJQ 2312 at 2325 (QCCA), the Quebec Court of Appeal observed that the traditional judicial role is that of the arbiter of a judicial duel (« arbitre d'un duel judiciaire »).

reflected the philosophy that the parties, not the judges, were the masters of their case. This notion began to wane in 2002 with the codal reforms discussed earlier in which case management was made part of the judge's duties. The new *Code* continues, and reinforces, this trend in favour of judicial case management. While it states that "the parties control the course of their case," such control is explicitly subordinated to "the *duty* of the courts to ensure proper case management."¹¹⁹ Moreover, case management now becomes an unequivocal part of the court's very "mission."¹²⁰

The mechanism by which the court will now exercise its case management duty is the newly-minted procedure of a "case protocol." This case protocol, which must be filed by the parties within 45 days after service of the originating demand, must document the consideration given to ADR and address the steps that will be taken to ensure the orderly progression of the proceedings, including the time and foreseeable legal costs in completing such steps. Incorporated in such steps are such things as pre-trial examinations on discovery and expert evidence.¹²¹ While the parties had been obliged, pursuant to the 2002 amendments, to prepare, and present to the court, an "agreement as to the conduct of the proceedings,"¹²² such agreement mainly reflected the timetable by which the parties would organize their 180-day pre-trial period. The case protocol introduced in the new *Code* moves beyond a mere timetable by requiring the parties to do such things as outline the consideration they gave to ADR and the advisability of holding a judicial settlement conference, predict the foreseeable legal costs involved in the steps they outline, and justify why they do not intend to seek a joint expert opinion.¹²³

In addition, the court is given more extensive case management "measures" aimed at simplifying or expediting the proceedings. These measures include authorizing sworn statements in lieu of oral evidence, convening the parties to a case management or settlement conference, and imposing joint expert evidence.¹²⁴ Moreover, the new *Code* gives judges the ability to award costs, even as against the successful party, as a punishment for breaching any undertakings with regard to the conduct

¹¹⁹ 2014 *Code*, *supra* note 3, art 19(1) [emphasis added].

¹²⁰ *Ibid*, art 9(2).

¹²¹ *Ibid*, arts 148 *et seq.*

¹²² See 1965 *Code*, *supra* note 90, arts 151.1 *et seq.*

¹²³ See 2014 *Code*, *supra* note 3, arts 148(2), (4). Particulars regarding expert evidence will be discussed *infra* in Part III.A.iii of this paper.

¹²⁴ See *ibid*, arts 158(1), (2). See generally *ibid*, art 158. Particulars regarding expert evidence will be discussed *infra* in part 4.A).3) of this paper.

of proceedings or for procedural behaviour that is abusive, or disproportionate.¹²⁵

This legislative trend to expand judicial powers of intervention in the actual management of the parties' case departs from the classic adversarial model of the common law and approximates more closely the role of the more directive and active continental civilian judge. Admittedly, the Quebec judge is given these extensive managerial powers primarily in the context of the pre-trial period rather than at the actual trial itself. And unlike their French counterparts, Quebec judges are not yet in a position to completely control the evidentiary process. However, there is even movement in this direction. In non-contentious cases or those involving a child's interest or person's status or capacity, the judge is able to order the presentation of evidence and hear persons who have not been called as witnesses.¹²⁶ The new *Code* also gives judges extensive power over expert evidence, particularly with regard to the imposition of joint expertise.¹²⁷ Furthermore, the combined effect of article 18, which mandates judges to observe the principle of proportionality in managing the proceedings, and article 158, which enables them, on their own initiative, to take measures to simplify and shorten the trial, gives judges considerable powers that can potentially be applied both to managing the pre-trial as well as the trial itself.

Overall, while there are still many differences between the Quebec and the continental civilian judge, there is no doubt that the movement in the role of the Quebec judge is swinging in a decidedly civilian direction.

2) *Discovery*

Discovery has been available in Quebec as a means of gathering and analyzing evidence from opposing parties since 1888.¹²⁸ While discovery can be seen as a laudable procedural tool that equalizes the informational imbalances between the parties, it can also be abused – the culprit of both delays and legal costs. This is substantiated by the *Report of the Task Force on Discovery Process* in Ontario which attests that discovery constitutes, on average, between 25 per cent and 50 per cent of the total billings in a case.¹²⁹ As a result, many jurisdictions have placed restrictions on its scope

¹²⁵ 2014 Code, *supra* note 3, arts 341 *et seq.*

¹²⁶ *Ibid.*, art 50.

¹²⁷ *Ibid.*, art 158(2). See also discussion at Part 4 A)3) below.

¹²⁸ See discussion in Part 3)D) of this paper.

¹²⁹ The Task Force on the Discovery Process in Ontario, *Report of the Task Force on the Discovery Process in Ontario* (Ottawa: Superior Court of Justice and Ministry of

and duration.¹³⁰ Quebec's new *Code of Civil Procedure* follows this trend. The new *Code* has restricted the availability of discovery to cases where the judicial demand exceeds \$30,000 and has severely limited its duration in other cases.¹³¹ More particularly, in eligible cases under \$100,000, discovery may only last three hours while in all other cases, it may not exceed five hours. And although short extensions of one – two hours are possible by agreement between the parties, any longer extensions require court authorization.

While Quebec is not the only jurisdiction to place such limitations on discovery – Ontario, for example, has done likewise – it is certainly a sign of rejection of a quintessentially common law tool unique to the adversarial system. These severe restrictions on its use contribute to the current movement in the pendulum. Although the changes to discovery may not swing the pendulum explicitly in a civilian direction, they have the effect of shifting Quebec procedure away from the traditional common law adversarial position.

3) *Expert Evidence*

Some of the most controversial changes to the new *Code* involve expert evidence. A change in the philosophical position regarding expertise is set out in the section of the *Code* entitled “Guiding Principles of Procedure”¹³² wherein article 22 emphasizes that the “mission” of the expert is “to enlighten the court” and that this mission “overrides the parties’ interests.”¹³³

It is, however, with respect to the more practical changes regarding expertise that the new *Code* raises the greatest controversy. The *Code* gives the court much greater control over expert evidence and seeks to limit its ambit. There is, for example, a new general rule mandating that parties will not be able to seek more than one expert opinion per area or matter, unless

the Attorney General for Ontario, 2003), online: <www.ontariocourts.ca/scj/files/pubs/rtf/report-EN.pdf>.

¹³⁰ For example, the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, r 31.05.1(1) provides that examination for discovery cannot exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. In a case brought under the simplified procedure, the limit is two hours (*ibid*, r 76.04(2)).

¹³¹ See 2014 *Code*, *supra* note 3, art 229.

¹³² *Ibid*, arts 17–24.

¹³³ *Ibid*, art 231.

authorized by the court.¹³⁴ In addition, article 148(4) requires the parties to include in their case protocol¹³⁵ information about their intentions regarding the use of experts and, in particular, to explain, if that is the case, why they do not intend to seek joint expertise. Concomitantly, the court, as part of its case management measures, may “impose joint expert evidence” if warranted by the principles of proportionality and efficiency.¹³⁶ The upshot of these latter two provisions is to make joint expertise effectively the default position, placing the burden on the parties to explain why this default position should be relaxed in their particular case.

These developments collectively represent a significant departure from the philosophy of the traditional adversarial position, namely, that as part of the parties’ ability to control their case and present their evidence as they see fit, they have the ability to find, hire and call their own experts as witnesses, often several of them in any given case.¹³⁷ This has often led to trials becoming a battle between experts. Joint expertise is highly unusual in the current adversarial context and, not surprisingly, its imposition has created great backlash, not only from the legal community but from the medical one as well.¹³⁸

While the new *Quebec Code* does not go so far as to put the judge completely in charge of the evidentiary process, nor to outsource that evidentiary process to experts he or she chooses, the restrictions on, and control over, expert evidence approximate the civilian position much more than its common law counterpart and again, push the pendulum in the *civiliste* direction.

¹³⁴ *Ibid*, art 232(2). In addition, the court retains the ability to appoint experts on its own initiative (see *ibid*, art 234). This had been the case under the previous *Code* as well; see 1965 *Code*, *supra* note 90, art 414.

¹³⁵ The case protocol is discussed in Part 4 A) 1) of this paper.

¹³⁶ 2014 *Code*, *supra* note 3 at art 158(2).

¹³⁷ Recall the number of expert witnesses in the Tim Hortons case discussed in *Laflamme*, *supra* note 48.

¹³⁸ See e.g. Barreau du Québec, *Rapport du sous-comité magistrature-Justice-Barreau sur les expertises* (Montreal: Barreau du Québec, 2010) at 64-65, online: <www.barreau.qc.ca/pdf/medias/positions/2007/200707-expertises.pdf>; Comité sur l’expertise familiale, *Rapport du Comité sur l’expertise en matière familiale* (Quebec: Ministre de la Justice et Ministre de la Santé et des Services Sociaux, 1999), online: <www.justice.gouv.qc.ca/francais/publications/rapports/pdf/rapp-cemf.pdf>; and The Canadian Medical Protective Association, *Submission to the Committee on Institutions on the Draft Bill to enact the new Code of Civil Procedure* (Ottawa: Canadian Medical Protective Association, 2011) at 11-18, online: <oplfrpd5.cmpa-acpm.ca/documents/10179/24937/com_submission_on_institutions-e.pdf>, retrieved on May 15, 2014.

4) Motivation Behind These New Codal Changes

As argued above, the net effect of the legislative changes to the new *Code* is to move Quebec procedure in a *civiliste* direction. Many of the changes have been borrowed from either the philosophy or practical attributes of the civilian procedural system outlined in Part 2. Others have the effect of limiting aspects of the traditional common law procedural system. Noting the trend is not, however, sufficient. An inquiry into the motivation behind these changes and the potential impact of legal transplantation from civilian systems also needs to be examined.

It seems evident that the changes to the new *Code* have been informed primarily by a desire to fix a problematic civil justice system, a system that continues to be too slow, inefficient and expensive despite the mechanisms brought in by the 2002 reform.¹³⁹ But this begs the question as to why the changes chosen to accomplish this much-needed fixing reflect civilian procedural trends. There are several possible reasons. For one, the excesses of the adversarial system have, in large part, been blamed for the current crisis in the civil justice system. Morissette JA of the Quebec Court of Appeal has asserted, in the context of the 2002 reforms, that the legislature was seeking to eliminate “les effets pervers du système «contradictoire» ou «*adversarial*».”¹⁴⁰ As a result, there is a desire to limit the access to some key adversarial procedures, such as discovery and expert evidence, which have been blamed for a large part of the cost and delays of the current system.¹⁴¹ There is also a perceived need for more “managerial judging” to keep the parties in line.¹⁴² Ironically, this is precisely the opposite perception to that held by the Commissioners of the 1866 *Code* who labeled the French procedural system “full of inconveniences” and lauded the “superiority” of the adversarial system.¹⁴³

A look to continental civilian procedural systems may also be motivated by the perception that such systems yield more efficient civil justice. According to the World Justice Project and, in particular, its *Civil Justice Index*,¹⁴⁴ countries that belong to the civil law tradition generally

¹³⁹ See 2014 *Code*, *supra* note 3 at “Explanatory Notes”; *Le Rapport d’évaluation*, *supra* note 108; and Lafond, *supra* note 49 at 244.

¹⁴⁰ Morissette, “Gestion d’instance”, *supra* note 10 at 395.

¹⁴¹ See *Le Rapport d’évaluation*, *supra* note 108 at 39, citing discovery and expertise as the major obstacles to rapid and less costly access to justice. Note that Lord Woolf, in the United Kingdom, also identified the adversarial culture as a reason for civil procedure being slow and expensive (Woolf Report, *supra* note 51 at s 1).

¹⁴² Kötz, *supra* note 11 at 42-43.

¹⁴³ See *Eighth Report of the Commissioners*, *supra* note 72.

¹⁴⁴ The World Justice Project, *Rule of Law Index 2011* (Washington, D.C.: The World Justice Project, 2011) at 11, online: <www.worldjusticeproject.org/sites/default

ranked higher on that index than countries which one would more readily associate with the common law. In fact, seven out of the top ten countries ranked on the *Index* belong to the civilian tradition.¹⁴⁵

Borrowing, or seeking inspiration, from other jurisdictions is nothing new in the world of law. Indeed, as Ugo Mattei has stated, legal transplantation is “the most fertile source of legal development.”¹⁴⁶ It is, of course, overly simplistic to speak of legal transplantation as a monolithic concept when in reality, as the vast literature on the subject points out, there are significant variances in how such transplantation occurs,¹⁴⁷ why it occurs¹⁴⁸ and how its “success” may be measured.¹⁴⁹ While this level of detailed analysis is beyond the scope of this paper, it does appear that the gist of the legal transplantation taking place in the Quebec procedural context could be encompassed by what Monateri has dubbed “the strategic model,” namely a model whereby a borrowing system “pick[s] up what they need, and ... use[s] what they have borrowed to cope with their own

/files/WJP_Rule_of_Law_Index_2011_Report.pdf>. The Civil Justice Index (factor 7) was measured according to the accessibility, impartiality and efficiency of a given country’s civil justice system.

¹⁴⁵ The top ten countries include, in descending order: Norway, Netherlands, Germany, Singapore, Finland, Denmark, Sweden, Japan, New Zealand and Austria. A contrary opinion regarding the efficiency of civil and common law procedural systems may be found in Aron Balas *et al*, “The Divergence of Legal Procedures” (2009) 1:2 Am Econ J: Econ Poli 138 at 146, where the authors assert that the higher level of procedural formalism found in civil law countries is associated with higher expected duration of judicial proceedings.

¹⁴⁶ Ugo Mattei, “Efficiency in Legal Transplants: An Essay in Comparative Law and Economics” (1994) 14 Int’l Rev Law & Econ 3 at 4. See also, Alan Watson, “Aspects of Reception of Law” (1996) 44 Am J Comp L 335; Alan Watson, “Legal Transplants and European Private Law” (2000) 4.4 Elec J of Comp L, online: <www.ejcl.org/44/art44-2.html>, retrieved on May 26, 2014. *Contra* Pierre Legrand, “The Impossibility of ‘Legal Transplants’” (1997) 4 MJECCL 111.

¹⁴⁷ In particular, whether it occurs by imposition or voluntary emulation. See Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (I)” (1991) 39:1 Am J Comp L 1; and Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (II)” (1991) 39:2 Am J Comp L 343. Jonathan Miller proposes a four-part typology of transplants based on different actor motivations and different transplant procedures consisting of the “Cost-Saving Transplant,” the “Externally-Dictated Transplant,” the “Entrepreneurial Transplant,” and the “Legitimacy-Generating Transplant,” see Jonathan M Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) 51:4 Am J Comp L 839 at 842.

¹⁴⁸ Such as, for example, reasons of efficiency; see Mattei, *supra* note 146.

¹⁴⁹ Daniel Berkowitz, Katharina Pistor and Jean-François Richard, “The Transplant Effect” (2003) 51:1 Am J Comp L 163.

problems.”¹⁵⁰ Faced with a crisis in the civil justice system, the Quebec legislator has strategically borrowed solutions – what it believes are “good ideas”¹⁵¹ – from elsewhere with a view to fixing problems. The fact that the inspiration for these changes comes from continental civilian procedural systems does not seem to be ideologically driven. In particular, any such legal borrowing has not been inspired, at least explicitly, by a desire to return to, or assert, the integrity of the civil law and the distinct legal culture in Quebec, an aspiration that was, at least to a certain extent, part of the *Quebec Civil Code* reform that took place in the 1990s.¹⁵²

The following section will examine recent judicial developments in procedural law where a similar trend of “*civil-isation*” is occurring, and which, together with the aforementioned codal changes, is helping to move the pendulum in the civilian direction. However, the motivation for this judicial trend is different from its legislative counterpart. Here, as will be demonstrated, civilian methodology and ideology are at the core of the changing landscape.

B) Recent Judicial Developments

An analysis of contemporary civil procedure in Quebec is incomplete without an examination of the judicial context and a close scrutiny of key decisions rendered at the appellate and Supreme Court levels. As described in the historical evolution section of this paper, much of Quebec civil procedure has been borrowed from, or inspired by, the common law adversarial system. This reality begs the perennial question as to how judges should interpret and apply Quebec law when the relevant provisions or issues originate in the common law, and what role common law sources

¹⁵⁰ Pier Giuseppe Monateri, “The Weak Law: Contaminations and Legal Cultures” (2003) 13 *Transnat’l L & Contemp Probs* 575 at 583.

¹⁵¹ The strategic model is reminiscent of what US Supreme Court Justice Elena Kagan said at her Senate Confirmation Hearing when she was asked whether as a Supreme Court justice she would look to foreign law. She answered, “I guess I’m in favor of good ideas coming from wherever you can get them;” see US, *Committee on the Judiciary*, 111th Cong, Sess 2 (Washington, DC: United States Government Printing Office, 2010) at 126, online: <purl.fdlp.gov/GPO/gpo12385>, retrieved on June 2, 2014. See also Georgios Mousourakis, “Transplanting Legal Models Across Culturally Diverse Societies: A Comparative Law Perspective” (2010) 57 *Osaka U L Rev* 87 at 88: “As Rudolf [von] Jhering once remarked, ‘[T]he reception of a foreign legal institution is not a matter of nationality, but a matter of usefulness and need. No one bothers to fetch a thing from afar when one has one as good or better at home, but only a fool would refuse a good medicine just because it did not grow in his own back garden.’”

¹⁵² See Brierley, *supra* note 4.

should play in that interpretation.¹⁵³ This is a very complex question for which there is no consistent or singular answer. Rather, the judicial reactions to this legal transplantation issue map onto a spectrum suggesting a range of potential responses.

At one extreme end of this spectrum, one finds Quebec decisions where judges are seemingly at ease with applying common law sources and interpretations. By way of example, in a 1993 case dealing with judicial recusal, the Quebec Court of Appeal had to decide whether judicial disqualification should be based solely on the enumerated, objective categories listed in the *Code of Civil Procedure* or whether the common law standard of reasonable apprehension of bias should also apply to disqualify a judge. Accepting the common law apprehension of justice criterion, Tyndale JA stated, somewhat ironically:

... [I]t is apparent that in civilized jurisdictions other than the Province of Quebec apprehension of bias is a ground for recusal like any other, urged in the same way as any other. Surely the distinctiveness of our society, and our civil law rather than common law system, do not require that we be deprived of a useful and logical remedy available elsewhere!¹⁵⁴

At that same end of the spectrum, we find judgments that suggest that it is even *incumbent* to resort to the common law where there is a *lacuna* in Quebec law. In another decision of the Quebec Court of Appeal dealing with judicial recusal, Morissette JA stated:

Aucun jugement publié au Québec ne porte sur des faits similaires à ceux qui ont donné naissance à la demande de récusation en Cour supérieure. Aussi incombe-t-il à la Cour de consulter la jurisprudence canadienne et étrangère sur cette question.¹⁵⁵

To be fair, in most cases where Quebec judges turn to the common law for authority, they do so with a requisite degree of caution. As Morissette JA stated in the aforementioned case, while common law principles may be relevant and applicable, they do require “un usage prudent et éclairé.”¹⁵⁶

¹⁵³ See e.g. Daniel Jutras, “Regard Sur La Common Law Au Québec : Perspective et Cadrage” (2008) 10 RCLF 311 at 324; Jean-Louis Baudouin, “L’interprétation du Code Civil Québécois par la Cour Suprême du Canada” (1975) 53:4 Can Bar Rev 715 at 730.

¹⁵⁴ *Droit de la famille – 1559*, [1993] RJQ 625, 101 DLR (4th) 345, 1993 CarswellQue 469 at para 11(WL) (QCCA). See generally on recusal in Quebec, Luc Huppé, “La Transformation du Modèle Québécois de Récusation des Juges” (2012) 46 RJT 207.

¹⁵⁵ *Wightman v Widdrington*, 2007 QCCA 1687 at para 58, [2008] RJQ 59.

¹⁵⁶ *Ibid.* See also *PL v JL*, 2011 QCCA 1233, [2011] RJQ 1274. In that case, the trial judge had not applied a leading Supreme Court decision on the ground that it was a

Notwithstanding these words of caution, however, there are innumerable Quebec cases in which judges turn to the common law for guidance in interpreting and applying Quebec law, even going so far as to state that it is not repugnant to the spirit of the civil law to be inspired by a notion developed by the well-known and somewhat controversial English judge Lord Denning!¹⁵⁷

At the other end of the spectrum, one finds examples of cases in which Quebec judges are extremely reluctant about looking to the common law for precedent or even guidance. As Thibault JA of the Quebec Court of Appeal recently explained, the civil law is a complete system and as a result, one should be wary of adopting principles from other legal systems without questioning their compatibility with Quebec law.¹⁵⁸ This echoes Gonthier J's wise words that we must be "[m]indful of the dangers of comparative law unequipped with full information and understanding of other legal systems"¹⁵⁹ because, as William Bishop has noted, "[a]ny legal system is a complex interlocking balance."¹⁶⁰

It is, of course, very difficult to reconcile this diversity of judicial opinion, particularly because of the extremely contextual nature of this question. The willingness, or lack thereof, of Quebec judges to look to the common law will depend on a variety of factors including the subject matter of the issue before the court, the availability of Quebec sources to interpret that issue, as well its origins and compatibility with civilian legal principles. Another factor appears to be whether the applicable rule or

common law decision and did not apply in Quebec. The Court of Appeal disagreed stating, at para 36 : "L'arrêt de principe en matière de prescription pour les victimes d'inceste nous vient de la common law...*Il faut donc être prudent avant d'en importer les principes en droit civil.* Toutefois...l'esprit de cette décision s'applique au droit civil du Québec."

¹⁵⁷ In *Lebel v Cie d'assurance-vie RBC*, 2009 QCCS 1204 at para 255, [2009] RRA 634, Trahan J of the Quebec Superior Court stated: "Le tribunal est d'avis qu'il ne répugne pas à l'esprit du droit civil de s'inspirer de la notion d'expectative de tranquillité d'esprit élaborée par Lord Denning et reprise par les tribunaux des provinces de common law..." See also *Hy Bloom c Banque Nationale du Canada*, 2010 QCCS 737, [2010] RJQ 912 where Wagner J (now a justice of the Supreme Court of Canada) rejected the plaintiff's argument to the effect that the Court had an obligation to follow a Quebec appellate decision as binding precedent, favouring instead a decision of the Ontario Court of Appeal on the ground that it enunciated a more modern interpretation of the relevant federal statute (the *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36).

¹⁵⁸ *Anglo Pacific Group PLC v Ernst & Young inc*, 2013 QCCA 1323 at para 36, [2013] RJQ 1264.

¹⁵⁹ *Laferrière v Lawson*, [1991] 1 SCR 541.

¹⁶⁰ William Bishop, "The Choice of Remedy for Breach of Contract" (1985) J Legal Stud 299 at 318.

legislation prescribes a standard, rather than a fixed rule, thereby allowing for the exercise of judicial discretion. For example, it may not be misguided to look to the common law in a case dealing with judicial recusal since its underlying justification is the protection of independent and impartial justice, a principle that fits comfortably within both the civil and the common law.¹⁶¹ On the other hand, it may be less appropriate for a Quebec judge to follow common law precedent in a case on specific performance because, although the injunction was inherited from the common law, its restrictive interpretation in common law does not fit comfortably within the context of the civil law. The division between law and equity, the theory of efficient breach and the presumptive nature of damages as the primary remedy in the common law do not fit the contours of the civil law or its theory of contractual performance.¹⁶² Moreover, where the applicable legislation in a given case is seen to enact a precise rule leaving little room for judicial discretion, judicial receptivity to the introduction or even discussion of common law concepts is noticeably timid.¹⁶³

As this paper focuses on Quebec procedural law, the judicial interpretation of procedural cases in particular will now be examined. This examination will reveal a discernible trend at the Supreme Court of Canada level, led largely by LeBel J, evidencing an explicit agenda promoting the integrity and heritage of the civil law tradition. To demonstrate this trend, three key Supreme Court judgments dealing with various issues of Quebec civil procedure, decided between 2001 and 2014, will be analyzed.

¹⁶¹ Huppé, *supra* note 154.

¹⁶² As a result, according to Baudouin JA in *Varnet Software Corp v Varnet UK Ltd*, [1994] RJQ 2755 at 2758, 59 CPR (3d) 299 (CA), “[i]t is not because injunction is historically a common law procedural remedy that the restrictive approach of common law to mandatory injunctive relief should also be followed.” For a comparative examination of specific performance, see Rosalie Jukier, “Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract” in Robert Sharpe and Kent Roach, eds, *Taking Rights Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) at 85.

¹⁶³ For example, this has been the case in the area of class actions in Quebec. The judiciary has viewed the four distinct criteria for class action authorisation enunciated in the 1965 *Code*, *supra* note 90 at art 1003 (and reproduced in 2014 *Code*, *supra* note 3 at art 575) as prohibiting the introduction of additional judicial discretion to investigate whether, despite meeting the criteria, the class action is a preferable procedure, as is done in common law Canada, or whether it is a proportionate procedure; see *Vivendi Canada Inc v Dell’Aniello*, 2014 SCC 1 at para 67, [2014] 1 SCR 3 [*Vivendi*].

1) *Lac d'Amiante* (2001)¹⁶⁴

In *Lac d'Amiante*, the Supreme Court had to decide the fairly circumscribed issue of whether information disclosed by the parties during the pre-trial discovery process should be kept confidential. LeBel J, who wrote the unanimous decision for the Court, upheld the net result of the Quebec Court of Appeal decision to the effect that pre-trial discovery should benefit from confidentiality. He went to great lengths, however, to emphasize that the reasons for such decision must be made “in accordance with the techniques of civil law analysis.”¹⁶⁵ LeBel J’s methodology departed radically from that of Mailhot JA of the Court of Appeal,¹⁶⁶ who had reasoned that since the concept of discovery in Quebec originated in the common law, recourse could be had to the decisions of common law courts. Citing decisions from Ontario and the UK, Mailhot JA held that since the common law protected disclosures made in discovery using an implied undertaking rule of confidentiality,¹⁶⁷ the same rule of confidentiality should apply in Quebec.

Notwithstanding the common law origins of discovery, LeBel J rejected any such blind allegiance to the common law, emphasizing instead that Quebec civil procedure is “part of a legal tradition that is different from the common law,”¹⁶⁸ one where “the codified law is paramount [and] courts must base their decisions on it.”¹⁶⁹ Moreover, he emphasized that Quebec procedure must be “governed by a tradition of civil law interpretation...within the legal framework comprised by the *Code* and the general principles of procedure underlying it.”¹⁷⁰ As a result, LeBel J applied what he called a “civil law method of analysis”¹⁷¹ and based the confidentiality of discovery on principles found in the *Code of Civil Procedure*, the *Civil Code of Quebec* and the *Quebec Charter of Human Rights and Freedoms*.¹⁷² His reasoning included reference to the fact that the *Code of Civil Procedure* did not consider discovery to be part of the sitting of the court (thereby exempting it from the open court principle), as

¹⁶⁴ *Lac d'Amiante*, *supra* note 88.

¹⁶⁵ *Ibid*, at para 79.

¹⁶⁶ *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, [1999] RJQ 970 at para 47, [1999] QJ No 1043, (QCCA).

¹⁶⁷ The implied undertaking rule applies only until such time as disclosures obtained in discovery are put into evidence in the court record; see *Lac d'Amiante*, *supra* note 88 at para 64.

¹⁶⁸ *Lac d'Amiante*, *ibid* at para 35.

¹⁶⁹ *Ibid* at para 37.

¹⁷⁰ *Ibid* at para 39.

¹⁷¹ *Ibid* at para 41.

¹⁷² *Quebec Charter*, *supra* note 2.

well as the protection of privacy interests afforded by the *Civil Code* and the *Quebec Charter*.

Catherine Piché has called the *Lac d'Amiante* decision, “sans conteste le plus important en droit judiciaire privé québécois.”¹⁷³ Indeed, as Daniel Jutras has asserted, this decision has an important “fondement identitaire [et] portée culturelle”¹⁷⁴ which will be discussed following the outline of two subsequent judgments by LeBel J in the procedural arena.

2) *Globe and Mail* (2010)¹⁷⁵

The *Globe and Mail v Canada (Attorney General)* decision involved the extent to which a journalist in Quebec could refuse to disclose a confidential source by invoking the journalist source privilege. As in *Lac d'Amiante*, both the *Civil Code* and the *Code of Civil Procedure* were silent on this specific issue leaving a gap in the codified law. The common law, on the other hand, had developed a four-part test, known as the “Wigmore doctrine,” which provided a framework for finding the existence of a journalist source privilege.¹⁷⁶ LeBel J was faced with the question of whether the Court could fill that gap by resorting to a doctrine developed in the common law. This would seem problematic following a literal reading of his previous decision in *Lac d'Amiante*.

LeBel J wrote a careful judgment in which he displayed a more open attitude toward applying and adapting the common law to Quebec procedural and evidentiary issues while, at the same time, underscoring his allegiance to the primacy of civilian interpretation and analysis articulated in *Lac d'Amiante*. He did so by emphasizing, once again, that the *Code* is “the primary source of the principles and rules of the law of civil procedure in Quebec”¹⁷⁷ and that any framework used to address legal issues must be “consistent with the normative structure of Quebec law and with its civil tradition.”¹⁷⁸ He admitted, however, that “not everything is found in the *C.C.P.*” and that Quebec civil procedure is not “completely detached from the common law model.”¹⁷⁹ Recognizing a “residual role for common law legal principles,” he asserted that “if the ultimate source of a legal rule is the common law, then it would be only logical to resort to the common law

¹⁷³ Catherine Piché, *Droit Judiciaire Privé* (Montreal: Les Éditions Thémis, 2012) at 53.

¹⁷⁴ Jutras, “Culture,” *supra* note 6 at 289.

¹⁷⁵ *Supra* note 62.

¹⁷⁶ *Ibid* at para 22.

¹⁷⁷ *Ibid* at para 30.

¹⁷⁸ *Ibid* at para 28.

¹⁷⁹ *Ibid* at para 30.

in the process of interpreting and articulating that same rule in the civil law.”¹⁸⁰

While, arguably, these assertions could be interpreted as a retreat from the firmness of his allegiance to civilian analysis expressed in *Lac d’Amiante*, LeBel J did warn us that there is a limit to the common law’s residual role in Quebec cases, namely where it would not otherwise “be contrary to the overarching principles set on in the *C.C.Q.* and the *Quebec Charter*.”¹⁸¹

3) *Vivendi Canada Inc v Dell’Aniello* (2014)¹⁸²

The *Vivendi* case concerned the interpretation of a class action provision of Quebec’s *Code of Civil Procedure*, regarding the commonality requirement necessary for class action authorisation.¹⁸³ In deciding this appeal, the Supreme Court had to consider the applicability of leading Canadian cases emanating from outside of Quebec, as well as the role that the procedural principle of proportionality plays in class action authorisations.

LeBel J again wrote for a unanimous Supreme Court, this time co-authoring his decision with Wagner J, another Quebec judge more recently named to the Court. On the first question regarding the applicability of non-Quebec cases, they wrote that “[c]aution must be exercised when applying the principles from [common law decisions] to the rules of Quebec civil procedure relating to class actions.”¹⁸⁴ Admitting that these decisions “provide a general framework,” they warned that “tests established in a common law context cannot necessarily be imported without adaptation into Quebec civil procedure.”¹⁸⁵ As a result, and based on differences in the wording of applicable legislation, they concluded that the commonality test is less stringent and more flexible in Quebec and that “the case law on class actions from the common law provinces is not determinative.”¹⁸⁶

¹⁸⁰ *Ibid* at para 45.

¹⁸¹ *Ibid*. See also Christian Leblanc, Marc-André Nadon and Émilie Forgues-Bundock, “The Journalist-Source Privilege in Quebec Civil Law: *Globe and Mail v Canada (Attorney General)*” (2011) 54 Sup Ct L Rev 273 at 305.

¹⁸² *Vivendi*, *supra* note 163.

¹⁸³ 1965 *Code*, *supra* note 90 at art 1003(a) reads: “The court authorizes the bringing of the class action and ascribes the status of representative to the members it designates if of opinion that: (a) the recourses of the members raise identical, similar or related questions of law or fact.”

¹⁸⁴ *Vivendi*, *supra* note 163 at para 48.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid* at para 53.

As for the role of proportionality in class action authorisations, here again LeBel and Wagner JJ distinguished Quebec law from that of the rest of Canada. They asserted that while the *Code of Civil Procedure* explicitly codifies proportionality as a general procedural principle in article 4.2, the proportionality of the class action is not a separate, additional criterion as it is in common law Canada. Class action legislation in the rest of Canada requires the judge to ensure that, even if all other criteria are met, the class action is the “preferable procedure.” LeBel and Wagner JJ warned that this additional criterion is not supported by the clear wording of the *Code* in Quebec and that “[c]aution therefore dictates that such a criterion not be introduced indirectly [via the principle of proportionality] into Quebec’s rules of civil procedure.”¹⁸⁷

Whatever one’s opinion may be on the desirability of importing proportionality throughout the procedural rules in the *Code*, it is clear that the *Vivendi* decision set out a very strong methodological preference. Quebec procedural law, while partly of common law origin, requires a distinct approach, one that may involve the consideration of common law authority but one that must be equally cautious of blind allegiance to common law influences.

4) *The Judicial “Civil-isation” of Quebec Civil Procedure*

The judgments outlined above all speak, to varying degrees, of the importance of prioritizing the civilian tradition as well as its interpretation and framework in Quebec civil procedure. What is most interesting, however, is that the emphasis on this civilian analytical framework – what LeBel J himself has called “a grille d’analyse civiliste”¹⁸⁸ – was not necessary to obtain the substantive outcome in these particular cases. The most obvious example is *Lac d’Amiante* where the finding of the existence of confidentiality in discovery was identical whether one used the common law as authority or applied a more civilian methodology. Likewise, the results were the same in *Globe and Mail*, where the Supreme Court concluded by finding for a journalist-source privilege as it exists in the common law, and in *Vivendi*, where the Court held in favour of the authorisation of the class action, as it would have done following the common law case-law authority.

As noted earlier, the motivation behind this judicial trend is different from its legislative counterpart. It is not a pragmatic effort to improve civil procedure, make civil justice more accessible and efficient, or hold

¹⁸⁷ *Ibid* at para 67.

¹⁸⁸ Louis LeBel, “L’Influence de la Cour Suprême du Canada sur l’Application du *Code Civil du Québec* Depuis 1994” (2010) 88:2 Can Bar Rev 231 at 241.

litigating parties to a higher level of accountability. Rather, it appears ideologically based, forming part of a school of thought that has been described as “la sauvegarde de l’intégrité du droit civil.”¹⁸⁹ Historically, this philosophical approach at the judicial level has been attributed, in large part, to Pierre-Basile Mignault, a justice of the Supreme Court of Canada from 1918-1929. Mignault J has been dubbed the defender of the integrity of Quebec civil law¹⁹⁰ and his protectionist attitude towards the civil law and the central role he played in reviving civilian methodology on the Supreme Court at the beginning of the last century has been well recognized.¹⁹¹ Mignault J considered the *Civil Code* to be an inalienable legacy, a precious heritage and part of a unique legal tradition worthy of protection.¹⁹² He has been recognized, through both his doctrinal writings and judgments, as the most ardent proponent of protecting the integrity of the civil law through autonomous interpretation and the most vocal critic of subsuming the civil law to the wholesale application of common law principles and precedent.

Although Mignault J’s tenure on the Supreme Court of Canada preceded that of LeBel J by almost a century,¹⁹³ there is a great deal of resemblance between their conceptions of civilian methodology and interpretation as

¹⁸⁹ Sylvio Normand, “Un theme dominant de la pensée juridique au Québec: La sauvegarde de l’intégrité du droit civil” (1987) 32:3 McGill LJ 559 [Normand, “Sauvegarde”]. This protectionist attitude towards the integrity of the civil law has most recently been echoed by the Supreme Court in its decision in *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at paras 49, 85, [2014] SCR 433 where the Court emphasized the need for it to represent Quebec’s distinct legal traditions and social values as well as the civil law’s distinctive character.

¹⁹⁰ Jean-Gabriel Castel entitled an article he wrote “Le juge Mignault défenseur de l’intégrité du droit civil québécois” (1975) 53:3 Can Bar Rev 543.

¹⁹¹ In the first decades after the creation of the Supreme Court in 1875, the Court evidenced a preference for unification via the application of common law sources to Quebec civilian cases. For a sampling of the discussion of the Supreme Court’s historical attitude towards Quebec civil law and its interaction with common law, see Louis LeBel and Pierre-Louis Le Saunier, “L’interaction du droit civil et de la common law à la Cour suprême du Canada” (2006) 47:2 C de D 179; H Patrick Glenn, “La Cour Suprême du Canada et la Tradition du Droit Civil” (2001) 80:1&2 Can Bar Rev 151; Baudouin, *supra* note 153; David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929” (1987) 32:3 McGill LJ 523; Normand, “Sauvegarde,” *supra* note 189; Claire L’Heureux-Dubé, “By Reason of Authority or by Authority of Reason” (1993) 27:1 UBC L Rev 1 at 13-14; Albert Mayrand, “L’autorité du précédent au Québec” (1994) 28 RJT 775; H Patrick Glenn, “Le droit comparé et la Cour suprême du Canada” in Ernest Caparros, ed, *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) at 197.

¹⁹² See LeBel and Le Saunier, *ibid* at 187-189; and Castel, *supra* note 190 at 545.

¹⁹³ LeBel J was appointed to the Supreme Court of Canada in 2000 and retired in November 2014. Mignault J sat on the Supreme Court of Canada from 1918-1929.

well as consistency between their articulations of the need to preserve the primacy and integrity of the civil law tradition in Quebec. Like Mignault J, LeBel J has articulated the need for the two legal traditions of the civil and common law to remain distinct and evolve in parallel fashion, rather than having one be subsumed by the other.¹⁹⁴ And, as Mignault J did before him, LeBel J's judgments in many areas of law have cautioned against importing common law rules into civilian matters, emphasising the need to apply civilian procedure, methodology and principles.¹⁹⁵

Admittedly, LeBel J ought more properly to be thought of as an open-minded and cosmopolitan Mignault. His views are certainly not as extreme as those of Mignault J who objected to any common law infiltration lest it adulterate the purity of the civil law. But the opinions of these two important jurists must be placed in the context of the times in which each lived and wrote. LeBel J belongs to an era very different from that of Mignault J, a time when the integrity of the civil law is not considered in jeopardy as had been the case a hundred years ago and when the distinctiveness of the civil law has found its place in Canada.¹⁹⁶ Perhaps as a result of this, rather than wanting to keep the civil and common law in watertight compartments,¹⁹⁷ LeBel J recognizes the value of dialogue between the traditions.¹⁹⁸ Moreover, he admits that certain areas of law are

¹⁹⁴ LeBel and Le Saunier, *supra* note 191 at 238. This preference for parallel development is to be contrasted with what Gonthier J has called convergence and cross-fertilisation; see Charles Doherty Gonthier, "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings" (1992-93) 21 Can Bus LJ 323.

¹⁹⁵ For just two examples of such decisions outside the law of procedure, see: *Prud'homme v Prud'homme*, 2002 SCC 85, [2002] 4 SCR 663, where LeBel J emphasised that the general principles of civil responsibility of the civil law, rather than the particular rules of the common law, should be applied to the law of defamation; *Quebec (Agence du Revenu) v Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 SCR 838, where he applied the civil law of contractual obligations and emphasised, in particular, its notion of consensualism and rules of contractual interpretation based on the common intent of the parties (articulated in *Civil Code of Quebec*, SQ 1991, c 64, art 145).

¹⁹⁶ As Baudouin, *supra* note 153 at 736, has stated when speaking about a more contemporary Supreme Court, "la méthodologie civiliste a trouvé apparemment la place qui aurait dû être la sienne antérieurement." This has been reinforced by the enactment of a modern *Civil Code of Quebec* in 1991, which came into force in 1994, and which Brierley has called "The Renewal of Quebec's Distinct Legal Culture;" see Brierley, *supra* note 4. Moreover, Quebec's civilian tradition has not gone the way of Louisiana's or South Africa's as Mignault J feared it might; see Castel, *supra* note 190 at 552.

¹⁹⁷ Mignault J had proclaimed that "[u]ne cloison étanche et infranchissable sépare les deux grands systèmes juridiques." P-B Mignault, "Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" (1932) 11 *Revue du Droit* 201 at 206, cited in Normand, "Sauvegarde," *supra* note 189 at 577.

¹⁹⁸ LeBel and Le Saunier, *supra* note 191 at 202-19.

more conducive to convergence or harmonisation given their globalized context. This is evident in the *Globe and Mail* decision discussed earlier where he said:

The overarching issues raised by this appeal are of course not unique to the province of Quebec. The news media's reach is borderless. This is further support for an approach that would result in consistency across the country while preserving the distinctive legal context under the *Civil Code*.¹⁹⁹

Notwithstanding his more open attitude, LeBel J is consistent in his articulation of the primacy and integrity of the civil law tradition, its methodology and interpretation. Moreover, this ideological view appears to be given support in the newly-minted preliminary provision of the 2014 *Code of Civil Procedure* which, in paragraph 3, states that: "This Code must be interpreted and applied as a whole, *in the civil law tradition*."²⁰⁰ While the preliminary provision of the *Code of Civil Procedure* has not yet been the subject of commentary or judicial interpretation, the interpretation given to its *Civil Code* counterpart²⁰¹ is instructive. In *Doré v Verdun*, the Supreme Court of Canada stated that one of the teachings of the *Civil Code's* preliminary provision is that, "unlike statute law in the common law, the *Civil Code* is not a law of exception ... it must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved."²⁰² This view is consonant with LeBel J's plea to apply a civilian methodology to Quebec procedural cases, to ensure that any common law import into procedural law does not offend existing civil law rules or principles, and to be mindful of the need to adapt borrowed common law principles to fit within the particular context and contours of Quebec civil law. This judicial ideology is undoubtedly helping to swing the proverbial pendulum in a civilian direction.

¹⁹⁹ *Globe and Mail*, *supra* note 175 at para 55.

²⁰⁰ 2014 *Code*, *supra* note 2 [emphasis added].

²⁰¹ The *Civil Code of Quebec*, CQLR, c C-1991, Preliminary Provision at para 2 reads: "The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it." This preliminary provision has been commented on doctrinally, for example, by H Patrick Glenn, "La Disposition préliminaire du *Code civil du Québec*, le droit commun et les principes généraux du droit" (2005) 46:1&2 C de D 339; and Alain-François Bisson, "La Disposition préliminaire du *Code civil du Québec*" (1999) 44:3 McGill LJ 539.

²⁰² *Doré v Verdun (City)*, [1997] 2 SCR 862 at para 15.

5. Conclusion

The purpose of this paper has been to examine the influences of legal traditions on civil procedure in Quebec. Such examination has revealed that recent developments in Quebec procedural law, both on the legislative and judicial fronts, are moving the law in a *civiliste* direction, in many ways, closer to its original roots where it began in the seventeenth century. On one level, this may be evidenced by the legislative importation of substantive procedural concepts that bear closer allegiance to the continental civilian procedural system than to its English adversarial counterpart. The more active role of the judge, limits on the ambit of discovery and the introduction of common expertise are but three examples. At the same time, there is movement at the judicial level emphasising the importance of respecting and applying the civilian tradition, along with its unique methodology and overarching principles, in procedural cases.

This “civil-isation” of procedural law is, of course, not unique to Quebec. Even staunchly common law jurisdictions, most notably England, are moving in similar directions. The motivation in these jurisdictions is similar to that in Quebec, namely the need to enact procedural changes that might fix a civil justice system in crisis. The motivation behind the jurisprudential trend is somewhat different, evidencing the resurgence of an explicit aspiration to protect the integrity of the civilian tradition in Canada.

To some extent, these legislative and judicial developments are merely part of the natural ebb and flow of the ever-changing and developing nature of law where it is not unusual for such juridical evolution to be accompanied by legal transplantation.²⁰³ Peculiar to the jurisdiction of Quebec is its mixed legal character and, in particular, the mixity of the sources of its procedural law. On the one hand, this mixity may be perceived pejoratively, as a source of confusion and uncertainty. As LeBel J has stated, “[t]hese mixed origins [of Quebec civil law and procedure] are without doubt at the root of the semantic, if not conceptual problems that continue to affect this field of law.”²⁰⁴ On the other hand, this mixity may be perceived more positively, evidencing the ability of mixed jurisdictions to learn, experiment and adapt through the experience of two rich legal

²⁰³ As Alan Watson has asserted, the act of borrowing legal ideas from foreign legal systems has been a primary means by which the law has changed throughout history. Alan Watson, “Comparative Law and Legal Change” (1978) 37:2 Cambridge LJ 313 at 317–318.

²⁰⁴ *Foster Wheeler*, *supra* note 47.

traditions. As Stevenson J commented in the Supreme Court decision of *Canadian National Railway Co v Norsk Pacific Steamship*:

This Court has the benefit of being the final court of appeal in a country that has two legal traditions: the English common law and the French civil law. Our two legal traditions are independent and should not be confused. Concepts and solutions found in one tradition should not be imposed on the other tradition. But this does not mean that there is no place for comparative law on this Court.²⁰⁵

It may only be hoped that this mutually beneficial respect for legal sources from both legal traditions continues to inspire the law of civil procedure in Quebec so that its recent reforms may constitute a true “roadmap for change.”²⁰⁶

²⁰⁵ [1992] 1 SCR 1021 at 1077-78.

²⁰⁶ “A Roadmap for Change” is the title of the Action Committee on Access to Justice in Civil and Family Matters’ recent Report; see 2013 *Report on Access to Civil and Family Justice*, *supra* note 50.