

## CONTRACT LAW: WHAT CAN JERSEY LEARN FROM THE QUEBEC EXPERIENCE?

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*In this article, the author traces the evolution of Quebec's civilian legal system, as exemplified by the enactment of the modern Civil Code of Quebec which came into force in 1994. The Quebec perspective is presented to provide Jersey law reformers and jurists with an interesting, and even inspiring, example of how a jurisdiction, that adheres to the civil law tradition in its private law, can successfully adapt and modernize its legal system without abandoning its civilian heritage. While the Quebec experience is not identical to that of Jersey, the similarities between the two jurisdictions ensure its relevance, particularly with respect to contractual obligations. As Jersey grapples with establishing its legal identity, the Quebec experience demonstrates that it is indeed possible to adapt a civilian legal system to one that functions well in the contemporary, economically-friendly environment of modern-day society.*

1 The Bailiwick of Jersey, relatively small both in terms of physical geography and population, has generated a great deal of interest, and some confusion, as to the sources and the future of its law of contract. As is evident from the Consultation Paper and Report prepared by the Jersey Law Commission in 2002<sup>1</sup> and 2004<sup>2</sup> respectively, as well as from the numerous scholarly articles on the subject,<sup>3</sup> the sources of Jersey's contract law, and indeed the Island's legal identity in general,

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<sup>1</sup> The Jersey Law Commission, *The Jersey Law of Contract* (Consultation Paper No. 5) (St Helier, Jersey: The Jersey Law Commission, 2002) [JLC, "Jersey Law"].

<sup>2</sup> The Jersey Law Commission, *The Law of Contract* (Topic Report No. 10) (St Helier, Jersey: The Jersey Law Commission, 2004) [JLC, "Contract"].

<sup>3</sup> See e.g. Hanson, "Comparative Law in Action: The Jersey Law of Contract" (2005) 16 Stellenbosch L. Rev. 194; Binnington, "Frozen in Aspic? The Approach of the Jersey Courts to the Roots of the Island's Common Law" (1997) 1 J.L. Rev. 21; Kelleher, "The Sources of Jersey Contract Law" (1999) 3 J.L. Rev. 1; Gretton & Reid, "The Civil Law Tradition: Some Thoughts from North of the Tweed" (2007) 11 J. & G. L. Rev. 286; Hanson, "Jersey's Contract Law: A Question of Identity?" (2005) 9 J.L. Rev. 126 [Hanson, "Identity"].

are at a crossroads. The customary law of the ancient Duchy of Normandy, which is uniformly recognized to be the origin of its law, is seen as having failed to respond to the contemporary needs of Jersey society for the reasons pointed out so lucidly by the Jersey Law Commission in its 2004 Report. The major reasons cited include the inaccessibility of Norman texts, language barriers to accessing works on Norman customary law, difficulty in applying ancient concepts to modern commercial realities and uncertainty.<sup>4</sup> This uncertainty arises at two levels. The first relates to the sources that may legitimately be considered to interpret Norman Law (for instance, whether post-Pothier sources, such as modern French law and the *Code Napoléon*, are applicable). The second relates to the inconsistency with which Jersey courts have applied French and English law to resolve contractual disputes.<sup>5</sup>

2 Various solutions, ranging from the maintenance of the *status quo*, to the codification of a Jersey law of contract, or even the wholesale transplantation of English law by statute,<sup>6</sup> have been proposed and debated.<sup>7</sup> It is, of course, not for the foreigner, such that I am, to deign to impose views or propose solutions for the future of Jersey's contract law. It may, however, be valuable for the foreigner to bring an outside perspective to this debate in the hope that Jersey may be able to benefit and learn from another jurisdiction's experience. This paper is, therefore, intended to provide an insight into the Quebec experience which may prove useful to those grappling with the future of Jersey contract law. In this light, Quebec is indeed an interesting example to study but not, it is submitted, for the reasons examined, and ultimately rejected, by the Jersey Law Commission, namely with a view to adopting, or transplanting, the Quebec Civil Code (CCQ) in Jersey. Rather, Quebec provides an interesting, and even inspiring, example of a jurisdiction that has successfully adapted and

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<sup>4</sup> JLC, "Contract", *supra* note 2 at 4.

<sup>5</sup> See Fairgrieve, *Coursepack: Jersey Law of Contract* (Institute of Jersey Law, 2009-10) at 24-25.

<sup>6</sup> JLC, "Contract", *supra* note 2 at 5.

<sup>7</sup> Hanson, "Identity", *supra* note 3 at 126 (discussing the different approaches recommended by Binnington, Kelleher and Ozanne). See also Binnington *et al.* *The Way(s) Forward: Contract Law in Guernsey and Jersey* (Panel discussion at the Contract Law of the Channel Islands at the Crossroads conference hosted by the Institute of Law, Jersey, 15 October 2010) [unpublished] (the panel, which was chaired by Sir Philip Bailhache included Alan Binnington, Tim Hanson, Alison Ozanne, Michael Preston and Duncan Fairgrieve).

modernized its civilian legal system to one that functions well in the contemporary, economically-friendly environment of modern-day Quebec.

### **A snapshot of Quebec's juridical landscape: a mixed legal system**

3 Quebec, one of the 10 provinces and 3 territories of Canada, has a population of just over 7.9 million people occupying a 1.5 million km<sup>2</sup> territory with a GDP of \$303 billion.<sup>8</sup> Within Canada, these statistics rank Quebec second only to its neighbouring province, Ontario, in size, population and GDP. There are currently 23,000 members of the Quebec Bar and another 3,700 members of the notarial profession.<sup>9</sup> These statistics evidence a strong economic, and a vibrant legal, community.

4 In terms of the briefest of historical overviews, Quebec began as a French colony (known as New France) under French rule until the historic battle between the British and the French in 1759, in which the British were victorious. The outcome of this famous battle began British rule in the province, Quebec officially becoming a British colony pursuant to the *Treaty of Paris*<sup>10</sup> of 1763.

5 The seminal historical moment, however, that determined the *law* of Quebec, came several years later in 1774, with the enactment of the *Quebec Act*.<sup>11</sup> This Act of the British Parliament granted to Quebec, by way of concession and in order to secure the allegiance of the French Canadians, the right to continue using the French language

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<sup>8</sup> See Statistics Canada, "Population by Year, by Province and Territory", Statistics Canada CANSIM, Table 051-0001 (Ottawa: Minister of Industry, 2010), online: Statistics Canada <<http://www40.statcan.gc.ca/l01/cst01/demo02a-eng.htm>>; Statistics Canada, "Gross domestic product, expenditure-based, by province and territory", Statistics Canada CANSIM, table 384-0002 and Catalogue no. 13-213-PPB (Ottawa: Minister of Industry, 2010), online: Statistics Canada <<http://www40.statcan.gc.ca/l01/cst01/econ15-eng.htm>>.

<sup>9</sup> Federation of Law Societies of Canada, *2007 Law Societies Statistics* (Ottawa: Federation of Law Societies of Canada, 2008) at 2, online: Federation of Law Societies of Canada <<http://www.flsc.ca/en/pdf/statistics2007.pdf>>.

<sup>10</sup> *The Definitive Treaty of Peace and Friendship (Paris)*, 10 February 1763, 15 R.T.A.F. 66, 42 Cons. T.S. 279 (signed by Great Britain, France and Spain, with Portugal in agreement).

<sup>11</sup> *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. III, ch. 83 (1774) (*Quebec Act*).

(today 85% of the population remains francophone), practising the Roman Catholic religion and applying the French Civil Law—at the time based largely upon the 1580 revision of the *Coutume de Paris*<sup>12</sup> and Roman law. The first codification of private law in Quebec occurred in 1866, one year prior to Canadian Confederation, with the enactment of the *Civil Code of Lower Canada* (CCLC).

6 The Canadian Constitution (the *British North America Act, 1867*<sup>13</sup>) adopted at Confederation has had an important impact on the legal landscape in Quebec. It created a federal system of government, dividing powers between the central federal government and the provinces. Laws governing a subject matter that falls within federal jurisdiction (enumerated in s 91 and including, by way of example, criminal law, bankruptcy, and banking) are dealt with in a uniform manner across the country. As the rest of Canada can be characterized as a common law jurisdiction, this federal law is very much in accordance with the common law tradition. However, in matters that fall within the purview of the provinces (enumerated in s 92), such as private law areas of contract, tort (civil responsibility), property, and successions<sup>14</sup>, each province can apply its own legal tradition. As such, these are dealt with according to civilian legal principles in Quebec and according to the common law in the rest of Canada.

7 It is for this reason that Canada is characterized as a bijural country: both major western legal traditions, the civil law and the common law, operate within the federation. Quebec, more particularly, is described as a mixed legal system.<sup>15</sup> It is described in this way primarily because in its private law Quebec follows the French civilian tradition, whereas in its public (or more accurately federal) law it follows the English common law tradition. While this explains the mixed nature of substantive law applied in the province,

<sup>12</sup> *Coutume de la ville, prévosté & vicomté de Paris, avec les commentaires de L. Charondas Le Caron* (Paris: L'huillier et Mettayer, 1595).

<sup>13</sup> Renamed Constitution Act, 1867 (UK), 30 & 31 Vict., ch. 3, L.R.C. 1985, app. II, no 5.

<sup>14</sup> These matters fall within *ibid*, s 92(14), "Property and Civil Rights in the Province".

<sup>15</sup> See e.g. Glenn, "Quebec: Mixité and Monism" in Örüçü et al, eds, *Studies in Legal Systems: Mixed and Mixing* (The Hague: Kluwer Law International, 1996); Tetley, "Mixed Jurisdictions: Common Law v Civil Law (codified and uncoded)" (1999) 60 La. L. Rev. 677; Brierley "Quebec (Report 1)" and Baudouin, "Quebec (Report 2)" in Palmer, ed., *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001) 329 and 347, respectively.

the mixed nature of Quebec's legal system has, in addition, been influenced considerably by the fact that the judicial institutions in which these laws are interpreted and applied are modeled after the British court system and operate according to civil procedural rules and principles that owe their origins, as well, to the English adversarial system, rather than the continental inquisitorial system.

8 Not surprisingly, this has had a large impact on the role of the judge and of judgments in Quebec. The civil and common law traditions have, of course, diametrically different conceptions of these roles; under the classical civilian model, the judge is viewed primarily as the mouthpiece of the Code (*la porte parole de la loi*)<sup>16</sup> with no law-making power *per se*, whereas the entire system of the common law is predicated on the accumulation of precedent and the value of judicial decisions as *case-law*. And although many civilian jurisdictions today do not follow this conception of the role of the judge and of judgments to the letter (even in France, there is the notion of a "jurisprudence constante" that is followed by lower courts<sup>17</sup>), Quebec departs even more significantly from this traditional civilian view. There is, in practice, a heavy use of jurisprudence as persuasive authority by lawyers and judges (creating a system of *de facto* precedent) and consequently, many important legal concepts applicable in Quebec law have in fact "grown up" in the courts in the common law mode, rather than being "laid down" in the Code in the typical civilian fashion.<sup>18</sup>

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<sup>16</sup> Dedek, "The Relationship between Rights and Remedies in Private Law" in Sharpe & Roach, eds, *Taking Remedies Seriously/Les Recours et les Mesures de Redressement: Une Affaire Sérieuse* (Montreal: Canadian Institute for the Administration of Justice, 2010) 63 at 80 citing de Montesquieu, "Introduction" in de Montesquieu, ed., *De L'esprit Des Loix* (Paris: n.p., 1748) i at xiii.

<sup>17</sup> See e.g. Troper & Grzegorzczuk, "Precedent in France" in MacCormick and Summers, eds, *Interpreting Precedents: A Comparative Study* (Dartmouth, MA: Dartmouth Publishing, 1997) 103; Tunc, "Methodology of the Civil Law in France" (1976) 50 Tul. L. Rev. 459 at 464; David & de Vries, *The French Legal System: An Introduction to Civil Law Systems* (New York: Oceana Publications, 1958) at 119; Baudouin, "Impact of Common Law in Louisiana and Quebec" in Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge: Louisiana State University Press, 1974) 1 at 13.

<sup>18</sup> Good faith and unjust enrichment are two such examples in Quebec where courts were instrumental in creating new legal principles and where these jurisprudential developments were subsequently codified by the Legislature.

9 Moreover, not only are the judicial institutions and the procedural system in Quebec inherited from, and oriented to, the common law, but the judicial role itself is very much that of the common law judge. For example, judges are appointed from the Bar (rather than educated in the classroom as in the continental system), and their judgment-writing style, which includes personal judgments, dissents, and lengthy and fulsome discussions of issues and holdings, is far more reminiscent of the decisions of the UK Supreme Court than those of the French Cour de Cassation. The result is that judgments in Quebec read very much like judgments from anywhere else in common law Canada, distinguished only by the fact that they are drafted primarily in French.

10 For all the aforementioned reasons, Quebec is said to be a mixed legal system, in its substantive law, its procedural rules, its institutions of justice and its judicial culture.

### **Evolution of Quebec private law**

11 Since 1866, Quebec has been governed, in its private law, by a Civil Code (the *Civil Code of Lower Canada* of 1866 and then the *Civil Code of Quebec* of 1991 which came into force in 1994). The *Civil Code of Lower Canada* has often been described as a very loyal follower of the French *Code Napoléon* of 1804 although even in 1866 there can be found therein some significant differences attributed to common law influence such as rules of evidence, the insertion of commercial matters into the Code and the English notion of testamentary freedom.<sup>19</sup>

12 By the 1950s, the specter of recodification was raised in Quebec, as it had been in many other civilian jurisdictions,<sup>20</sup> and after a period

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See arts 6, 7 and 1375 C.C.Q (good faith) and arts 1493–1496 C.C.Q. (unjust enrichment).

<sup>19</sup> Popovici, “Libres propos sur la culture juridique québécoise dans un monde qui rétrécit” (2009) 54 McGill L.J. 223 at 226.

<sup>20</sup> See Murillo, “The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification” (2001) 11 J. Transnat’l L. & Pol’y 1 at 13 (“Generally, over the 20th century, the obsolescence in various degrees of the early 19th-century codification has triggered a tendency towards partial or global reform to adapt civil codes to the fundamental transformations taking place in the civil law tradition.”) Other civilian jurisdictions that undertook global recodifications of their law during the same period include Italy (Civil Code of 1942), Portugal (Civil Code of 1966), Guatemala (Civil Code of 1963), Bolivia (Civil Code of 1975),

of approximately 36 years, this project came to fruition. The recodification process in Quebec is marked by three periods. The initial period occurred in the 1950s where little beyond the emancipation of the married woman was actually adopted. The second period took place in the 1960s and 1970s where, over a period of 12 years, the work of the Civil Code Revision Office produced a Draft Civil Code (1978).<sup>21</sup> The third period was marked by the years from 1978 to 1991 where the Draft Civil Code was examined, refined and modified, ultimately resulting in the new *Civil Code of Quebec*, enacted in 1991 but to come into force only in 1994.<sup>22</sup>

13 Much has been written about recodification in Quebec or, as Professor John Brierley, former Dean of the Faculty of Law at McGill University, termed it, “the renewal of Quebec’s distinct legal culture”.<sup>23</sup> It is indeed seen as quite a feat to have successfully accomplished recodification for it is uniformly acknowledged to be an arduous and precarious undertaking. Brierley has described it as an “audacious process”<sup>24</sup> and as another former Dean of McGill’s Law Faculty, Professor Roderick Macdonald, has put it, “whatever else it may be, a civil code is not a regulation or an order-in-council that can be peremptorily and continually modified”.<sup>25</sup>

14 The purpose of the reform of the Code was threefold.<sup>26</sup> Sociologically, it was intended to close the gap between codal rules and lived experience. Methodologically, it would serve to consolidate and rationalize conflicting currents in judicial interpretation. Finally,

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Venezuela (Civil Code of 1982), Peru (Civil Code of 1984), Paraguay (Civil Code of 1987), Netherlands (Civil Code of 1990), Brazil (Civil Code of 2002).

<sup>21</sup> Quebec, Civil Code Revision Office, *Report on the Québec Civil Code*, vol. 1, *Draft Civil Code* (Quebec: Éditeur officiel, 1978).

<sup>22</sup> See Brierley, “The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Quebec” (1992) 42 U.T.L.J. 484 at 495. See also Macdonald, “Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies” (1994) 39 McGill L.J. 761 at 810–811.

<sup>23</sup> Brierley, *ibid.*

<sup>24</sup> *Ibid.* at 488.

<sup>25</sup> Macdonald, *supra* note 22 at 806. See also Rémillard, “*Avant-Propos*” in Rémillard, ed., *Le Nouveau Code Civil du Québec: Un Bilan* (Montreal: Wilson & Lafleur, 1995) 1 at 2 (“*un code civil est plus qu’une simple loi, il est un véritable contrat social*”).

<sup>26</sup> Macdonald, *ibid.* at 810.

symbolically, it would reassert the centrality of the Code and the civilian legal tradition in the distinct society of Quebec.<sup>27</sup>

15 The New Quebec Code has been described as neither a revolution nor a simple revision.<sup>28</sup> It is seen as a model of continuity with elements of novelty and modernization.<sup>29</sup> In particular, it is estimated that approximately 70% of the *Civil Code of Quebec* is the same as the *Civil Code of Lower Canada*<sup>30</sup> and while the inspiration for the new Code was eclectic<sup>31</sup> (in the sense that many different Codes and civilian jurisdictions, as well as the common law, were studied and used), there is no doubt that it is very much a code that remains loyal to the civilian tradition. It follows the vocation of a code in its systemized, rational and internally coherent attempt to present, in a broad-principled manner, all of the private law, aspiring to be, in the words of Brierley,<sup>32</sup> “panoptic” and “pansophic”. Its taxonomic clarity and architectonic perfection have been lauded and jurists uniformly assert that it retains and maintains the “*tradition civiliste*”.<sup>33</sup>

16 It is, of course, difficult to assess the modern character of the Code or to measure its success. As Macdonald explains, some would want to measure the success of the new Code academically, according to its level of internal coherence. Others would prefer to assess how it fits practically with the needs of the lawyers and legal practice. Still others would want to concentrate on how it fairly resolves human problems.<sup>34</sup> Nonetheless, many trumpet the C.C.Q. as an example of a “modern code”, modern in the sense that it reflects the spirit of

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<sup>27</sup> This nationalistic importance of the new Quebec Code is underscored by Brierley, *supra* note 22 at 496 and by Popovici, *supra* note 19 at 228.

<sup>28</sup> Popovici, *ibid.*

<sup>29</sup> *Ibid.* at 228–229.

<sup>30</sup> See *ibid.* at 231–232; Gaudet, “*La doctrine et le Code civil du Québec*” in *Le nouveau Code civil: interpretation et application, les Journées Maximilien-Caron 1992* (Montreal: Thémis, 1993) 129 at 223. See also Brierley, *supra* note 22 at 485.

<sup>31</sup> See Popovici, *ibid.* at 232–233; Brierley, *ibid.* at 501–502.

<sup>32</sup> Brierley, *ibid.* at 491.

<sup>33</sup> Popovici, *supra* note 19 at 223, 229; Pineau, “*La réforme d’un Code civil*” in Serge Lortie et al, eds, *Du Code civil du Québec: contribution à l’histoire immédiate d’une recodification réussie* (Montreal: Thémis, 2005) 233 at 236.

<sup>34</sup> Macdonald, *supra* note 22 at 807.



innovation in its desire to adapt to contemporary society<sup>35</sup> and harmonize the law with current economic and social realities.<sup>36</sup>

17 In terms of adapting to *contemporary social realities*, the new Code is said to recognize, in its introduction of many instances of a so-called “new contractual morality”,<sup>37</sup> that parties are not, in fact, free and equal as the underlying contractual theory of autonomy of the will would have us believe, and that strict adherence to the autonomist theory has broken down in contemporary situations of contracting. As examples of this new contractual morality, we see the codification of the doctrine of good faith in both the creation and performance of contractual obligations.<sup>38</sup> This concept was developed jurisprudentially,<sup>39</sup> first in the context of abuse of rights and then more generally into the context of reasonableness in the divulging of relevant information at contract formation and in the performance of one’s contractual rights and obligations post-formation.

18 Contractual morality was also introduced through a special regime of protection for parties who enter into either adhesion contracts without the benefit of negotiation or consumer contracts, most notably with the introduction of the concept of the abusive clause for those more vulnerable contracting parties.<sup>40</sup> In addition, the new Code

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<sup>35</sup> Popovici, *supra* note 19 at 231.

<sup>36</sup> Crépeau, “*Une certaine conception de la recodification*” in Lortie *et al.*, *supra* note 33, 23 at 64.

<sup>37</sup> Baudouin, Jobin & Vézina, *Les obligations*, 6th ed. (Montreal: Yvon Blais, 2005) at 13; Rolland, “*Les figures contemporaines du contrat et le Code civil du Québec*” (1999) 44 McGill, L.J. 903.

<sup>38</sup> Arts 6, 7, 1375 C.C.Q.

<sup>39</sup> This jurisprudential development may be illustrated by a trilogy of Supreme Court of Canada decisions (*National Bank v Soucisse et al.*, [1981] 2 S.C.R. 339; *Houle v Canadian National Bank*, [1990] 3 S.C.R. 122 [*Houle*]; *Bank of Montreal v Bail Ltée*, [1992] 2 S.C.R. 554). See Jukier, “*Banque Nationale du Canada v Houle* (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law”, Case Comment (1992) 37 McGill, L.J. 221 [Jukier, “*Houle*”].

<sup>40</sup> See generally arts 1435–1437 C.C.Q. and in particular art 1437 regarding the abusive clause (“An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced ... An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.”)

regulates the penalty clause more generally, giving judges the power to review such clauses when abusive or excessive, whatever the nature of the contract.<sup>41</sup>

19 The new Code, however, retains its allegiance to its civilian roots, as well as to notions of certainty and predictability of contractual relations, in its refusal to enact a general lesion (or unconscionability) provision (outside of the consumer setting or contracts of loan<sup>42</sup>) or a general *imprévision* provision. As such, post-contract modifications due to unforeseeable events are only possible if these events constitute “force majeure”<sup>43</sup> (causing absolute impossibility of performance), are provided for in a *force majeure* clause in the parties’ contract, or are mutually consented to by the parties.

20 As for the ways in which the Civil Code of Quebec has adapted to *new economic realities*, the most notable example is the adoption into the Civil Code of the entire regime of the Trust,<sup>44</sup> an instrument that has caused civilian jurisdictions serious theoretical problems given the differences between the common law and civilian notions of ownership. Other changes include the creation of the movable hypothec<sup>45</sup> (which recognizes the shift in importance from immovable to movable property and the fact that today, many movable instruments constitute much of people’s wealth thereby exemplifying a new logic in the entire regime of secured financing), and the unification and simplification of prescription periods<sup>46</sup> in both contractual and extra-contractual matters.

### **What can Jersey draw from the Quebec experience?**

21 It is indeed possible for Jersey to relate to the evolution of civilian contract law in Quebec because the two jurisdictions bear some degree of similarity. Both can be described as having civil law in their DNA,<sup>47</sup> and both operate, for many purposes, as autonomous civilian jurisdictions within larger jurisdictions, be it Canada or the United Kingdom, that have common law as their legal tradition.

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<sup>41</sup> Art 1623 C.C.Q. (to be contrasted with prior law under arts 1076 and 1135 CCLC).

<sup>42</sup> Art 2332 C.C.Q. and Consumer Protection Act, R.S.Q. c. P-40.1, ss 8, 9.

<sup>43</sup> Defined in art. 1470(2) C.C.Q.

<sup>44</sup> Arts 1260—1298 C.C.Q.

<sup>45</sup> Arts 2665, 2696–2714.7 C.C.Q.

<sup>46</sup> Art 2925 C.C.Q.

<sup>47</sup> Fairgrieve, *supra* note 5 at 24.

22 While these similarities bode well for anyone from Jersey seeking to learn from the Quebec experience, one must, at the same time, point to the many differences that exist between these two jurisdictions. For one, Jersey has never had a Code and as such, there is no document to reform or recodify. Any codification of the law of contract would, therefore, have to start from scratch. Secondly, unlike Jersey, the large population of Quebec, together with the province's historic commercial importance and activity, means that Quebec has had the benefit of a robust legislative and jurisprudential evolution that was built up over decades and, indeed, over a century. Finally, one cannot ignore the political element as an important factor in the retention of civil law in Quebec. The New Code has been termed an example of legal nationalism;<sup>48</sup> a symbol of Quebec's distinct legal culture within a distinct society<sup>49</sup> with political overtones of secession.<sup>50</sup> While there may indeed be a similar sense of national legal identity in Jersey, there also seems to be overriding financial and economic motivations for legal certainty.

23 Despite these differences, the similarities in Quebec and Jersey's legal histories, traditions and aspirations enable us to draw some interesting conclusions from Quebec's experience which, in a nutshell, demonstrates that a civilian system is indeed capable of being modernized so as to operate successfully in a contemporary, economically-friendly society. To put it bluntly, no serious contention can be made that one would not invest, or do business, in Quebec because it follows the civilian legal tradition.

24 This last statement, however, begs the question raised by the World Bank's "Doing Business Reports" of 2004 and 2006,<sup>51</sup> which draw upon the "legal origins" literature<sup>52</sup> and assert that legal systems

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<sup>48</sup> Popovici, *supra* note 19 at 231.

<sup>49</sup> For reference to Quebec's distinct society, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 59 [*Secession Reference*].

<sup>50</sup> There have been two referenda (1980 and 1995) asking the Quebec population whether they wanted to secede from Canada. See also *Secession Reference*, *ibid.*

<sup>51</sup> World Bank, *Doing Business in 2004: Understanding Regulations* (Washington, DC: The World Bank/Oxford University Press, 2003); World Bank, *Doing Business in 2006: Creating Jobs* (Washington, DC: The World Bank/International Finance Corporation, 2005).

<sup>52</sup> See e.g. La Porta, Lopez-de-Silanes & Shleifer, "The Economic Consequences of Legal Origins" (2008) 46 J. of Econ. Lit. 285; Beck, Demirgüç-Kunt & Levine, "Law and Finance: Why Does Legal Origin

belonging to the common law tradition are better at fostering economic performance. If that is indeed the case, and if Jersey desires to reform its contract law, absent any political constraint to maintain the civil law tradition as a nationalistic symbol, why not adopt the common law? The assertion that the common law is better for business must first be further investigated.

25 The response by French jurists to this assertion has been vociferous.<sup>53</sup> They have both criticized the methodology of the World Bank reports and have touted the virtues of the civil law as being an accessible, rational, democratic (in its intelligibility to the everyday man) and certain legal system. Others have responded to these Reports by positing that their conclusions do not apply well to mixed or hybrid legal systems, citing studies that actually show that such hybrid or mixed jurisdictions, which more typically follow the civil law in their private law of property and contract, and the common law in their public law, have performed extremely well regarding GDP growth and other economic factors.<sup>54</sup> The conclusion reached is that “this result implies that having major areas of law remain civil law did not hinder the economic performance of those countries”.<sup>55</sup> Quebec falls quite squarely within this thesis.

26 Moreover, a plausible thesis may be advanced to the effect that what ultimately may be of most importance to a well-functioning economic environment is not so much the legal origin of the particular jurisdiction as much as the strength of its institutions that support the enforcement of such law, namely, courts wedded to the rule of law with independent judiciaries and the availability of reliable arbitration.<sup>56</sup>

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Matter?” (2003) 31 J. of Comp. Econ. 653; Glaeser & Shleifer, “Legal Origins” (2002) Q. J. of Econ. 1193.

<sup>53</sup> Association Henri Capitant des amis de la culture juridique française, *Les droits de tradition civiliste en question: à propos des rapports Doing business de la Banque mondiale* (Paris: Société de législation comparée, 2006).

<sup>54</sup> Kim, “Mixed Systems in Legal Origins Analysis” (2010) 83 S. Cal. L. Rev. 693 at 722.

<sup>55</sup> *Ibid.*

<sup>56</sup> See e.g. Feld & Voigt, “Economic Growth and Judicial Independence: Cross-Country Evidence using a new set of indicators” (2003) 19 *European Journal of Political Economy* 497; Trebilcock & Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008); Wanis-St. John, “Implementing ADR in Transitioning States: Lessons Learned From Practice” (2000) 5 Harv.

27 These World Bank Reports, however, necessitate more profound reflection as to whether there is anything inherent about the civilian contract system that makes it less conducive for the business community than the common law contract tradition. The following examines some of the reasons that might be said to support this assertion.

28 First, much of the thinking behind the assumption may be linked to the law and economics movement, so prevalent in the common law jurisdiction of the United States, which seeks to analyze law and its effectiveness through the lens of economic efficiency.<sup>57</sup> However, as Catherine Valecke has aptly pointed out, just because jurists within a legal tradition seek to analyze law through an economic lens (as do the Americans but not the French for example), does not necessarily mean the law itself leads to better economic outcomes.<sup>58</sup>

29 Apart from the link between law and economics, some assert that the civil law is antithetical to a strong business environment in its acceptance and enforcement of a general obligation of good faith. The common law, at least in England and Canada, remains fairly obstinate in its unwillingness to recognize a general duty of good faith.<sup>59</sup> The same is not true in the civilian jurisdiction of Quebec. Introduced by the Supreme Court of Canada jurisprudentially but quickly codified in the C.C.Q.,<sup>60</sup> the concept of good faith goes beyond intentional or malicious behavior and actually requires contracting parties to act reasonably vis-à-vis their co-contractant in the formation of the contract (requiring adequate disclosures beyond the fraud standard) as well as in its performance. As such, although previously thought to be an oxymoron, abuse of rights is possible and in the high-profile case of *Houle v Banque National*,<sup>61</sup> this translated into an obligation on the part of the Bank not to call a large demand loan, nor to seize and sell

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Negot. L. Rev. 339; Siems, "Legal Origins: Reconciling Law & Finance and Comparative Law" (2007) 52 McGill L.J. 55.

<sup>57</sup> Valecke, "The French Response to the World Bank's *Doing Business* Reports" (2010) 60 U.T.L.J. 197 at 200-206.

<sup>58</sup> *Ibid.* at 206.

<sup>59</sup> See Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Can Bus. L.J. 385; Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed. (Oxford: Clarendon Press, 2005) at 164-165; *Martel Building Ltd. v Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 at para. 73 [*Martel*]; McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 780-807.

<sup>60</sup> *Supra* notes 38, 39 and accompanying text.

<sup>61</sup> *Houle*, *supra* note 39. See also Jukier, "Houle", *supra* note 39.

assets to execute that loan, without reasonable notice, despite the fact that the loan was clearly a demand loan without any explicitly-required notice period. Although there are isolated examples to the contrary, in general, common law judges and jurists react differently to the adoption of a good faith duty, expressing the worry that it might “hobble the marketplace”<sup>62</sup> and disincentivize parties from acquiring useful information on their own.<sup>63</sup>

30 While it is true that good faith is an astounding doctrine in many ways, and while it is also true that Anglo-Canadian common law does not, barring specific legislative pronouncement, accept such a doctrine in a generalized form, there are many similar or equivalent doctrines at play in the common law such as undue influence<sup>64</sup> and even unconscionability.<sup>65</sup> The latter, applicable only in cases of unequal bargaining power, is arguably less relevant where both parties are acting in a commercial context, but can certainly apply against a commercial party who contracts with a non-commercial or more vulnerable party.

31 To return to reasons that may justify the World Bank’s position, there is also the assertion that the civil law’s view of remedies is less attuned to the business model. It is often said that in the civil law, “rights precede remedies” while in the common law “remedies precede rights”.<sup>66</sup> If we accept that businesses need remedies, it would then follow that the common law might better provide the legal basis for a sound business environment.

32 Of course no legal system, including those adhering to the civilian tradition, is devoid of “damage remedies” in the contractual setting. It is true, however, that insofar as the parties request it, courts in civilian jurisdictions will be more inclined to grant the remedy of specific performance than their common law counterparts, where that remedy still bears the markings of an equitable remedy which is thereby

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<sup>62</sup> *Martel*, *supra* note 59 at para. 67, Iacobucci J.

<sup>63</sup> Kronman. “Mistake, Disclosure, Information and the Law of Contracts” (1978) 7 J. Legal Stud. 1.

<sup>64</sup> See *Barclays Bank plc v O’Brien*, [1993] UKHL 6, [1993] 4 All ER 417 where the doctrine of undue influence rendered a mortgage, granted as security to a Bank in a matrimonial context, unenforceable.

<sup>65</sup> *Lloyds Bank Ltd v Bundy*, [1974] EWCA Civ 8, [1974] 3 All ER 757 (UK); *Harry v Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

<sup>66</sup> Descheemacker, “*Faut-il codifier le droit privé européen des contrats*” (2002) 47 McGill L.J. 791 at 808.

exceptional, discretionary and of last resort.<sup>67</sup> As Oliver Wendell Holmes has said, “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else”.<sup>68</sup>

33 Ordering the specific performance of a financially disadvantageous contract has been criticized by many, specifically those advocating an economic analysis of law, as being economically inefficient and not in the best business interests of the parties, who would be best off “divorced” from each other with, in the words of Lord Hoffmann in the House of Lords, “the forensic link between them ... severed”.<sup>69</sup> Specific performance can cause the contract breaker to be liable to “potentially large unquantifiable and unlimited losses which may be out of all proportion to the breach”.<sup>70</sup> The civilian jurist would react to these statements by countering that “[j]udicial interference is rarely necessary to enforce contracts which will yield a profit to the defendant”.<sup>71</sup> Moreover, aside from the penchant to protect the victim of the breach rather than the one who caused it, the doctrine of good faith, so questioned by the common law, could very well be the answer to limit the availability of specific performance in civil law cases where the cost of performing is so out of proportion to the value of the performance.<sup>72</sup>

34 As can be seen from the above discussion, there are many functional equivalents in the common law to the civilian doctrines that appear unfavourable to the business environment. Moreover, it is possible to identify other contract doctrines in the common law which may act in an equally unfriendly manner to commercial ventures.

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<sup>67</sup> Jukier, “Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract” in Sharpe & Roach, *supra* note 16, 85 [Jukier, “Specific Performance”]; *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd.* (1997), [1998] A.C. 1 at 11, [1997] 2 W.L.R. 898 (H.L.), Lord Hoffmann [*Argyll* cited to A.C.]; Heslen & Hardy, “Is the System of Contract Remedies in the Netherlands Efficient From a Law and Economics Perspective?” in Smits, Haas and Heslen, eds. *Specific Performance in Contract Law: National and Other Perspectives* (Antwerp: Intersentia, 2008) 287 at 288.

<sup>68</sup> Holmes, “The Path of the Law” (1897) 10 Harv. L. Rev 457 at 462.

<sup>69</sup> *Argyll*, *supra* note 67 at 16.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*, [1988] R.J.Q. 716 at 728 (C.S.), Steinberg J.

<sup>72</sup> Jukier, “Specific Performance”, *supra* note 67 at 112–114.

35 Take the requirement that contracts in the common law must have consideration in order to be valid. Consideration, being a *quid pro quo* or evidence of a bargain, something that weeds out gratuitous promises, at first seems to mesh well with the commercial or business nature of the contractual regime. However, as cases in a multitude of common law jurisdictions have indicated, when attempting to modify a business deal, usually for some practical business or market-driven reason, consideration comes knocking at the door again with the need for fresh consideration for every new (or modified) promise.<sup>73</sup> Thus, the Ontario Court of Appeal has held that a promise to pay more for the supply of steel, agreed to in the context of an increase in market price, was not enforceable because it was unsupported by fresh consideration.<sup>74</sup> The English Court of Appeal, in *Williams v Roffey*,<sup>75</sup> had to create the notion of the “practical benefit” to obviate the nefarious effects of the fresh consideration rule in order to allow a sub-contractor to enforce a promise to be paid more money by the contractor when the initial price was clearly economically inadequate. Most recently, in the Canadian common law province of New Brunswick, the issue of fresh consideration reared its head in a very commercial venture involving millions of dollars concerning the creation of a runway at an airport and a promise to pay the contractor more money to replace a landing system.<sup>76</sup>

36 These examples demonstrate that at times, rather than promoting business efficiency, the doctrine of consideration can generate obstacles. The aforementioned recent Canadian decision dealing with the airport runway, which echoes in many ways the English Court of Appeal’s position, has intimated that consideration should not necessarily apply to modifications of contracts and that the true inquiry should centre around the doctrine of duress.<sup>77</sup> If the modification was made freely, then it should be enforced; if imposed on the contracting party by duress, then it should not be. It is interesting to note that this is how the civil law has always approached this issue, allowing parties to modify their contracts

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<sup>73</sup> *Stilk v Myrick*, [1809] EWHC KB J58, 170 ER 1168; *Harris v Watson* (1791), Peake 72, 170 ER 94.

<sup>74</sup> *Gilbert Steel Ltd v University Construction Ltd* (1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.).

<sup>75</sup> *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, [1989] EWCA Civ 5, [1991] 1 QB 1.

<sup>76</sup> *Greater Fredericton Airport Authority Inc v NAV Canada*, 2008 NBCA 28, N.B.R. (2d) 238.

<sup>77</sup> *Ibid* at paras 27–32.



subject to the concept of violence or fear,<sup>78</sup> independently of any notion of consideration.

37 A strict application of the doctrine of privity has also caused many problems in the commercial context, particularly when contracting parties wished to exonerate third parties from liability, be they employees or independent contractors. This article is not the place to explore all the intricacies of the mental gymnastics performed by the House of Lords in a line of shipping cases in the attempt to allow stevedores to be exonerated from liability when these stevedores were clearly third parties to the shipping contract.<sup>79</sup> It is, however, worth mentioning that England, although not Canada,<sup>80</sup> has recently legislated (in the *Contract (Rights of Third Parties Act) 1999*<sup>81</sup>) a very civilian notion of the *stipulation pour autrui*<sup>82</sup> in order to solve this problem.

38 As the above discussion demonstrates, it is difficult to make generalizations as to which legal tradition is best suited to modern economic society. This lesson is well-learned by students and professors engaged in the transsystemic study of law, the term the Faculty of Law of McGill University uses to designate its unique method of legal education.<sup>83</sup> Transsystemia integrates, in a non-judgmental way, the study of many legal traditions and systems including, primarily, the two major western legal traditions of the

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<sup>78</sup> Arts 1402–1404 C.C.Q.

<sup>79</sup> See e.g. *Scruttons Ltd v Midland Silicones Ltd*, [1961] UKHL 4, [1962] AC 446; *New Zealand Shipping v Satterthwaite (The Eurymedon)*, [1975] AC 154.

<sup>80</sup> See *London Drugs Inc v Kuehne & Nagel International Ltd*, [1992] 3 S.C.R. 299; *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 S.C.R. 108.

<sup>81</sup> (UK), 1999, c. 31.

<sup>82</sup> The stipulation for the benefit of a third party is codified in arts 1444–1450 C.C.Q.

<sup>83</sup> See generally Morissette, "McGill's Integrated Civil and Common Law Program" (2002) 52 J. Legal Educ. 12; Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29; de Mestral, "Guest Editorial: Bisystemic Law-Teaching—The McGill Programme and the Concept of Law in the EU" (2003) 40 C.M.L. Rev. 799; Howes, "Maladroit or Not? Learning to Be of Two Minds in the New Bi-jural Law Curricula" (2002) 52 J. Legal Educ. 5; Bédard, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'" (2001) 27 Queen's L.J. 237; Jukier, "Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom" (2005) 50 McGill L.J. 789.

civil and the common law. Having benefitted from this academic background, it is not this author's intention to tell Jersey that it would be best off to adopt the civil or the common law in its modernization and reformation of Contract Law. It is quite evident that both legal traditions have their merits, and their problems, and that most often, one can achieve "functional equivalence". However, it is not hard to agree that the current state of uncertainty does need to be regulated, and that Jersey does need to sort out its legal identity. In many ways, this is more important for the local population than for large financial or commercial ventures doing business in the jurisdiction. The latter can, and usually do, negotiate choice of law clauses into their contracts, and thereby contractually designate the legal system that will regulate their contractual dispute. The "Jerseyman", on the other hand, does not usually have such foresight or opportunity.

39 In its attempt to sort out its legal identity, Jersey should not only take into account current developments in the law of contract in both civil and common law legal systems, but it must also be mindful of the potential perils of legal transplantation. Having said that, the extremist views expressed by Pierre Legrand to the effect that legal transplantation is cultural plagiarism and is therefore impossible, or at least undesirable,<sup>84</sup> is certainly not endorsed by this author.<sup>85</sup> Legal ideas travel and have always travelled from the days of the reception of Roman Law into the basis of the European *ius commune*, and even as between the various coutumes of medieval law.<sup>86</sup>

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<sup>84</sup> See Legrand, "The Impossibility of 'Legal Transplants' (1997) 4 M.J.E.C.L. 111.

<sup>85</sup> Or indeed by others—see e.g. Watson, "Legal Transplants and European Private Law" (2000) 4.4 *Electronic J. Comp. L.*, online: <<http://www.ejcl.org/44/art44-2.html>>; Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 *Am. J. Comp. L.* 489; Kahn-Freund, "On Use and Misuse of Comparative Law" (1974) 37 *Modern L. Rev.* 1; Heim, "Predicting Legal Transplants: The Case of Servitudes in the Russian Federation" (1996) 6 *Transnat'l L. & Contemp. Probs.* 187; Nelken, "The Meaning of Success in Transnational Legal Transfers" (2001) 19 *Windsor Y.B. access Just.* 349. See also the many articles on the topic in Nelken & Feest, eds, *Adapting Legal Cultures* (Oxford: Hart, 2001). Most authors, including many of those cited above, do, however, also acknowledge the potential perils, and potential for failure, of legal transplantations.

<sup>86</sup> Kuskowski, "Common Laws and Local Customs: Adoption, Adaptation and Juristic Practice in Medieval France" (Presentation at Conference on the *Ius Commune*—A European Common Past? hosted by the Faculty of Law, McGill University, 1 October, 2010) [unpublished].

40 Moreover, as has been mentioned earlier in this paper, the inspiration for Quebec's new Code was eclectic, and some common law water (in the form of the trust and the moveable hypothec) was poured into its civilian wine. Rather, the words of the newest justice on the US Supreme Court, Elena Kagan, seem to be the most reasonable. In response to a question posed at her Senate Confirmation hearings, as to whether she would look to foreign law as a justice on the Supreme Court, she responded, "I'm in favor of good ideas coming from wherever you can get them".<sup>87</sup> Nonetheless, for legal transplants to be successful, one must be sensitive to the delicacy of the endeavour of transplantation and be very conscious of the social, political and legal context of the receiving jurisdiction.<sup>88</sup> In Jersey's case, this requires one to be extremely mindful of the fact that its DNA is civilian in nature.

41 The message of this short reflection is that while Jersey will ultimately decide what is in Jersey's best interest, with reliable judicial institutions and certainty and predictability of legal rules, businesses will adapt, whatever the Island's legal identity. Rather, in its quest to rediscover its legal identity, Jersey may well look to the evolution of Quebec's contract law as an example of a jurisdiction that has successfully modernized and adapted its legal system, without abandoning its civilian heritage.

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<sup>87</sup> US, Committee on the Judiciary, 111th Cong., Sess. 2 (29 June 2010) (Elena Kagan Senate Confirmation Hearing), online: United States Senate Committee on the Judiciary <<http://judiciary.senate.gov>>.

<sup>88</sup> Berkowitz *et al.*, "The Transplant Effect" (2003) 51 Am. J. Comp. L. 163; Mirjan Damaska, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 Am J. Comp. L. 839.