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Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec

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Abstract
This article explores judicial methodology in the mixed legal system of Quebec and examines, in particular, how the nature of its legal system as a mixed legal system influences the judicial methodology of its judges, especially with respect to the de facto use of precedent. Features of the mixity, including the institutional setting of Quebec courts as courts of inherent jurisdiction, the nature of Quebec's civil justice system and procedural law, as well as the judicial role and the effect of a supreme precedential authority (in the Supreme Court of Canada) are examined in turn as influential factors.

Keywords
judicial methodology; precedent; mixed legal systems; Quebec law

1. Introduction

The topic of judicial methodology has long fascinated legal philosophers,[1] jurists[2] and even judges themselves.[3] Whether inductive or deductive methods

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1) See generally, in the Anglo-American tradition, Llewllyn, KN (1951) *The Bramble Bush* Oceana Publications at 56-59; Dworkin, R (1977) *Taking Rights Seriously* Harvard University Press at 110-123; Fuller, LL (1964) *The Morality of Law* Yale University at 34. For a leading discussion of the role and processes of judicial decision-making in historical and cross-cultural contexts, see Dawson, JP (1968) *The Oracles of the Law* University of Michigan Law School.

2) For some examples of Canadian and Quebec sources on the subject see Young, AH (1994) '*Stare decisis* – Quebec Court of Appeal – Authority v. Persuasiveness: *Lefebvre c. Commission des affaires sociales*' (72) *Canadian Bar Review* 91 at 97-105; Popovici, A (1973) 'Dans quelle

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are employed to arrive at judicial decisions, the extent to which doctrinal and other academic writings are used by judges to support their findings and, of course, the major question of the place and role of prior decisions have all been the focus of a wealth of scholarly writings and academic conferences. These questions have preoccupied scholars from civilian and common law legal systems alike and, although today recognized as an overly simplistic or general proposition, the doctrine of stare decisis, or binding nature of precedent, has often been cited as one of the fundamental differences in methodology between the civil and the common law.[4]

The elusive nature of determining how judges arrive at, and justify,[5] their decisions is even more complex in a mixed legal system,[6] a category in which the legal jurisdiction of Quebec finds itself. This paper will explore *why* judges in Quebec use the judicial methodology they use and, in particular, why they turn to prior decisions in the way that they do.[7]

Before, however, one seeks to hypothesize the reasons for the particular methodology of Quebec judges, two preliminary issues must be addressed. The first is what one means when one characterizes Quebec as a mixed legal system. The second is determining, and briefly describing, the judicial methodology that Quebec judges currently employ.

2. Quebec: A Mixed Legal System

As Professor Vernon Palmer has so wisely pointed out, there is no 'single paradigm', no 'single style' and, indeed, no 'canonical meaning' to being a mixed

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mesure la jurisprudence et la doctrine sont-elles source de droit au Québec' (8) *Revue Juridique Thémis* 189 at 189-195; Valcke, C (2007) '"Precedent" and "Legal System" in Comparative Law – A Canadian Perspective' in Hondius, E (ed) (2007) *Precedent in Comparative Law* Bruylant 85 at 88-95; Smith, L (2005) 'The Rationality of Tradition' in Endicott, T; Getzler, J and Peel, E (eds) (2005) *Properties of Law: Essays in Honour of Jim Harris* Oxford University Press 297.

3) See L'Heureux-Dubé, C (1993) 'By Reason of Authority or by Authority of Reason' (27) *UBC Law Review* 1; Dalphond, PJ (2004) 'Le style civiliste et le juge: le juge québécois ne serait-il pas le prototype du juge civiliste de l'avenir?' in Kasirer, N (ed) *Le droit civil, avant tout un style?* Thémis 81; Mignault, PB (1925) 'The Authority of Decided Cases' (3) *Canadian Bar Review* 1.

4) See Dainow, J (1966-67) 'The Civil Law and the Common Law: Some Points of Comparison' (15) *American Journal of Comparative Law* 419 at 424-427; Smits, J (2002) *The Making of European Private Law* Intersentia at chapter 3.

5) The subtle, yet important, difference between the judicial 'process of discovery' and the 'procedure of justification' has been examined by Wasserstrom, RA (1961) *The Judicial Decision* Standford University Press. This article will focus on the nature of judicial methodology primarily in the sense of how judges justify their decisions.

6) What Professor Vernon Palmer has so aptly entitled 'the third legal family' in Palmer, VV (2009) 'Quebec and Her Sisters in the Third Legal Family' (54) *McGill Law Journal* 321.

7) As such, the question of their use of doctrine, which is an interesting but separate topic, will not be explored in this paper. For an overview of this topic see Dalphond, PJ (2008) 'La doctrine a-t-elle un avenir au Québec' (53) *McGill Law Journal* 517.

jurisdiction.[8] We are all mixed, or as some would say 'mixed up', in our own unique ways.[9]

Quebec, one of Canada's ten provinces, may be referred to as a mixed jurisdiction in three senses.[10] The first, and the one that has received the most focus, is its bijurality.[11] As a result of Quebec's history and Canada's constitutional framework, both major western legal traditions, the civil law and the common law, find their place within the province's legal jurisdiction.

In terms of the briefest of historical overviews,[12] 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, over 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* of 1763.[13] The seminal historical moment, however, that determined the *law* of Quebec, came several years later in 1774, with the enactment of the *Quebec Act*.[14] This Act of the British Parliament granted Quebec, by way of concession and in order to secure the allegiance of its inhabitants, the right to continue using the French language, practicing the Roman Catholic religion and applying the French Civil Law – at the time based largely upon the 1580 revision of the *Coutume de Paris* and Roman law.[15] 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*.[16]

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8) Palmer, supra at 6, 339, 350.

9) The late Lord Rodger of Earlsferry, scheduled to deliver the opening keynote for the Third International Congress of the World Society of Mixed Jurisdictions held in Jerusalem in June 2011, entitled his address: 'Mixed Jurisdictions in a Mixed-Up Legal World' [undelivered].

10) See Glenn, HP (1996) 'Quebec: Mixité and Monism' in Örücü, E; Attwooll, E and Coyle, S (eds) (1996) *Studies in Legal Systems: Mixed and Mixing* Kluwer Law International 1; Tetley, W (1999) 'Mixed Jurisdictions: Common law v. civil law (codified and uncodified)' (60) *Louisiana Law Review* 677; Brierley, JEC (2001) 'Quebec (Report 1)' in Palmer, VV (ed) (2001) *Mixed jurisdictions worldwide: the third legal family* Cambridge University Press 329.

11) See eg L'Heureux-Dubé, C (2002) 'Bijuralism: A Supreme Court of Canada Perspective' (62) *Louisiana Law Review* 449.

12) Much of the historical overview is taken from Jukier, R (2011) 'Contract Law: What can Jersey Learn from the Quebec Experience?' (14) *Jersey and Guernsey Law Review* 131 at paragraphs 4-7.

13) *The Definitive Treaty of Peace and Friendship* (*Paris*), 10 February 1763, 15 RTAF 66, 42 Cons TS 279 [signed by Great Britain, France and Spain, with Portugal in agreement].

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

15) *Coutume de la ville, prévosté & vicomté de Paris, avec les commentaires de L Charondas Le Caron* (Paris: L'huillier et Mettayer, 1595). It must be pointed out, however, that while for the most part, this served to bring the French civilian tradition into Quebec private law, several keys areas of English common law remained including, most notably, freedom of willing making Quebec itself a bijural jurisdiction within a bijural country.

16) The 1866 Civil Code of Lower Canada was replaced with the Civil Code of Quebec of 1991 (hereinafter "CCQ"), which came into force 1 January 1994.

The Canadian Constitution (the *British North America Act, 1867*) has also had an important impact on the legal landscape in Quebec.[17] It created a federal system of government, dividing legislative powers between the central federal government and the provinces. Laws governing a subject matter that falls within federal jurisdiction (enumerated in section 91 and including, by way of example, Criminal law, Bankruptcy, and Banking) are dealt with, in principle, 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 section 92, such as private law areas of Contract, Tort (Civil Responsibility), Property, or Successions),[18] each province applies its own legal tradition. As such, these are dealt with, generally, according to civilian legal principles in Quebec and according to the common law in the rest of Canada. Quebec is thus said to be bijural in the sense that in its private law, Quebec follows the French civilian tradition, whereas in its public (or more accurately federal) law, it follows the law of the rest of Canada which is of the English common law tradition.

While this explains the mixed nature of substantive law applied in the province, the mixed nature of Quebec's legal system has also been considerably influenced by the fact that the judicial institutions in the province are modeled after the British court system. The superior courts in each province, which serve as the general first level entry point to litigants, are not only modeled on the English courts but the Superior Court of Quebec has existed since 1849, well before Confederation in 1867.[19] Furthermore, the judicial system has been structured to operate according to procedural rules and principles that owe their origins, as well, to the English adversarial system, rather than the continental inquisitorial system.[20]

Finally, the third sense in which Quebec is a mixed jurisdiction reflects the judicial role itself. In terms of their nomination, judges in Quebec, as in the rest of Canada, are appointed from the Bar in the English tradition, rather than educated in the classroom as in the continental system. Their judgment-writing

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17) Renamed *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

18) These matters fall within id at s 92(14), 'Property and Civil Rights in the Province'.

19) Pursuant to id at s 129 ('all Courts of Civil and Criminal Jurisdiction [...] existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made'). See also Brierley, JEC and Macdonald, RA (1993) *Quebec Civil Law: An Introduction to Quebec Private Law* Emond Montgomery Publications Limited at 49.

20) See *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc,* 2001 SCC 51 at paragraph 33, 2 SCR 743, LeBel J; Jutras, D (2009) 'Culture et droit processuel: le cas du Québec' (54) *McGill Law Journal* 273; Brisson, JM (1986) *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867* Thémis at 99-110; Dalphond (Judicial Style), supra at 3, 91-92. The effect on judicial methodology of these institutional and procedural aspects of Quebec's mixed legal system will be examined in Parts 3a and 3b of this paper.

style, which includes personal judgments, dissents, and lengthy and extensive 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 common law Canada,[21] distinguished only by the fact that they are drafted primarily in French.[22]

For these reasons, Quebec is a mixed legal system, in its substantive law, its procedural rules, its institutions of justice and its judicial culture.

3. Quebec's Judicial Methodology: The De Facto Use of Precedent

A brief description of the judicial methodology used by Quebec judges must be set out before embarking on an explanation of the reasons or causes for this particular approach. An attempt to examine how judges use prior decisions as justification for their own judgments begs the age-old question of whether judges should decide 'by authority of reason or by reason of authority'.[23]

While not entirely free from debate or controversy, two propositions may be set forth with a fair degree of certainty. The first is that Quebec judges are not bound to follow prior decisions and in this sense, there is little doubt that, as befits a civilian jurisdiction, there is no doctrine of stare decisis or precedent in the formal sense. This point has been made in several recent Quebec Court of Appeal decisions, most directly perhaps by Justice Pierre Dalphond who stated that, 'since there is really no *stare decisis* in the civil law, the Court must re-analyse many questions of law'.[24] As such, Quebec courts are always

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21) See especially Dalphond (Judicial Style), supra at 3, 91; Mazen, NJ (1982) 'Le juge civil québécois (Approche comparative d'un système de droit mixte)' (34) *Revue internationale de droit comparé* 375 at 399-404; Macdonald, RA (1985) 'Understanding Civil Law Scholarship in Quebec' (23) *Osgoode Hall Law Journal* 573 at 581-585. The effect of the judicial role on judicial methodology in Quebec will be examined in Part 3c of this paper.

22) In Canada, the use of either English or French in any court proceeding is constitutionally enshrined and, given that 80% of the population in Quebec is French, the result is that most decisions from Quebec are drafted in French. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 19(1).

23) This eloquent way of posing the question is attributable to former Justice Anglin of the Supreme Court of Canada, and used by another former Supreme Court Justice, Claire L'Heureux-Dubé, as the title of an article written on the subject of the use of precedent in Quebec. See L'Heureux-Dubé, supra at 3, 1 citing Anglin J in Baudouin, L (1965) *Aspects généraux du droit privé dans la province de Québec* Librairie Dalloz at 85.

24) *Genex Communications inc v Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201 at paragraph 27, [2009] RJQ 2743 ['puisqu'il n'y a pas vraiment de *stare decisis* en droit civil, la Cour doit reprendre l'analyse de plusieurs questions de droit', Translation by author].

free to redo and rethink legal analyses, rather than be bound to follow past precedent.[25]

Nonetheless, as a second proposition, it is difficult to deny the heavy use of, and strong reliance upon, jurisprudence as very persuasive authority.[26] While free to depart from previous judgments, most Quebec judges in fact cite prior cases extensively as support for their findings and decisions and as such, it is fairly safe to describe the current judicial methodology in Quebec as the de facto use of precedent in decision-making.[27]

Moreover, many important substantive legal concepts applicable in Quebec law have in fact 'grown up' in the courts in the common law manner, rather than being 'laid down' in the Code in the typical civilian fashion. The doctrines of good faith and unjust enrichment are two instances in which Quebec courts were instrumental in creating new legal principles and where jurisprudential developments were subsequently codified by the Legislature, reversing the usual civilian order of things.[28] As such, the practical importance of judicial decisions, both as authority for subsequent judicial reasoning as well as sources of law-making, cannot be underestimated in Quebec.

4. Seeking to Explain Why Quebec Judges Adopt this Judicial Methodology

The particular methodology and judicial customs currently applied by the Quebec judiciary have developed over a considerable period of time. Decisions

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25) See *Laurentienne-vie, cie d'assurance v Empire, cie d'assurance-vie,* 2000 RJQ 1708 at paragraph 59, [2000] RRA 637 (CA) where Justice Thibault states, '[l]a seconde conception de *stare decisis*, plus moderne, reconnaît qu'un tribunal est généralement lié par une décision antérieure, mais cela ne l'empêche pas de reconsidérer les motifs qui en sont à l'origine et de retenir une solution différente.' ['the second and more modern conception of *stare decisis* recognizes that, although a court is generally bound by an earlier decision, this does not prevent the court from reassessing the grounds of the original decision and from reaching a different conclusion.' Translation by author].

26) In the introduction to the Baudouin Renault Civil Code of Quebec it is stated that '[La jurisprudence] est une source non formelle en ce sense que la décision d'un tribunal ne lie évidement pas le législateur ni même les autres tribunaux. Cette même décision peut cependant avoir de fait, *une autorité morale considérable*.' [[Case law] is a non-formal source of law as it is evidently not binding on either the legislator or even on other courts. This same decision may, however, *have considerable moral authority*.' Translation by author] (emphasis added). Baudouin, JL and Renaud, Y (eds) (2008) *Code Civil du Québec/Civil Code of Québec* Wilson & Lafleur Ltée at xx.

27) See Mayrand, A (1994) 'L'autorité du précédent au Québec' (28) *Revue Juridique Thémis* 771 at 783; Dalphond (Judicial Style), supra at 3, 95-96; L'Heureux-Dubé, supra at 3, 15-17.

28) The implied obligation of good faith in the execution of contracts was first introduced into Quebec Civil Law by the Supreme Court of Canada in *Houle v Canadian National Bank*, [1990] 3 SCR 122 at paragraph 102, 74 DLR (4th) 577 with subsequent codification in articles 6, 7 and 1375 CCQ. Similarly, the doctrine of unjust enrichment was jurisprudentially developed in *Cie Immobilière Viger v L Giguère Inc*, [1977] 2 SCR 67 at paragraphs 21-27, 10 NR 277 and later codified in articles 1493-1496 CCQ.

rendered by trial and appellate courts today differ considerably in style and methodology from those rendered over the course of the almost century and a half that Canada has been a country.[29] The changes reflect broad societal transformations echoed in changing conceptions of legal education,[30] the legal profession,[31] and, of course, the role of the civil justice system as a mechanism of dispute resolution.[32] Judicial methodology is thus a result of a myriad of factors, many of them subtle as opposed to overt, and many of them as psychologically and sociologically based as they are legally inspired.

However, despite the difficulty in attributing precise reasons for the current judicial methodology used in Quebec, this paper will attempt to evaluate a number of hypotheses, ranging from the institutional setting and legal framework in which judges work, and the judicial role they find themselves in, to other more subtle factors that may account for why Quebec judges do what they do.[33]

4.1. The Institutional Setting: Courts of Inherent Jurisdiction

This hypothesis will explore the impact of the institutional setting, or the nature of the courts, in which Quebec judges find themselves. As previously explained, Quebec superior courts, which serve as the general first level entry point to litigants, are, like those in every other province, modeled on the English courts. For purposes of explaining judicial methodology, the most important feature of these courts is the fact that they are courts of inherent jurisdiction.[34] In *R v Caron,* a very recent Canadian Supreme Court decision,

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29) One such change is reflected in the length of decisions. Today, decisions rendered at all court levels are longer and more discursive than older judgments. See McInnes, M; Bolton, J and Derzko, N (1994) 'Clerking at the Supreme Court of Canada' (33) *Alberta Law Review* 58 at 78.

30) See especially Macdonald, RA (1982) 'Curricular Development in the 1980s: A Perspective' (32) *Journal of Legal Education* 569.

31) See eg Jutras (Processuel), supra at 20, 282.

32) See UK, (1996) *The Ministry of Justice, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales by the Right Honourable the Lord Woolf* Her Majesty's Stationery Office; Jolowicz, JA (2000) *On Civil Procedure* Cambridge University Press at 70; Otis, L and Reiter, EH (2006) 'Mediation by Judges: A New Phenomenon in the Transformation of Justice' (6) *Pepperdine Dispute Resolution Law Journal* 351.

33) There is also an important question of *how* Quebec judges use precedent as de facto or persuasive authority, namely what precedent do they use? Do they rely only on Quebec civil law decisions or common law precedents as well? This question is outside the scope of this paper but see generally Jutras, D (2010) 'Cartographie de la mixeté: La common law et la complétude du droit civil au Québec' (88) *Canadian Bar Review* 247 at 248; Valcke, supra at 2, Annex I; Glenn, HP (1987) 'Persuasive Authority' (32) *McGill Law Journal* 261 at 294-295.

34) *Hétu v Notre-Dame-de-Lourdes* (*Municipalité de*), 2005 QCCA 199 at paragraphs 34-37, [2005] RJQ 443. For a comprehensive analysis of the doctrine of inherent jurisdiction see Jacob, IH (1970) 'The Inherent Jurisdiction of the Court' (23) *Current Legal Problems* 23. It should be noted that the superior courts in Quebec are courts that fall under federal jurisdiction (see

two aspects of inherent jurisdiction were emphasized by the Court, namely, the fact that these courts have 'a residual source of power which they may draw upon as necessary whenever it is just or equitable to do so' and that 'these powers are derived from the very nature of the court as a superior court of law and not from statute'.[35]

Quebec judges have applied their inherent jurisdiction to a wide array of legal issues but this paper will highlight two major examples. The first is interim or advanced cost awards. In Quebec, as is the case to varying degrees in the rest of Canada, a proportion of costs are awarded, at the conclusion of the case, to the winning party.[36] Exceptionally, however, where there is a public interest component to the case or other compelling reason, courts may award costs in advance of the determination of the case in order to help an impecunious party fund the litigation.[37] In cases originating in common law provinces, the Supreme Court of Canada has explained the rationale for the awarding of such advanced or interim costs as being the inherent jurisdiction of the courts.[38] However, this rationale has also been explicitly stated as the reason for such exceptional cost awards at the Court of Appeal level in Quebec.[39]

Similarly, the creation of the Anton Piller order by Quebec courts is also attributable, not to any specific codal reference, but to the court's inherent jurisdiction.[40] The Anton Piller order, which has been termed the 'nuclear weapon'[41] of the private law, is essentially a search and seizure order which is granted ex parte in private law cases and which enables a plaintiff to conduct a

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Constitution Act, supra at 17, s 96) but that there are also provincial courts in each province, in Quebec known as the Cour du Québec. This Court, which is of provincial jurisdiction, is a statutory court and not a court of inherent jurisdiction. See *McMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paragraph 18, 130 DLR (4th) 385, Lamer CJ.

35) *R v Caron*, 2011 SCC 5 at paragraph 24, 1 SCR 78, Binnie J citing Jacob, supra at 34, 27, 51.

36) See eg Article 477 Code of Civil Procedure (hereinafter "CCP") (in Quebec, costs awarded at the conclusion of the case to the winning party consist of a proportion of judicial and extra-judicial costs, calculated according to tariff rates).

37) See generally *British Columbia* (*Minister of Forests*) *v Okanagan Indian Band*, 2003 SCC 71 at paragraph 36, [2003] 3 SCR 371, LeBel J; *Little Sisters Book & Art Emporium v Canada* (*Commissioner of Customs & Revenue Agency*), 2007 SCC 2 at paragraphs 38-44, [2007] 1 SCR 38, Bastarache & Lebel JJ and *Caron*, supra at 35, paragraphs 36-39. Note, the Code of Civil Procedure was amended in 2009 to include specific codal justification for advanced costs in one specific context, namely that of procedural abuse. See article 54.3(5) CCP.

38) See *Okanagan*, supra at 37, paragraphs 1, 35, 37.

39) See *Hétu*, supra at 34, paragraph 57.

40) See *Tossi Internationale v Las Vegas Creations*, [1993] RJQ 1482 (available on Azimut) (Qc Sup Ct) citing *Ferco International Usine de Ferrures de Bâtiment v Woreli Management* (20 February 1992), Montreal, 500-05-002603-924 (Qc Sup Ct).

41) *Bank Mellat v Nikpour* (1982), 1985 FSR 87 at 92, [1982] Com LR 158, Donaldson J (UK CA). For an overview of the Anton Piller Order and its draconian nature see *Celanese Canada v Murray Demolition*, 2006 SCC 36, [2006] 2 SCR 189.

surprise search and seizure of relevant evidence from the defendant's premises if the plaintiff has convinced the judge in chambers that there is a risk that the defendant will destroy or delete such evidence. Again, this powerful order has been attributed to the inherent powers of the court, both in the English Court of Appeal where it originated, and in Quebec where it has been followed.[42]

These two examples demonstrate that Quebec superior courts, like their counterparts in common law jurisdictions, have used their inherent powers quite boldly and creatively. This has resulted in the jurisprudential creation of certain rights, such as advanced or interim costs, and remedies, such as the Anton Piller order. The fact that these rights and remedies are created by the judges imbues their judgments with both importance and, of necessity, authority. Simply put, a judge wanting to order advanced or interim costs has no specific codal or statutory authority on which to rely and must, therefore, consider past cases in which similar orders have been granted by the courts.

Before, however, any link between the courts' inherent jurisdiction and their reliance on precedent may be established, a word of caution is necessary with respect to how the concept itself is applied in Quebec. The reliance on the superior courts' inherent jurisdiction has been somewhat nuanced in Quebec by a 2001 decision of the Supreme Court of Canada in *Lac d'Amiante,* where the Court warned that the creative power of the Quebec judge must be circumscribed by the terms of the Code.[43] The context in which this nuance was established arose in a case where the Court had to decide the fairly circumscribed issue of whether or not information shared by the parties during the pre-trial discovery process should be kept confidential. While not overruling the Quebec Court of Appeal on the substantive answer that yes, pre-trial discovery should be kept confidential, Justice Lebel of the Supreme Court chastised the Court of Appeal for the basis of its legal reasoning. In particular, the Court of Appeal had reasoned that since the concept of discovery in Quebec originated from the common law, and that in the common law, whatever is discovered is kept confidential until such time as it is put into evidence in the court record, the same rule of confidentiality should apply in Quebec.[44] The Supreme Court, while agreeing with the result, stated that the reasons for this must be based on codal principles and civilian-based analysis rather than a blind allegiance to the common law.[45]

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42) See *Anton Piller KG v Manufacturing Processes Ltd* (1975), [1976] Ch 55 at 57, [1976] 1 All ER 779, Denning L (UK CA). The Quebec Superior Court relied on its inherent jurisdiction to grant an Anton Piller order in *Tossi* and *Ferco*, supra at 40.

43) *Lac D'Amiante* (SCC), supra at 20, paragraph 39. In the context of this case, the relevant Code is the Code of Civil Procedure of Quebec (CCP).

44) *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc,* [1999] RJQ 970 at paragraph 47, [1999] QJ No 1043, Mailhot J (Qc CA).

45) *Lac D'Amiante* (SCC), supra at 20, paragraph 39.

While Justice Lebel's reluctance to apply common law reasoning to Quebec cases is neither isolated nor unjustified,[46] his statements regarding the scope of Quebec courts' inherent jurisdiction are somewhat more problematic. He intimates that the latitude and creative powers given to Quebec courts differ from those given to courts in other provinces, concluding that 'these inherent or ancillary powers, that were established by arts. 20 and 46 *C.C.P.,* only give the courts a *secondary or interstitial function* in defining procedure in Quebec'.[47]

Given that the structure of superior courts is consistent across Canada and that judges, whatever provincial jurisdiction they find themselves in, are named to these courts in a uniform manner by the federal government according to section 96 of the *Canadian Constitution*, it would be odd, at best, to allocate different inherent powers to judges in these identical courts in Quebec and the rest of Canada.[48] Justice Lebel himself seems to admit as much in the more recent decision of *Globe and Mail v. Canada* when he states:

> But the codification of civil procedure does not mean that civil procedure, as administered by the courts of Quebec, is completely detached from the common law model. The structure of the court system itself remains basically the same, as I mentioned above. Superior courts enjoy the constitutional protection of s. 96 of the *Constitution Act, 1867*. Moreover, as this Court indicated in *Lac d'Amiante*, not everything is found in the *C.C.P.* It leaves room for rules of practice. It also allows for targeted judicial intervention, and the authority to issue orders that address the particular context of court cases, particularly under arts. 20 and 46 of the *C.C.P.* [49]

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46) For example, this occurred with respect to the remedy of Specific Performance in Quebec civil law which had been borrowed from the English injunction. Quebec judges originally used the fact of this legal transplantation to justify their blind application of the doctrine's common law principles. Eventually, however, Quebec judges adapted the remedy to accord with civilian remedial principles. See Jukier, R (2010) 'Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract' in Sharpe, RJ and Roach, K (eds) (2010) *Taking Remedies Seriously/Les Recours et les Mesures de Redressement: Une Affaire Sérieuse* Canadian Institute for the Administration of Justice 34 at 88 citing *Varnet Software v Varnet UK Ltd*, [1994] RJQ 2755 at 2758, 59 CPR (3d) 29, Baudouin J (Qc CA).

47) See *Lac d'Amiante* (SCC), supra at 20, paragraph 37 (emphasis added). See also paragraphs 38-39 in which Justice Lebel indicates that the CCP limits the latitude with which Quebec's judiciary can create positive rules of civil procedure, a limitation not seemingly imposed on other Canadian provinces. Articles 20 and 46 CCP are seen as the codification of the inherent jurisdiction powers of the Superior Court of Quebec. In particular, article 46 reads: 'The courts and judges have all the powers necessary for the exercise of their jurisdiction'. This is supplemented by article 20 which reads: 'Whenever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with this Code or with some other provision of law.'

48) A question arises as to whether such distinction would be compatible with Canadian constitutional principles. See Jutras (Processuel), supra at 20, 293, n 59. Accord *Charbel v Bélanger* (1990), JE 91-322 (available on Azimut), Gomery J ('there is no reason to believe that the inherent jurisdiction of the Superior Court of Quebec is in any way inferior to that exercised by the courts of England' at 14).

49) *Globe and Mail v Canada* (*Attorney General*), 2010 SCC 41 at paragraph 30, [2010] 2 SCR 592. See as well the Scottish case of *Hepburn v Royal Alexandra Hospital NHS Trust*, [2010] CSIH 71 at

As such, notwithstanding the codification of procedure in Quebec, the inherent jurisdiction enjoyed by judges sitting in Quebec superior courts should be similar in ambit, scope and principle to that exercised by courts in common law jurisdictions.

A further potential limitation of the inherent jurisdiction hypothesis lies in the fact that it is limited to procedural matters and does not extend to substantive issues.[50] For this reason, Quebec courts are admittedly unable to use the doctrine to create 'new legal institutions according to the needs of the moment'[51] and some doctrinal writers have criticized the courts' use of their inherent jurisdiction powers in areas of law that go beyond purely procedural matters.[52]

Beyond the difficulty in distinguishing procedure from substance,[53] and although the inherent jurisdiction of the courts may be limited to procedural areas of law, this residual source of powers goes beyond mere technical matters or those limited to pure court administration. As Jacob points out, this inherent jurisdiction is a 'residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them'.[54] It is no surprise, therefore, that the areas in which the courts have justifiably used their inherent jurisdiction are both far-reaching and significant. Using the Anton Piller order as an example, the broadest definition of procedure would certainly capture this extraordinary remedy which bears similar procedural trademarks to those of an injunction, also characterized as part of procedural law, but the use of such order certainly carries with it a heavy substantive effect.[55]

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paragraph 20, [2010] SLT 1071 where the Court had to decide whether the Scottish Court of Session was a court of inherent jurisdiction despite the fact that legislation, *Court of Session Act* 1988 (UK), c 36, s 5, gives that court powers akin to those given to Quebec courts pursuant to articles 46 and 20. Lord President stated that, 'the existence of such a legislative power does not, in my view, detract from or limit the inherent power which the court has otherwise'.

50) See Jacob, supra at 34, 24.

51) *MB c LL* [2003] RDF 539 at paragraph 31, JE 2003-1363, Dalphond J (Qc CA) ['de nouvelles institutions juridiques, ajustées aux besoins du moment'. Translation by author].

52) See eg Antoine Leduc, A (2005) 'Les limites de la "jurisdiction inhérente" du tribunal et le cas du financement débiteur-exploitant ("DIP Financing") en droit civil québécois' (2005) 39:3 *Revue Juridique Thémis* 551.

53) Valcke, supra at 2 ('the line between substantive and procedural matters is not nearly as watertight as the external delineation of the Canadian system and sub-systems would suggest' at 103).

54) Jacob, supra at 34, 51.

55) Namely, the seizure of evidence obtained from the search of defendant's premises for later use at trial. See Berryman, J (1984) 'Anton Piller Orders: A Canadian Common Law Approach' (34) *University of Toronto Law Journal* 1 ('Anton Piller orders exemplify the outer extremes of a

As a result, while one may certainly concede that the Superior Court's inherent jurisdiction is not the perfect or complete answer as to why Quebec judges tend to use precedent in the way that they do, Professor Palmer's assertion that greater inherent power leads to more creative mindsets strikes a true chord.[56] This creative mindset carries through to the mentality of the judges and the entire judgment process. The fact that the judges hold this important and broad inherent jurisdiction certainly gives them the rightful impression that they are much more than 'la porte parole de la loi' or 'mouthpieces of the Code' as the classical civilian model characterizes them.[57] As Brierley has so aptly written, '[t]he judge functioning under a Civil Code is a powerful person in the shaping of the law'.[58] The inherent jurisdiction of superior court judges is one factor which supports their role as lawmakers, thereby imbuing their judgments with precedential authority.

4.2. The Legal Framework: The Nature of the Civil Justice System and Procedural Law in Quebec

This hypothesis will explore the impact of the legal framework applicable in Quebec, specifically the nature of the civil justice system and its accompanying procedural law, on judicial methodology. Although Quebec's procedural law is presented in a civilian format, namely in a Code of Civil Procedure, it can best be described as adversarial in nature and largely of common law origin.[59] It has been aptly portrayed as having 'an air of common law in a civil law jurisdiction'.[60]

It is somewhat ironic that current trends in civil procedure (even in England, due to the pivotal reform work of jurists such as Lord Woolf)[61] are moving civil procedure away from adversarial tendencies and towards cooperative justice, and shifting the role of the judge to a more inquisitorial, or at least active, one.[62]

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court's coercive powers. The order operates *in personam* and carries with it the potential of imprisonment for contempt of court if not obeyed by the defendant' at 18).

56) Palmer, supra at 6, 343.

57) Dedek, H (2010) 'The Relationship between Rights and Remedies in Private Law' in Sharpe, RJ and Roach, K (eds) (2010) *Taking Remedies Seriously/Les Recours et les Mesures de Redressement: Une Affaire Sérieuse* Canadian Institute for the Administration of Justice 63 at 80 citing de Montesquieu, C (1748) 'Introduction' in de Montesquieu, C (ed) (1748) *De L'esprit Des Loix* np i at xiii.

58) Brierley, JEC (1992) 'The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec' (42) *University of Toronto Law Journal* 484 at 496.

59) Supra at 20.

60) Jutras (Processuel), supra at 20, 285 ['un air de common law en pays de droit civil'. Translation by author].

61) Woolf, supra at 32.

62) Jutras (Processuel), supra at 20, 283.

However, despite some recent reforms in this direction,[63] Quebec procedure remains party-driven and characterized by oral advocacy, adversarial trial techniques, and rules of evidence and procedure reminiscent of the common law, especially those that form part of the pre-trial process such as discovery.[64]

While the common law nature of the civil justice system and procedural law in Quebec is not particularly controversial, its influence on judicial methodology is perhaps less obvious. Some would say that procedural or adjectival law should have little or no influence on either substantive law or judicial methodology because procedure is simply the 'handmaid' and not the 'mistress'.[65] Article 2 of the Quebec Code of Civil Procedure leaves little doubt as to the inferior status of procedural rules as compared to substantive law.[66] Furthermore, as Goldstein has noted, in an article that followed the first Worldwide Congress on Mixed Jurisdictions in 2003, 'most mixed jurisdictions [...] did not report any significant specific examples of the impact of their common law procedure on their substantive civil law'.[67]

Yet even if one concedes that the common law nature of procedure has not directly influenced civilian substantive law in Quebec, one sees, nonetheless, the interesting phenomenon of adjectival law having had a profound effect in influencing the *methodology* of substantive law. According to the Honourable Claire l'Heureux-Dubé, '[t]his structural affinity with the common law judiciary could not but have an impact on the role played by previously-decided cases'.[68] After all, if Quebec judges sit in English-style courtrooms, with adversarial atmospheres and common law procedural rules, it is somewhat natural for them to adopt common law precedential techniques as well.

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63) See Quebec, Civil Procedure Review Committee, *Report of the Civil Procedure Review Committee*: *A new judicial culture: summary* (Sainte-Foy, Quebec: Ministère de la Justice, 2001). In essence, Quebec has incorporated a greater case management role for judges, see articles 4.1 and 151.1 et seq CCP.

64) See eg Baudouin, JL (1974) 'The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec' in Dainow, J (ed) (1974) *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* Louisiana State University Press 1 at 8.

65) *Re Coles and Ravenshear Arbitration* (1906), [1907] 1 KB 1 at 4, Collins J (UK CA). See Jolowicz, supra at 32, chapter 3.

66) Article 2 CCP reads: 'The rules of procedure in this Code are intended to render effective the substantive law and to ensure that it is carried out; and failing a provision to the contrary, failure to observe the rules which are not of public order can only affect a proceeding if the defect has not been remedied when it was possible to do so. The provisions of this Code must be interpreted the one by the other, and, so far as possible, in such a way as to facilitate rather than to delay or to end prematurely the normal advancement of cases'.

67) Goldstein, S (2003) 'The Odd Couple: Common Law Procedure and Civilian Substantive Law' (78) *Tulane Law Review* 291 at 305.

68) L'Heureux-Dubé, supra at 3, 16.

This structural affinity with the common law judiciary is reinforced by the fact that Quebec judges were themselves once lawyers.[69] As will be seen in the following section, rather than being educated as judges, they are all former members of the Bar, many having practiced and litigated pursuant to this argumentative and adversarial civil justice system. At one point, they themselves searched for judicial authorities on their side, readily accessible at the touch of a finger from electronic databases,[70] in order to convince judges to adjudicate in their client's favour. These habits formed as lawyers cannot but influence them in their role as judges.

As such, the entire context of the common law-oriented civil justice system, as well as its procedural rules, carries through to the judicial methodology of Quebec judges. While one may concede that this impact may have been indirect, the effect on 'habits of legal thought'[71] cannot be underestimated.

4.3. The Judicial Role

This hypothesis will examine the relationship between the judicial role in Quebec and the judicial methodology Quebec judges have adopted. Two related, but somewhat distinct, aspects of the judicial role need to be highlighted. The first concerns the nomination, education and status of Quebec judges. The second relates more particularly to their judgment-writing style.

Judges in Quebec, as in the rest of Canada, are appointed from amongst members of the Bar who hold a minimum of ten years of Bar membership.[72] There is no requirement that these ten years be spent in litigation, or even in

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69) Judges in Quebec, as in the rest of Canada, are appointed following a minimum of ten years of membership in the Quebec Bar, see text accompanying note 72. See also Mazen, supra at 21, 399 where he observes that judges are not educated as judges per se so the habits they formed as lawyers carry through when they are named judges.

70) The availability of prior decisions on easily-accessible electronic databases has also influenced their use as precedent given the ease of finding past authorities and their consequential use as authority by lawyers. See eg Brenner, SW (1989-90) 'Of Publication and Precedent: An enquiry into the Ethnomethodology of Case Reporting in the American Legal System' (39) *DePaul Law Review* 461 at 536-542.

71) Goldstein, supra at 67 citing van der Merwe, GC; du Plessis, JE and de Waal, MJ (2001), 'The Republic of South Africa (Report 2)' in Palmer, VV (ed) (2001) *Mixed jurisdictions worldwide: the third legal family* Cambridge University Press 145 at 177.

72) See eg *Judges Act*, RCS 1985, c J-1, s 3. Note that this 10 year requirement is true in Quebec not only for s 96 judges who are appointed by the federal government to sit in the Superior Court of Quebec or the Court of Appeal, but as well for judges appointed to the provincial Cour du Québec by the provincial government pursuant to s 92(14) of the Constitution which allows for the creation and staffing of provincial courts. See *Loi sur les tribunaux judiciaires,* RSQ 1964, c T-16, s 87. There are, as well, other judges located in administrative tribunals that are invested with adjudicative power and who may not be named in the same manner as judges in the Superior Court of Quebec or the Cour du Québec. Their decision-making process is beyond the scope of this article.

conventional legal practice. While most judges were previously lawyers in the traditional sense of the profession, many are former professors or attorneys who worked as in-house counsel, for NGOs, or for the federal or provincial government. The important distinction between Quebec judges and those appointed in other civilian jurisdictions, particularly in continental Europe, is that Quebec judges are not 'juges de carrières', educated to be judges in the classroom as in the French model of the École de la Magistrature.[73] As a result, Quebec judges begin their judicial career after having significantly more work experience and at an older age than the average French judge.[74] Rather than being seen to occupy a primarily bureaucratic role, Quebec judges enjoy a very high status and moral authority, much like British judges.[75]

As concerns their judgment-writing, here again, we see styles far more reminiscent of the prototypical common law judgment, rather than its continental civilian counterpart.[76] For one, Quebec judgments are personal, as opposed to anonymous, in the sense that a particular judge's name is associated with the decision he or she penned. In appellate contexts, where the bench consists of more than one judge, dissents are possible and often quite common. Moreover, Quebec judgments at all levels are quite lengthy and include ample discussions of facts, issues and the reasons for the holdings. While article 471 of the Quebec Code of Civil Procedure requires judges to motivate their judgments with 'a concise statement of the reasons on which the decision is based', it imposes no particular format or style of judgment.[77] The result is that judgments in Quebec read very much like judgments from anywhere else in common law Canada except that, as was pointed out earlier, they are mostly drafted in French.[78] This has led some to even question whether there is still room to characterize the Quebec judge as a civilian judge at all. In the words of Justice Dalphond, who has written a particularly introspective commentary on the judicial role of the Quebec judge, 'can we say that the Quebec judge is not really a civilian judge given the judicial structure in Quebec, which is very different from that in France?'.[79]

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73) The National Judicial Institute organizes continuing education courses for all of Canada's judges and most judges are expected to take up to 10 days of judicial education per year but this is not compulsory.

74) Available at: <http://www.statcan.gc.ca/pub/85-002-x/2009001/article/10782-eng.htm> (The median age for a judge in Canada is 58 years old).

75) See Mazen, supra at 21, 379; Dalphond (Judicial Style), supra at 3, 92; Jutras (Processuel), supra at 20, 286.

76) Supra at 21 and 22.

77) Article 471 CCP.

78) Supra at 22.

79) Dalphond (Judicial Style), supra at 3, 93 ['[p]eut-on dire que le juge québecois n'est pas vraiment un juge civiliste vu les caractéristiques si différentes de sa structure judiciaire par rapport a celle du juge français?' Translation by author].

As with the preceding hypotheses, the influence of this judicial role on the judge's methodology needs to be made explicit. Some argue that the discursive and lengthy nature of judgments may actually detract from their precedential value, because the very amplitude of reasons and recitation of facts provides the judge in future cases more possibilities to distinguish a decision he or she does not wish to follow.[80] However, whether or not that is the case, this paper is not concerned with the internal application of the doctrine of stare decisis per se, but rather the extent to which Quebec judges look to prior decisions as part of their judicial methodology and consider them to be strongly persuasive authority.

In this light, the two aspects of the judicial role canvassed above both support this methodology. The moral authority of the Quebec judge, which results from the nomination process and the judge's position in the larger legal hierarchy, lends credibility to the importance of their judgments and their reasons for judgment. It is thus natural for decisions to become imbued with authority and looked to with great respect by subsequent judges.

Furthermore, the judgment-writing style contributes to this judicial methodology and the respect for prior decisions. As Dainow so aptly put it, 'the manner of writing opinions reflects the basic mode of thought for legal problems and their solution'.[81] As Quebec judges have similar manners of writing judgments to their common law counterparts, their mode of thought comes, somewhat naturally, to approximate that of the common law judge who turns to precedent to justify decisions and provide rationality and consistency to the law. The *pensée discursive* [discursive thinking] of the Quebec judge, as opposed to the *motivation succincte* [succinct reasoning] of the French judge, encourages Quebec judges to refer to, and rely upon, prior decisions.[82] This has led Baudouin to conclude that '[i]t would be futile to think that, in this respect, the form has not had an influence on the substance. There can be little doubt that the adoption of the French style of judgment in Quebec would have considerably lessened the use of previously decided cases'.[83]

4.4. The Influence of the Supreme Court of Canada as an Overarching Precedential Authority

In Canada, there is one supreme judicial authority for all cases, of all natures, coming from all courts in the country – the Supreme Court of Canada.[84] The

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80) Id at 97; Komárek, K 'Judicial Lawmaking and Precedent in Supreme Courts' available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793219> at 11, 25; Smith, supra at 2, 305-306.
81) Dainow, supra at 4, 432-433.
82) Mazen, supra at 21, 399 [Translation by author].
83) Baudouin, supra at 64, 16.
84) See *Supreme Court Act*, RSC 1985, c S-26, s 52.

status of its decisions, in terms of their precedential value, has, historically, been somewhat controversial in Quebec.[85] In the first decades following its creation in 1875, Supreme Court decisions were not particularly well received in Quebec and 'Quebec courts demonstrated very early a reluctance to follow precedents laid down by Canada's court of last resort'.[86] This has been explained primarily by the fact that the Supreme Court's trend towards harmonization of Canadian law at the time led Quebec jurists to fear that the very 'integrity of the civil law was at stake'.[87] What followed was a series of both carrots and sticks. Sticks took the form of the Supreme Court repeatedly overruling decisions of the Quebec Court of Appeal that did not follow the precedent set by the Court.[88] Carrots, on the other hand, resulted from the development of a different philosophical stance by the Supreme Court itself. Led largely by Justice Mignault (who served on the Court from 1918-1929), the Supreme Court began rendering decisions more palatable to Quebec by respecting and ensuring the distinctiveness of its civil law tradition.[89] The result is that today, few doubt the precedential authority of Supreme Court of Canada cases in Quebec.[90]

The question pertinent to this study, however, is the consequence of the precedential nature of Supreme Court cases on the general judicial methodology in Quebec. What effect does this factor have on Quebec judges' use of prior decisions emanating from appellate and other lower courts? The best explanation is that the requirement on the part of Quebec judges to follow one supreme precedential authority cannot but seep into general judicial attitudes with respect to the perceived precedential value of other decisions.

The ricochet effect into mainstream judicial culture of the requirement to follow a supreme authority has been noted by academics in other contexts, particularly the European context with respect to the effect of the decisions rendered by supra-national courts in Europe. The decisions of the European Court of Human Rights and the European Court of Justice are considered binding on the national courts of its member states. Speaking of the Court of Justice, Komárek characterizes 'disregard of its case-law as a breach of Community law' and states that 'the case-law of the Court is of binding, and not merely persuasive authority'.[91] As a result, national courts of the member

85) See Valcke, supra at 2, 105; Brierley and Macdonald, supra at 19, 124.
86) L'Heureux Dubé, supra at 3, 11. See also Mignault, supra at 3, 14.
87) L'Heureux Dubé, supra at 3, 12. See also Brierley and Macdonald, supra at 19, 57.
88) See Mayrand, supra at 27, 782.
89) See L'Heureux Dubé, supra at 3, 13-14.
90) For a comprehensive historical examination of the role of Supreme Court precedents in Quebec decisions see id at 11-18; Mayrand, supra at 27; Glenn, HP (2001) 'La Cour suprême du Canada et la tradition du droit civil' (80) *Canadian Bar Rev*iew 151 at 164-179.
91) Komárek, supra at 80, 6. This is echoed by Allan Shoenberger who, in speaking about both the European Court of Human Rights and the European Court of Justice, states that, 'decisions

states, which happen to belong to the civilian tradition, have had to change their judicial practice, at least with regard to decisions emanating from these supra-national courts.

In Professor Shoenberger's opinion, '[t]his development has started to affect the jurisprudence of the civil law systems, for such civil law courts must now pay attention to judicial precedent'.[92] Calling this 'a startling new trend' and 'a fundamental transformation', Shoenberger posits, quite compellingly, that the binding nature of the new supra-national courts in Europe has arguably started to affect the more general judicial methodology in civil law systems as these civilian courts start to *have* to pay attention to some form of precedent.[93]

Given that Quebec judges feel a similar compulsion to follow Supreme Court decisions, the same argument applies to them, namely, because they must turn to certain supreme authorities as precedent, the judges acquire the habit or general mindset of looking at other authorities, particularly when the reliance on previous decisions has proven to be a useful or positive exercise.

4.5. Human Nature: The Desire to Apply Lessons of the Past

As MacCormick and Summers have fittingly pointed out, 'applying lessons of the past to solve problems of the present or future is a basic part of human practical reason'.[94] Judges are certainly not exempt from this natural, psychological desire to build on what others have done before them. In fact, judges may be even more tempted to follow the past in their desire for rational decision-making. As Lionel Smith states, 'the normative requirements of rationality [...] demand consistency', such consistency being often touted as the positive by-product of the doctrine of precedent.[95]

There is no doubt that in the legal world, where the maxim to 'treat like cases alike' is a familiar incantation, there is a general desire to create an overall body of law that has a modicum of predictability. Not only is this predictability or certainty of judicial decisions seen to be a fundamental tenet of the rule of law,[96] but it also imbues the judicial system with a sense of authority

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are made by judicial determinations, which not only bind the immediate case but also set precedent for other future cases'. Shoenberger, A (2009) 'Changes in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System' (55) *Loyola Law Review* 5 at 5.

92) Ibid.

93) Schoenberger, supra at 91, 8, 21.

94) MacCormick, N and Summers, RS (1997) *Interpreting Precedents: A Comparative Study* Ashgate/Dartmouth at 1.

95) Smith, supra at 2, 300.

96) Ibid. See also *Stations de la vallée de St-Sauveur v MA,* 2010 QCCA 1509, [2010] RJQ 1872 at paragraph 82 where Justice Kasirer states, 'It is not just the persuasiveness but also the legitimacy of judicial decision-making that is wrapped up, in part, in this ideal [of treating like cases alike], itself connected to the rule of law.'

and legitimacy,[97] thereby inculcating a desire on the part of the public to use the courts to resolve their disputes. This is particularly relevant today when we see considerable criticism levied at the civil justice system,[98] and where there exist credible competing alternatives for dispute settlement, be they through the mechanisms of ADR (alternative dispute resolution such as mediation and arbitration) or JDR (judicial dispute resolution such as judicial settlement conferencing). This is not to say that a perfectly predictable system can ever exist in practice. There will always be a proportion of trial decisions that are overturned or varied on appeal. There will, likewise, always be circumstances in which prior decisions should not be followed because the societal conditions underlying those decisions no longer exist.[99] But the general tendency to create a predictable and fairly consistent body of law is hard to dispute.

As a result, even certain types of adjudicators who are clearly not bound by precedent tend to apply prior decisions with a view to creating consistency in their field. An interesting analogy in this regard may be made with arbitral decisions where, in certain arbitral tribunals, despite there being no obligation whatsoever to apply the doctrine of stare decisis, arbitrators are beginning to create a version of 'arbitral precedent', relying on prior awards in making their decisions. Professor Bjorklund, for example, describes the emergence of such arbitral precedent in the context of decisions by Investment Tribunals.[100] Focusing, in particular, on the opportunity of *amici* to participate in investment tribunals, she calls the development of this area of tribunal awards a 'successful excursion in arbitral precedent'.[101] The methodology of the arbitrators that she describes, namely, that they first look at the relevant treaty provision, and then turn to prior decisions as persuasive authority which they tend to follow if they are well-reasoned and create consistent awards, bears an eerily similar methodology to that used by judges of Quebec courts.[102]

The justification for this arbitral practice of relying on precedent in a de facto manner rests on the 'unification and stability of judicial activity'.[103]

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97) As opposed to what Beverly McLachlin, Chief Justice of the Supreme Court of Canada, has called 'palm tree justice' in *Peel* (*Regional Municipality*) *v Canada; Peel* (*Regional Municipality*) *v Ontario*, [1992] 3 SCR 762 at paragraph 57, 98 DLR (4th) 140.

98) These critiques are largely concentrated on delays and costs and not on the substance of judicial decisions. See Woolf, supra at 32.

99) See Smith, supra at 2, 307.

100) Bjorklund, AK (2010) 'The Promise of Arbitral Precedent: The Case of Amici Curiae' in Hoffmann, AK (ed) (2010) *Protection of Foreign Investments through Modern Treaty Arbitration: Diversity and Harmonisation*, ASA Special Series (No 34) 165. See also Kaufmann-Kohler, G (2007) 'Arbitral Precedent: Dream, Necessity or Excuse' (25) *Arbitration International* 358.

101) Bjorklund, supra at 100, 180.

102) Id at 168. See also Mazen, supra at 21, n 131 for a similar description of judicial methodology in Quebec.

103) Bjorklund, supra at 100, 165.

Kaufmann-Kohler, another scholar studying the precedential effect of arbitral decisions concurs.[104] In answering her own question of why arbitrators do what they do, Kaufmann-Kohler states it is because of the desire for predictability and consistency – to achieve what Fuller describes as the 'internal morality of law'.[105] As such, despite there being no formal system of precedent, arbitrators, just like Quebec judges, naturally turn to past decisions 'as a fundamental feature of any orderly due process'.[106]

5. Conclusion

If one had to describe, in a nutshell, the judicial methodology used by Quebec judges with respect to the force of prior decisions, one might summarize the situation as follows. Quebec judges justify their decisions primarily by authority of reason, as supported by reason of authority, without, of course, being blindly subjugated to that authority.

As to why this is the case, as with most everything else in life, there is no silver bullet – no one single answer. There are a myriad of practical reasons, many of which have been pointed out by Mary Garvey Algero, in the context of the Louisiana judge who, like his or her Quebec counterpart, also adjudicates in a similarly mixed legal jurisdiction.[107] These range from the judges' law school training, which would likely have involved the consideration of cases, to the accurate and reliable reporting of decisions, with easy access electronically or in print. They also include the ease with which judges can employ past decisions, given their well-reasoned opinion and complete analysis.

The goal of this paper has been to link some of the factors that distinguish Quebec as a mixed jurisdiction with its judicial methodology. In so doing, it has explored some of the institutional and legal frameworks, as well as reasons related to the judicial role, particular to Quebec judges, that consciously, or subconsciously, combine to create Quebec's distinct method of judicial reasoning within its unique mixed legal system.

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104) Kaufmann-Kohler, supra at 100, 372.
105) Id at 374 citing Fuller, supra at 1, 96.
106) Bjorklund, supra at 100, n 10 citing Schreuer, C and Weiniger, M (2008) 'A Doctrine of Precedent?' in Muchlinski, P; Ortino, F and Schreuer, C (eds) (2008) *Oxford Handbook of International Investment Law* Oxford University Press 1888 at 1889.
107) Algero, MG (2005) 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of Civil Law State in a Common Law Nation' (65) *Louisiana L*aw *Review* 775 at 807-814.