

Part II

Justice LeBel – The Civilian Jurist

Juge LeBel – Le juriste civiliste

The Legacy of Justice Louis LeBel: The Civilian Tradition and Procedural Law

Rosalie Jukier*

I. INTRODUCTION

In his 14 years on the bench of the Supreme Court of Canada, Justice Louis LeBel has left his mark on many areas of the law, including on a wide array of subject matters that fall within the law of Civil Procedure. As one of three Quebec judges on the Court, he has also played a significant role in cases emanating from Quebec, profoundly influencing Quebec private law in general, as well as Quebec procedural law more particularly. The decisions Justice LeBel has rendered in the area of procedural law unquestionably form an important legacy in and of themselves. However, the main purpose of this article is to use these decisions as a launching pad for a larger discussion about what it means to be a civilian judge operating in a bijural country. Quebec procedural law provides a rich laboratory for such examination because it has been tremendously influenced by, and often transplanted from, the common law adversarial system. Justice LeBel's decisions in this area demonstrate that notwithstanding legal transplantation, Quebec procedural law can retain a distinct civilian identity. But before attempting to document this legacy, procedural law must first be situated within the larger constitutional and historical context. As an examination of this backdrop reveals, procedural law in Quebec and Canada is somewhat complex.

* Associate Professor and member of the Paul-André Crépeau Centre for Private and Comparative Law, Faculty of Law, McGill University, Montreal, Quebec, Canada. The author wishes to thank her colleague Frédéric Bachand for many fruitful conversations regarding this article and McGill law student Rachel Zuroff for her invaluable research assistance, generously funded by the Foundation for Legal Research and the Wainwright Trust of the Faculty of Law, McGill University. The author is also indebted to the insightful comments by Professor Benjamin Berger, Professor Dwight Newman and the other participants at the "Legacy of Justice Louis LeBel" conference held at the University of Toronto, October 17-18, 2014, where this article was first presented.

Turning first to the constitutional division of powers, by virtue of section 92(14) of the Constitution, the rules of civil procedure themselves, as well as the responsibility for court administration, fall within provincial jurisdiction.¹ However, responsibility for the civil justice system itself, namely the courts and the judges that are appointed to adjudicate in these courts, is split between the provincial and federal governments. There are, of course, statutory provincial courts with specific and limited jurisdictional competence in both civil and criminal matters, staffed by judges appointed provincially, in every Canadian province. But there is also a uniform structure of superior courts of inherent jurisdiction across Canada, the judges of which are named and supervised in the same manner by the federal government pursuant to section 96 of the Constitution.² These superior courts of inherent jurisdiction were modelled on the British administration of justice and its court system. Accordingly, Quebec's provincially-created rules of civil procedure, codified in the civilian tradition, have operated within a civil justice system inspired by the common law. The fact that the "hardware" (the operating system of adjudication) is based on the English common law tradition while the "software" (the procedural rules) is legislated by a province that adheres to the civilian legal tradition has created an inherently problematic paradigm and, not surprisingly, these two realities have not always sat easily with each other.³

Turning next to an analysis of the substance of procedural law in Quebec, one discovers an added layer of complexity. An examination of the historical evolution of Quebec civil procedure demonstrates that it has been profoundly influenced by both western legal traditions — the civil and the common law.⁴ In a nutshell, Quebec originally inherited continental civilian procedure from the French.⁵ However, Quebec procedural law

¹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict, c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

² According to *R. v. Caron*, [2011] S.C.J. No. 5, at para. 24, [2011] 1 S.C.R. 78 (S.C.C.) [hereinafter "*Caron*"], "[t]he inherent jurisdiction of the provincial superior courts, is broadly defined as 'a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so': I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived 'not from any statute or rule of law, but from the very nature of the court as a superior court of law' (Jacob, at p. 27)...".

³ John E.C. Brierley & Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993), at para. 14 [hereinafter "*Brierley & Macdonald*"].

⁴ A detailed analysis of this historical evolution can be found in Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law", forthcoming 2015 *Can. Bar Rev.* [hereinafter "*Jukier, 'Impact of Legal Traditions'*"].

⁵ This was due to the application of the French *Ordonnance sur la procédure civile* of 1667 during the Régime Français (marked by the years 1534-1759). *L'Ordonnance de Louis XIV, Roi de France*

gradually came to resemble the English adversarial system much more than the investigative system of its continental European counterpart. This evolution resulted both from ordinances promulgated in the late 18th century, after Quebec was ceded to Britain, which instituted many aspects of common law procedure and evidence,⁶ as well as the adoption of successive Codes of Civil Procedure that codified procedural rules and principles borrowed from the common law.⁷ Justice LeBel has acknowledged the mixed origins of Quebec procedural law in his judgment in *Foster Wheeler* stating that it “traces its origins to diverse sources in legislation and case law, in both the French civil law and English common law traditions”, adding that “these mixed origins are without doubt at the root of the semantic, if not conceptual problems that continue to affect this field of law”.⁸

This brief overview of the constitutional context and historical development of Quebec civil procedure sets the stage for a discussion of the influence that Justice LeBel has had on this area of the law during his 14 years on the bench. An understanding of the larger canvass is necessary for a proper analysis of Justice LeBel’s judgments in this area because the importance of his influence lies not only in the substantive outcomes of the procedural decisions he rendered.⁹ Rather, his influence

et de Navarre, du mois d’Avril 1667 reprinted in *Édits, ordonnances royaux, déclarations et arrêts du Conseil d’État du Roi, concernant le Canada, mis par ordre chronologique, et publiés par ordre de Son Excellence Sir Robert Shore Milnes, Baronet, en conséquence de deux différentes Adresses de la Chambre d’Assemblée, en date des 5e et 7e mars 1801*, Vol. 1 (Quebec: P.E. Desbarats, 1801).

⁶ These include, for example, the Ordinance of 1777 instituting the application of English rules of evidence in commercial matters, the Ordinance of 1785 instituting the jury in civil matters and the Ordinance of 1787 enabling the courts to write their own rules of practice. See generally, Jean-Maurice Brisson, *La formation d’un droit mixte: l’évolution de la procédure civile de 1774 à 1867* (Montreal: Thémis, 1986).

⁷ Quebec has codified civil procedure four times in its history, in 1866, 1897, 1965 and 2014 (and there have also been several instances of substantial revision to existing *Codes of Civil Procedure* such as the reforms to the 1965 Code that took place in 2002 and 2009). The 1897 *Code of Civil Procedure* is the codification that is largely responsible for bringing the attributes of the English common law adversarial system to Quebec. That *Code* abolished the French process of the “enquête” whereby the judge or commissioner interviewed witnesses and reduced their testimony to writing. The 1897 *Code* also explicitly adopted the Open Court principle thereby introducing examination and cross-examination and the prioritization of oral, as opposed to written, evidence favoured by the English adversarial system. Moreover, the 1897 *Code* codified discovery and the injunction, both of common law origin.

⁸ *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) Inc.*, [2004] S.C.J. No. 18, at para. 23, [2004] 1 S.C.R. 456 (S.C.C.) [hereinafter “*Foster Wheeler*”].

⁹ Comparing the substantive outcomes of procedural decisions emanating from Quebec and the rest of Canada would be applying the functional method of comparative law which is only one dimension of this field. See Ralf Michaels, “The Functional Method of Comparative Law”

is much broader. Many of his key decisions concern areas of Quebec procedural law that have been borrowed from, or inspired by, the common law adversarial system, areas such as discovery, privilege and the class action. This reality begs the perennial question as to how judges should interpret and apply Quebec law when the relevant provisions or issues originate in the common law, and what role common law sources should play in that interpretation.¹⁰ This is, of course, a very difficult question for which there is no consistent or singular answer. However, an analysis of a few key judgments by Justice LeBel in the field of civil procedure gives us insight not only into the method of applying and interpreting civil procedure in Quebec, but also into the approach to legal transplants more generally. As this article will demonstrate, Justice LeBel's ultimate legacy is the prioritization of the civilian tradition, its codal interpretation and methodological framework.

II. KEY PROCEDURAL LAW DECISIONS

A first task is to identify some key decisions Justice LeBel has rendered in the area of procedure. It is, of course, difficult to define the precise contours of Civil Procedure as the line between procedure and evidence, procedure and conflicts of law and procedure and the regulation of the legal profession, is often quite blurry. Justice LeBel has indeed rendered many decisions in Civil Procedure, broadly defined, in cases that emanated both from Quebec and the rest of Canada. His judgments have touched on areas such as solicitor-client privilege¹¹ and journalist source privilege,¹² immunity of professional orders,¹³ geographic jurisdiction and *forum non conveniens*,¹⁴ choice of law clauses,¹⁵ enforcement of foreign

in M. Reimann & R. Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), at 340.

¹⁰ See, for example, Daniel Jutras, "Regard Sur La Common Law Au Québec: Perspective et Cadrage" (2008) 10 R.C.L.F. 324 [hereinafter "Jutras"]; Jean-Louis Baudouin, "L'interprétation du *Code Civil Québécois* par la Cour Suprême du Canada" (1975) 53 Can. Bar Rev. 730 [hereinafter "Baudouin"].

¹¹ *Maranda v. Richer*, [2003] S.C.J. No. 69, [2003] 3 S.C.R. 193 (S.C.C.).

¹² *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41, [2010] 2 S.C.R. 592 (S.C.C.) [hereinafter "*Globe and Mail*"].

¹³ *Finney v. Barreau du Québec*, [2004] S.C.J. No. 31, [2004] 2 S.C.R. 17 (S.C.C.).

¹⁴ *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] S.C.J. No. 51, [2002] 4 S.C.R. 205 (S.C.C.); *Club Resorts Ltd. v. Van Breda*, [2012] S.C.J. No. 17, [2012] 1 S.C.R. 572 (S.C.C.) [hereinafter "*Van Breda*"].

¹⁵ *GreCon Dinter Inc. v. J.R. Normand Inc.*, [2005] S.C.J. No. 46, [2005] 2 S.C.R. 401 (S.C.C.).

judgments,¹⁶ standing,¹⁷ professional secrecy,¹⁸ discovery,¹⁹ class actions,²⁰ costs,²¹ arbitration,²² and case dismissal.²³ As it is unrealistic to analyze every decision Justice LeBel has rendered in this general area, this article will instead examine several key decisions which exemplify Justice LeBel's philosophical approach to the judicial interpretation of Quebec procedural law. This examination will reveal a common theme, namely an explicit desire on Justice LeBel's part to protect the integrity and distinctiveness of the civil law tradition. To demonstrate this trend, three key Supreme Court judgments dealing with various issues of Quebec civil procedure, decided between 2001 and 2014, will be discussed in turn.²⁴

1. *Lac d'Amiante du Québec Ltée v. 2858-0702 (2001)*²⁵

In *Lac d'Amiante*, the Supreme Court was faced with the fairly circumscribed issue of whether or not information disclosed by the parties during the pre-trial discovery process should be kept confidential. Justice LeBel, who wrote the unanimous decision for the Court, upheld the net result of the Quebec Court of Appeal decision to the effect that

¹⁶ *Beals v. Saldanha*, [2003] S.C.J. No. 77, [2003] 3 S.C.R. 416 (S.C.C.) (LeBel J. dissenting).

¹⁷ *Alliance for Marriage and Family v. A. (A.)*, [2007] S.C.J. No. 40, [2007] 3 S.C.R. 124 (S.C.C.); *Behn v. Moulton Contracting Ltd.*, [2013] S.C.J. No. 26, [2013] 2 S.C.R. 227 (S.C.C.).

¹⁸ *Foster Wheeler*, *supra*, note 8; *Glegg v. Smith & Nephew Inc.*, [2005] S.C.J. No. 29, [2005] 1 S.C.R. 724 (S.C.C.) [hereinafter "*Glegg*"].

¹⁹ *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] S.C.J. No. 49, [2001] 2 S.C.R. 743 (S.C.C.) [hereinafter "*Lac d'Amiante*"].

²⁰ *Marcotte v. Longueuil (City)*, [2009] S.C.J. No. 43, [2009] 3 S.C.R. 65 (S.C.C.); *Canada Post Corporation v. Lépine*, [2009] S.C.J. No. 16, [2009] 1 S.C.R. 549 (S.C.C.); *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, [2013] 3 S.C.R. 600 (S.C.C.); *Vivendi Canada Inc. v. Dell'Aniello*, [2014] S.C.J. No. 1, [2014] 1 S.C.R. 3 (S.C.C.) (co-authored by LeBel and Wagner JJ.) [hereinafter "*Vivendi*"].

²¹ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371 (S.C.C.) [hereinafter "*Okanagan Indian Band*"].

²² *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] S.C.J. No. 15, [2003] 1 S.C.R. 178 (S.C.C.) [hereinafter "*Desputeaux*"]; *Dell Computer Corp. v. Union des consommateurs*, [2007] S.C.J. No. 34, [2007] 2 S.C.R. 801 (S.C.C.) (Bastarache and LeBel JJ. dissenting) [hereinafter "*Dell*"]; *Seidel v. TELUS Communications Inc.*, [2011] S.C.J. No. 15, [2011] 1 S.C.R. 531 (S.C.C.) (LeBel and Deschamps JJ. dissenting) [hereinafter "*Seidel*"].

²³ *Canada (Attorney General) v. Confédération des syndicats nationaux*, [2014] S.C.J. No. 49, [2014] 2 S.C.R. 477, 2014 SCC 49 (S.C.C.) (co-authored by LeBel and Wagner JJ.) [hereinafter "*Confédération des syndicats nationaux*"].

²⁴ The author discusses these three cases in her article, Jukier, 'Impact of Legal Traditions', *supra*, note 4.

²⁵ *Lac d'Amiante*, *supra*, note 19.

pre-trial discovery should benefit from confidentiality. However, he went to great lengths to emphasize that the reasons for such decision must be made “in accordance with the techniques of civil law analysis”.²⁶ Justice LeBel’s methodology departed radically from that of Mailhot J.A. of the Court of Appeal who had reasoned that since the concept of discovery in Quebec originated in the common law, recourse could be had to the decisions of common law courts.²⁷ Citing decisions from Ontario and the United Kingdom, Mailhot J.A. held that since the common law protected disclosures made in discovery using an implied undertaking rule of confidentiality,²⁸ the same rule of confidentiality should apply in Quebec.

Notwithstanding the common law origins of discovery, Justice LeBel rejected such blind allegiance to the common law, emphasizing instead that Quebec civil procedure is “part of a legal tradition that is different from the common law”,²⁹ one where “[t]he codified law is paramount [and] courts must base their decisions on it.”³⁰ Moreover, he emphasized that Quebec procedure must be “governed by a tradition of civil law interpretation ... within the legal framework comprised by the Code and the general principles of procedure underlying it”.³¹ As a result, Justice LeBel applied what he called a “civil law method of analysis”³² and based the confidentiality of discovery on principles found in the *Code of Civil Procedure*,³³ the *Civil Code of Québec*³⁴ and the *Quebec Charter of Human Rights and Freedoms*.³⁵ Finding in favour of confidentiality, Justice LeBel’s reasoning was quintessentially civilian including reference to the fact that the *Code of Civil Procedure* did not consider discovery to be part of the sitting of the court (thereby exempting it from the open court principle), as well as the protection of privacy interests afforded by the *Civil Code* and the *Quebec Charter*.

According to Catherine Piché, the *Lac d’Amiante* decision is, without doubt, the most important decision rendered in the field of Quebec

²⁶ *Id.*, at para. 79.

²⁷ *Lac d’Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, [1999] J.Q. no 1043, at para. 47 (Q.C.C.A.).

²⁸ The implied undertaking rule applies only until such time as disclosures obtained in discovery are put into evidence in the court record, see *Lac d’Amiante*, *supra*, note 19, at para. 64 (S.C.C.).

²⁹ *Id.*, at para. 35.

³⁰ *Id.*, at para. 37.

³¹ *Id.*, at para. 39.

³² *Id.*, at para. 41.

³³ CQLR, c. C-25 [hereinafter “*Code of Civil Procedure*”].

³⁴ CCQ-1991 [hereinafter “*Civil Code*”].

³⁵ CQLR, c. C-12 [hereinafter “*Quebec Charter*”].

procedural law.³⁶ This is because, as Daniel Jutras has explained, it is rooted in a sense of foundational identity and, accordingly, has an important impact on legal culture.³⁷

2. *Globe and Mail v. Canada (Attorney General)* (2010)³⁸

The *Globe and Mail* decision concerned the extent to which a journalist in Quebec could refuse to disclose a confidential source by invoking the journalist source privilege. As was the case in *Lac d'Amiante*, both the *Civil Code* and the *Code of Civil Procedure* were silent on this specific issue leaving a gap in the codified law. The common law, on the other hand, had developed a four-part test, known as the “Wigmore doctrine”, which provided a framework for finding the existence of a journalist source privilege.³⁹ Justice LeBel was faced with the question of whether the Court could fill that gap by resorting to a doctrine developed in the common law. If one were to adopt a literal reading of his previous decision in *Lac d'Amiante*, this approach would seem somewhat problematic.

Justice LeBel wrote a careful judgment in which he displayed a more open attitude toward applying and adapting the common law to Quebec procedural and evidentiary issues while, at the same time, underscoring his allegiance to the primacy of civilian interpretation and analysis articulated in *Lac d'Amiante*. He did so by emphasizing, once again, that the *Code* is “the primary source of the principles and rules of the law of civil procedure in Quebec”⁴⁰ and that any framework used to address legal issues must be “consistent with the normative structure of Quebec law and with its civil tradition”⁴¹.

Justice LeBel, however, admitted that “not everything is found in the *C.C.P. [Code of Civil Procedure]*”, and that Quebec civil procedure is not “completely detached from the common law model”.⁴² Recognizing a “residual role for common law legal principles”, he asserted that “[i]f the

³⁶ Catherine Piché, *Droit Judiciaire Privé* (Montreal: Les Éditions Thémis, 2012), at 53 stating that *Lac d'Amiante* is “sans conteste le plus important en droit judiciaire privé québécois”.

³⁷ Jutras, *supra*, note 10, emphasizing the decision’s “fondement identitaire” and “portée culturelle”.

³⁸ *Globe and Mail*, *supra*, note 12.

³⁹ *Id.*, at para. 22.

⁴⁰ *Id.*, at para. 30.

⁴¹ *Id.*, at para. 28.

⁴² *Id.*, at para. 30 (underlining added by author).

ultimate source of a legal rule is the common law, then it would be only logical to resort to the common law in the process of interpreting and articulating that same rule in the civil law.⁴³

While, arguably, these assertions could be interpreted as a retreat from the firmness of his allegiance to civilian analysis expressed in *Lac d'Amiante*, Justice LeBel does warn us that there is a limit to the common law's residual role in Quebec cases, namely where it would otherwise "be contrary to the overarching principles set on in the *C.C.Q. [Civil Code of Québec]* and the *Quebec Charter*".⁴⁴

3. *Vivendi Canada Inc. v. Dell'Aniello* (2014)⁴⁵

The *Vivendi* case dealt with the interpretation of a class action provision of Quebec's *Code of Civil Procedure*, regarding the commonality requirement necessary for class action authorization.⁴⁶ In deciding this appeal, the Supreme Court had to consider the applicability of leading Canadian cases emanating from outside of Quebec, as well as the role that the procedural principle of proportionality plays in class action authorizations.

Justice LeBel wrote for a unanimous Supreme Court, this time co-authoring his decision with fellow Quebec judge, Wagner J. On the first question regarding the applicability of non-Quebec cases, they state that "[c]aution must be exercised when applying the principles from [common law decisions] to the rules of Quebec civil procedure relating to class actions."⁴⁷ Admitting that these decisions "provide a general framework", they warn that "tests established in a common law context cannot necessarily be imported without adaptation into Quebec civil procedure".⁴⁸ As a result, and based on differences in the wording of applicable legislation, they conclude that the commonality test is less

⁴³ *Id.*, at para. 45.

⁴⁴ *Id.*, at para. 45 (underlining added by author). See also Christian Leblanc, Marc-André Nadon & Émilie Forgues Bundock, "The Journalist-Source Privilege in Quebec Civil Law: *Globe and Mail v. Canada (Attorney General)*" (2011) 54 Sup. Ct. L. Rev. 305.

⁴⁵ *Vivendi*, *supra*, note 20.

⁴⁶ Art. 1003(a) *Code of Civil Procedure* reads: "The court authorizes the bringing of the class action and ascribes the status of representative to the members it designates if of opinion that: (a) the recourses of the members raise identical, similar or related questions of law or fact."

⁴⁷ *Vivendi*, *supra*, note 20, at para. 48 (co-authored by LeBel and Wagner JJ.).

⁴⁸ *Id.*, at para. 48.

stringent and more flexible in Quebec and that “the case law on class actions from the common law provinces is not determinative”.⁴⁹

As for the role of proportionality in class action authorizations, here again Justices LeBel and Wagner distinguish Quebec law from that of the rest of Canada. They assert that while the *Code of Civil Procedure* explicitly codifies proportionality as a general procedural principle in article 4.2, the proportionality of the class action is not a separate, additional criterion as is the preferability factor in common law Canadian class action statutes. Class action legislation in the rest of Canada requires the judge to ensure that, even if all other criteria are met, the class action is the “preferable procedure”.⁵⁰ Justices LeBel and Wagner warn that this additional criterion is not supported by the clear wording of the *Code of Civil Procedure* in Quebec and that “[c]autiousness therefore dictates that such a criterion not be introduced indirectly [via the principle of proportionality] into Quebec’s rules of civil procedure.”⁵¹

Whatever one’s opinion may be on the desirability of importing proportionality throughout the procedural rules in the *Code of Civil Procedure*, it is clear that the *Vivendi* decision sets out a very strong methodological preference.⁵² Quebec procedural law, while partly of common law origin, requires a distinct approach, one that may involve the consideration of common law authority, but one that must be equally cautious of blind allegiance to common law influences.

III. JUSTICE LEBEL’S INFLUENCE ON QUEBEC CIVIL PROCEDURE

The judgments outlined above all speak, to varying degrees, of the importance of prioritizing the civilian tradition as well as its interpretation and framework in Quebec civil procedure. While these three cases have been singled out for particular analysis, it bears noting that they are not exceptional and that Justice LeBel has iterated a similar philosophical stance in other procedure and evidence cases. For example, in *Glegg*, a case dealing with professional secrecy in the context of a medical liability suit, he acknowledged that “[t]he *Code of Civil Procedure* does not provide

⁴⁹ *Id.*, at para. 53.

⁵⁰ See, for example, Ontario’s *Class Proceedings Act, 1992*, S.O. 1992, c. 6 which, in s. 5(1)(d) requires that the class proceeding “be the preferable procedure for the resolution of the common issues”.

⁵¹ *Vivendi*, *supra*, note 20, at para. 67 (S.C.C.) (co-authored by LeBel and Wagner JJ.).

⁵² Regarding the role proportionality plays in class actions in Quebec, see the most recent decision of the Supreme Court in *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, 2014 SCC 55 (S.C.C.).

for every detail of the procedure that would apply in every situation”⁵³ and that “there is no denying the influence of the common law”.⁵⁴ But at the end of the day, Justice LeBel underscored that the codified law in Quebec is the primary basis upon which the Court needs to ground civil law decisions, stating that, “the fact remains that this law is now codified”.⁵⁵

What is most interesting about this emphasis on a civilian analytical framework — what Justice LeBel himself has called “a grille d’analyse civiliste” — is that it was not necessary to obtain the substantive outcome in the particular cases.⁵⁶ The most obvious example is *Lac d’Amiante* where the finding of the existence of confidentiality in discovery was identical whether one used the common law as authority or applied a more civilian methodology. Likewise, the results were the same in *Globe and Mail*, where the Supreme Court concluded by finding for a journalist-source privilege as it exists in the common law, and in *Vivendi*, where the Court held in favour of the authorization of the class action, as it would have likely done following the common law case-law authority.

One must, therefore, question the underlying motivation for Justice LeBel’s emphasis on the importance of civilian methodology and interpretation. It was certainly not practically motivated as the outcome of the cases in question did not turn on this approach. Rather, it appears more ideologically based, forming part of the school of thought that has been described as “la sauvegarde de l’intégrité du droit civil”.⁵⁷

Historically, this philosophical approach at the judicial level has been attributed, in large part, to Pierre-Basile Mignault, a justice of the Supreme Court of Canada from 1918-1929. Justice Mignault has been both lauded for his staunch defence of the integrity of the civil law,⁵⁸ as well as criticized for the loss of dialogue between the civil and common law that occurred during his tenure on the Supreme Court.⁵⁹ Yet, however one views his judicial methodology, there is no doubt that under Mignault J.’s

⁵³ *Glegg, supra*, note 18, at para. 29.

⁵⁴ *Id.*, at para. 15.

⁵⁵ *Id.*, at para. 15. See also *Foster Wheeler, supra*, note 8, at para. 18 (S.C.C.).

⁵⁶ Justice Louis LeBel, “L’Influence de la Cour Suprême du Canada sur l’Application du *Code Civil du Québec* Depuis 1994” (2009) 88 Can. Bar Rev. 241.

⁵⁷ Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1987) 32:3 R.D. McGill 559 [hereinafter “Normand”].

⁵⁸ Jean-Gabriel Castel, “Le juge Mignault défenseur de l’intégrité du droit civil québécois” (1975) 53 Can. Bar Rev. 543 [hereinafter “Castel”].

⁵⁹ David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929” (1987) 32:3 McGill L.J. 523 [hereinafter “Howes”].

judicial leadership, the trend that had persisted in the early decades of the Supreme Court's existence towards harmonizing Canadian law, accomplished largely by the wholesale application of common law solutions to "Quebec" cases, began to ebb.⁶⁰ Justice Mignault's tenure on the Supreme Court set in motion a new trend — that of respecting and ensuring the distinctiveness of the civil law tradition. He has, in fact, been dubbed the defender of the integrity of Quebec civil law and his protectionist attitude towards the civil law and the central role he played in reviving civilian methodology has been well documented.⁶¹ Justice Mignault considered the *Civil Code* to be an inalienable legacy, a precious heritage and part of a unique legal tradition worthy of protection.⁶² He has been recognized, through both his doctrinal writings and judgments, as the most ardent proponent of protecting the integrity of the civil law through autonomous interpretation and the most vocal critic of subsuming the civil law to the wholesale application of common law principles and precedent.

Interestingly, this protectionist attitude towards the integrity of the civil law has most recently been echoed by the Supreme Court in its decision in the *Reference re Supreme Court Act, ss. 5 and 6*.⁶³ Sparked by the appointment of Nadon J.A. of the Federal Court of Appeal to serve as one of the three Quebec judges on the Supreme Court, the majority of the Court, in holding such judicial nomination void *ab initio*, reasoned that the purpose of the legislative provision guaranteeing that there be at least three Quebec judges on the bench⁶⁴ exists "to ensure not only civil law

⁶⁰ The preference for unification via the application of common law sources to Quebec civilian cases that occurred in the first decades of the Supreme Court following its creation in 1875 is attributed largely to Taschereau J. For a sampling of the discussion of the Supreme Court's historical attitude towards Quebec civil law and its interaction with common law, see Justice Louis LeBel & Pierre-Louis Le Saunier, "L'interaction du droit civil et de la common law à la Cour suprême du Canada" (2006) 47:2 C. de D. 179 [hereinafter "LeBel & Saunier"]; H. Patrick Glenn, "La Cour suprême du Canada et la tradition du droit civil" (2001) 80 Can. Bar Rev. 151; Boudouin, *supra*, note 10, at 715; Howes, *supra*, note 59; Normand, *supra*, note 57, at 559.

⁶¹ Jean-Gabriel Castel entitled the article he wrote "Le juge Mignault défenseur de l'intégrité du droit civil québécois." See Castel, *supra*, note 58. In addition to the sources cited *infra*, note 60, see Claire l'Heureux-Dubé, "By Reason of Authority or by Authority of Reason" (1993) 27:1 U.B.C. L. Rev. 1, at 13-14; Albert Mayrand, "L'autorité du précédent au Québec" (1994) 28 Revue Juridique Thémis 775; H Patrick Glenn, "Le droit comparé et la Cour suprême du Canada", in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Wilson & Lafleur: Montreal) 1989, 197.

⁶² LeBel & Saunier, *supra*, note 60, at 187-89; and Castel, *supra*, note 58, at 545.

⁶³ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433 (S.C.C.) [hereinafter "*Reference re Supreme Court Act*"].

⁶⁴ Section 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 reads: "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province."

training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court".⁶⁵ Moreover, the Court emphasized that it was important that "the common law and the civil law ... evolve side by side, while each maintained its distinctive character".⁶⁶ This is a methodology that Mignault J. would certainly underscore as well as one that Justice LeBel clearly endorses given that he formed part of the majority of the Court in that case and co-wrote the majority judgment together with McLachlin C.J.C. and Abella, Cromwell, Karakatsanis and Wagner JJ.

Although Mignault J.'s tenure on the Supreme Court of Canada preceded that of Justice LeBel by almost a century,⁶⁷ there is a great deal of resemblance between their conceptions of civilian methodology and interpretation, as well as consistency between their articulations of the need to preserve the primacy and integrity of the civil law tradition in Quebec. Like Mignault J., Justice LeBel has articulated the need for the two legal traditions of the civil and common law to remain distinct and evolve in parallel fashion, rather than for one to be subsumed by the other.⁶⁸ And, as Mignault J. did before him, Justice LeBel's judgments in many areas of law, outside of the procedural cases dealt with in this article, have warned against importing common law rules into civilian matters, underscoring the need to apply civilian procedure, methodology and principles. For example, in the case of *Prud'homme v. Prud'homme*, Justice LeBel emphasized that the general principles of civil responsibility of the civil law, rather than the particular rules of the common law, should be applied to the law of defamation.⁶⁹ And recently, in *Quebec (Agence du Revenu) v. Services Environnementaux AES inc.*, a case dealing with contractual interpretation, he applied the civil law of contractual obligations and emphasized, in particular, its notion of consensualism and its rules of contractual interpretation based on the common intent of the parties (articulated in article 1425 *Civil Code of Québec*).⁷⁰

⁶⁵ *Reference re Supreme Court Act*, *supra*, note 63, at para. 49.

⁶⁶ *Id.*, at para. 85.

⁶⁷ Justice LeBel was appointed to the Supreme Court of Canada in 2000 and will retire in November 2014. Justice Mignault sat on the Supreme Court of Canada from 1918-1929.

⁶⁸ LeBel & Saunier, *supra*, note 60, at 238. This preference for parallel development is to be contrasted with what Gonthier J. has called convergence and cross-fertilization. See Charles D. Gonthier, "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings" (1992-93) 21 *Can. Bus. L.J.* 323.

⁶⁹ *Prud'homme v. Prud'homme*, [2002] S.C.J. No. 86, [2002] 4 S.C.R. 663 (S.C.C.).

⁷⁰ *Quebec (Agence du Revenu) v. Services Environnementaux AES inc.*, [2013] S.C.J. No. 65, [2013] 3 S.C.R. 838 (S.C.C.).

However, while there are definite similarities in the ideologies expressed by both Justices LeBel and Mignault, Justice LeBel's views are more open-minded and cosmopolitan. They are certainly not as rigid as those of Mignault who objected to any common law infiltration lest it adulterate the purity of the civil law. But the opinions of these two important jurists must be placed in the context of the times in which each lived and wrote. Justice LeBel belongs to an era very different from that of Mignault J., a time when the integrity of the civil law is not considered in jeopardy as it was a hundred years ago and where the distinctiveness of the civil law has found its place in Canada.⁷¹ Likely as a result of this, rather than a desire to keep the civil and common law in watertight compartments,⁷² Justice LeBel recognizes the value of dialogue between the traditions.⁷³ Moreover, he admits that certain areas of law are more conducive to convergence or harmonization given their globalized context. This is most evident in the *Globe and Mail* decision where he says:

The overarching issues raised by this appeal are of course not unique to the province of Quebec. The news media's reach is borderless. This is further support for an approach that would result in consistency across the country, while preserving the distinctive legal context under the *Civil Code*.⁷⁴

Justice LeBel recognizes that while it is important to retain the methodological purity of the civil law in Quebec cases, we must also be cognizant of the need to achieve some degree of substantive consistency in decisional outcomes. After all, it would not make sense for there to be extreme divergence of outcomes within one country that has a fairly common conception of a market economy and shares overall ethical values. On the other hand, this desire can only go so far and must be

⁷¹ As Baudouin, *supra*, note 10, at 736, has stated when speaking about a more contemporary Supreme Court, "la méthodologie civiliste a trouvé apparemment la place qui aurait dû être la sienne antérieurement". This has been reinforced by the enactment of a modern *Civil Code of Québec* in 1991, which came into force in 1994, and which John E.C. Brierley has called "The Renewal of Quebec's Distinct Legal Culture" (1992) 42 U.T.L.J. 488. Moreover, Quebec's civilian tradition has not gone the way of Louisiana's or South Africa's as Mignault J. feared it might. See Castel, *supra*, note 58, at 552.

⁷² Justice Mignault has proclaimed that "[u]ne cloison étanche et infranchissable sépare les deux grands systèmes juridiques." See Pierre-Basile Mignault, "Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" (1932) 11 *Revue du Droit* 2016 cited in Normand, *supra*, note 57, at 577.

⁷³ LeBel & Saunier, *supra*, note 60, at 202-19.

⁷⁴ *Globe and Mail*, *supra*, note 12, at para. 55.

justified and rationalized by an adherence to civilian methodology and civilian sources. In this sense, Justice LeBel may be seen not only as a modern-day Mignault but as a cosmopolitan jurist as well.

IV. EXPLORING JUSTICE LEBEL'S PROPOSED CIVILIAN ANALYSIS

While Justice LeBel is fairly consistent in his articulation of the primacy of the civil law tradition, as well as the integrity of its methodology and interpretation, it is not always clear how this translates to the specific contexts of procedural law. More particularly, what precisely does it mean to apply a civilian analysis in an area of Quebec law that is entirely foreign to the civilian tradition? For example, what can a civilian analysis bring to discovery when discovery itself is unknown in the civil law? A close reading of the highlighted cases above demonstrates that there are subtly different meanings that may be attributed to Justice LeBel's proposal to apply a civilian analysis. Three such meanings will be canvassed in turn.

1. Methodological Interpretation

One possible interpretation is that Justice LeBel's message is a methodological one in that he is telling us to apply the *methodology* that is distinct to the civilian tradition, a methodology found in its deductive reasoning, its distinct emphasis on legal sources (including the prioritization of legislative over judicial sources), and its particular method of codal interpretation. More precisely, a Code, as opposed to a statute, has a unique vocation which befits a distinct interpretative methodology. Because a Code's ambition is to lay down directory principles and underlying values in an abstract and canonical form, it requires a broad, general and holistic interpretation rather than a strict and narrow one ordinarily applied to statutes.⁷⁵

Justice Mignault would certainly ascribe to this view as he was extremely critical of the *Civil Code* being interpreted as a statute and not as a Code.⁷⁶ Moreover, it would be consistent with the newly-minted preliminary provision of the 2014 Quebec *Code of Civil Procedure*. The new *Code of Civil Procedure* has broken with the tradition of former

⁷⁵ Brierley & Macdonald, *supra*, note 3, at paras. 31-32.

⁷⁶ Baudouin, *supra*, note 10; Normand, *supra*, note 57, at 581.

procedural codes by enacting a preliminary provision which, in paragraph 3 states that: “This Code must be interpreted and applied as a whole, *in the civil law tradition*.”⁷⁷ While the preliminary provision of the new *Code of Civil Procedure* has not yet been the subject of commentary or judicial interpretation, its *Civil Code* counterpart has.⁷⁸ In *Doré v. Verdun*, the Supreme Court of Canada stated that one of the teachings of the Quebec *Civil Code*’s preliminary provision is that, “unlike statute law in the common law, the *Civil Code* is not a law of exception ... it must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved”.⁷⁹

Justice LeBel often focuses on the codified nature of Quebec procedural law, thereby implying that the principles of codal interpretation described above should be applied. This interpretation of civilian analysis teaches us the importance of finding authority in the sources unique to the Civil Law, prioritizing those sources of law according to the civilian legal tradition,⁸⁰ and interpreting them in the spirit of codal interpretation described in *Doré*.

2. Limitational Interpretation

A second possible meaning to ascribe to Justice LeBel’s “grille d’analyse civiliste” is one that may be termed *limitational*. In particular, while in certain cases, resort may be had to the common law, particularly in cases where Quebec law is silent and there needs to be gap filling, judges must, at the very least, ensure that any such common law import

⁷⁷ CQLR, c. C-25.01, at para. 3 (emphasis added).

⁷⁸ Paragraph 2 of the Preliminary Provision of the *Civil Code of Québec* reads: “The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.” This preliminary provision has been commented on doctrinally, for example, by H.P. Glenn, “La Disposition préliminaire du *Code civil du Québec*, le droit commun et les principes généraux du droit” (2005) 46:1&2 C. de D. 339 and A-F Bisson, “La Disposition préliminaire du *Code civil du Québec*” (1999) 44:3 R. D. McGill 539.

⁷⁹ *Doré v. Verdun (City)*, [1997] S.C.J. No. 69, [1997] 2 S.C.R. 862, at para. 15 (S.C.C.) [hereinafter “*Doré*”].

⁸⁰ Civil Law prioritizes enacted law over case law which, unlike in the common law, does not follow the doctrine of *stare decisis*. It can be said that Quebec, as a mixed jurisdiction, has what one may call *de facto* precedent since, in practice, Quebec judges do look to precedent as persuasive authority. Moreover, in a recent decision by Justices LeBel and Wagner, *Confédération des syndicats nationaux*, *supra*, note 23, *stare decisis* was found to be a reason for the dismissal of a case in the Quebec civil law context. See generally, Rosalie Jukier, “Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec” (2011) 6:1 J. Comp. L. 54.

into procedural law does not offend overriding civil law rules or principles. This meaning may be drawn directly from the *Globe and Mail* decision. In that case, while Justice LeBel does look to the common law on privilege, in particular the “Wigmore test”, he warns us that the common law’s residual role in Quebec cases must be *limited* to instances where it “would not otherwise be contrary to the overarching principles set out in the *C.C.Q.* and the *Quebec Charter*”.⁸¹ In doing so, Justice LeBel teaches us a valuable lesson in legal transplantation. While, as Alan Watson has proclaimed, borrowing legal ideas from foreign legal systems may have been a primary means by which law has changed throughout history,⁸² such legal transplantation has not always been successful, especially when borrowing legal systems are not mindful of the need to respect the larger principles and values of their legal traditions.

3. Translational Interpretation

Finally, a third possible interpretation is *translational*, namely that Quebec judges must be mindful of the need to adapt or translate borrowed common law principles to fit within the particular context and contours of Quebec civil law. As Jean-Louis Baudouin has written, before one may borrow from a foreign legal system, one must ensure that “cette interprétation étrangère cadre bien avec les principes généraux du droit national sur le plan purement juridique [et] que cette interprétation étrangère sur le plan culturel et social est compatible avec les exigences du milieu.”⁸³ This interpretation accords best with the *Vivendi* decision, one in which Justices LeBel and Wagner look to the interpretation of the commonality requirement in common law class action cases for inspiration, but reject any wholesale adoption, choosing instead to adapt the applicability of common law cases to the particular context of the Quebec *Code*. In doing so, they reach an outcome that bears great resemblance to the commonality requirement in other provinces, but which stops short of importing any semblance of a preferability requirement, because that additional criterion for class action authorization does not fit within the legislated context of Quebec class actions.

It is likely that all three of these interpretations — the methodological, the limitational and the translational — are subsumed by Justice LeBel’s

⁸¹ *Globe and Mail*, *supra*, note 12, at para. 45.

⁸² Alan Watson, “Comparative Law and Legal Change” (1978) 37:2 *Can. L.J.* 313, at 317-18.

⁸³ Baudouin, *supra*, note 10, at 731.

words of counsel and that the precise meaning to ascribe to the civil law method of analysis depends on the particular circumstances and context of the legal question at issue. But whatever its precise meaning, there is no doubt that the overall effect has been to preserve and promote Canada's two distinct legal traditions.

V. THE INFLUENCE OF THE CIVIL LAW IN JUSTICE LeBEL'S COMMON LAW DECISIONS

This article has been primarily concerned with recording the influence of Justice LeBel on the civil law tradition in Canadian procedural law. The analysis has focused on Supreme Court cases emanating from Quebec where Justice LeBel has had to grapple carefully with the influence of the common law. But it is also interesting to examine the reverse side of the coin, namely, how Justice LeBel deals with the influence of the civil law in Canadian common law decisions. While it is acknowledged that both legal traditions have mutually influenced each other,⁸⁴ the practical reality is that the cross-fertilization of legal principles is usually thought of as moving in the common law to civil law direction rather than *vice versa*. However, in the decision of *Van Breda* from Ontario, Justice LeBel draws upon the civil law and the *Civil Code of Québec* numerous times throughout his judgment as a source of inspiration and explanation for his common law decision on territorial jurisdiction.⁸⁵

At issue in *Van Breda* was the elaboration of the "real and substantial connection" test for determining court jurisdiction in the private international law context. According to Justice LeBel, previous decisions had tended to give judges too much latitude in exercising their discretion on a case by case basis which undermined order and predictability in the assumption of jurisdiction.⁸⁶ Instead, in *Van Breda*, Justice LeBel emphasizes the importance of having rules of private international law that promote the security, clarity and predictability of judicial conclusions while achieving fair and efficient results. To this end, he rejects wide judicial discretion in favour of the creation of an appropriate

⁸⁴ LeBel & Saunier, *supra*, note 60; Charles D. Gonthier, "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings" (1992-93) 21 Can. Bus. L.J. 323.

⁸⁵ *Van Breda*, *supra*, note 14.

⁸⁶ *Id.*, at para. 51.

framework, one which would identify “a set of relevant presumptive connecting factors.”⁸⁷

While recognizing that the private international framework need not be uniform across Canada,⁸⁸ Justice LeBel’s approach is inspired, in part, by the regime established in Book X of the *Civil Code of Québec* which relies on specific facts linking the subject matter of the litigation to the jurisdiction. Not only does he cite the *Civil Code*, or the civil law, on 10 separate instances in his judgment, but the approach he proposes is inherently civilian.⁸⁹ Advocating the selection and use of a number of specific, objective factors is more consistent with a civilian approach due to its reliance on clear and established principles. The approach based on judicial discretion, on the other hand, is more often attributed to the common law mentality.

Justice LeBel’s decision in *Van Breda* demonstrates that his cosmopolitanism flows both ways. Not only is he careful in how he applies and interprets common law authority in Quebec civil law decisions, but his training in, and respect for, the civil law allows him to use its values and insights to inform his rulings in common law cases as well.

Once again, Justice LeBel offers inspiring lessons in the special Canadian context of judging in a bijural tradition. The fruits of this lesson can be seen in the recent common law decision of the Supreme Court in *Bhasin v. Hrynew*,⁹⁰ a unanimous decision penned by Cromwell J. (Justice LeBel having sat on the panel) on the topic of good faith contractual performance. Traditionally a difficult subject in the field of common law contracts, Cromwell J. boldly acknowledges good faith contractual performance as a general organizing principle of Canadian common law contract law and, in the process, refers to the broad and quite encompassing treatment of good faith in Quebec civil law. His reference to the *Civil Code* provisions, Quebec doctrine, and key Quebec decisions in the area help not only to buttress his decision in the case but

⁸⁷ *Id.*, at para. 78. While beyond the scope of this article, it should be noted that Justice LeBel’s decision in *Van Breda* has not been uniformly praised on its substance. Authors question both his choice of the presumptive connecting factors and the extent to which his approach has inserted more certainty into the law. See generally, Tanya Monestier, “(Still) A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013) 36 *Fordham Int’l L.J.* 397 and S.G.A. Pitel, “Checking in to Club Resorts: How Courts are Applying the New Test for Jurisdiction” (2013) 42:1&2 *Advocates’ Q.* 190.

⁸⁸ *Van Breda*, *supra*, note 14, at para. 71.

⁸⁹ *Van Breda*, *supra*, note 14, at paras. 21, 35, 39, 42, 55, 76, 77, 88, 106, 108 (S.C.C.) (the latter two instances relate to *forum non conveniens*).

⁹⁰ *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, 2014 SCC 71 (S.C.C.) [hereinafter “*Bhasin*”].

also to allay the fears of those worried about the potentially nefarious impacts of a general good faith doctrine. In the words of Cromwell J., we may “take comfort”⁹¹ from the Quebec experience which has not “impeded contractual activity or contractual stability.”⁹² From a methodological standpoint, comparative scholars may also take comfort in this decision. As Justice LeBel has taught us, while the duality of Canada’s legal traditions must be maintained and jealously protected, it need not prevent each of the traditions from learning from the other. Rather, careful and respectful comparative judicial methodology can only influence the development of the law in a positive way.

VI. CONCLUSION

In documenting the important legacy Justice Louis LeBel has left on the field of procedural law in Canada, this article could easily have taken another avenue. Rather than a thematic lens, this article could have approached the task by analyzing the impact his decisions have made on a variety of discrete areas that fall within the broad subject matter of procedural law. Had such an approach been taken, this article would surely have singled out decisions such as *Okanagan Indian Band*, a trailblazing judgment in which Justice LeBel established the conditions necessary for the award of interim costs, thereby ensuring access to justice for impecunious litigants in appropriate cases.⁹³ Such an approach would also have focused on the impact of Justice LeBel’s decisions on the field of arbitration within the broader concept of extra-judicial alternatives to dispute resolution. Justice LeBel’s judgments in cases such as *Desputeaux*,⁹⁴ *Dell*,⁹⁵ and *Seidel*⁹⁶ illustrate the contemporary movement in Quebec and Canada to a warmer receptivity towards arbitration, a movement emboldened by the new *Code of Civil Procedure* in Quebec, adopted in February of 2014, in which the first seven articles

⁹¹ *Id.*, at para. 82.

⁹² *Id.*, at para. 85.

⁹³ *Supra*, note 21. The *Okanagan Indian Band* decision paved the way for subsequent decisions in this area such as *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38 (S.C.C.) and *Caron*, *supra*, note 2, as well as influencing the Quebec Court of Appeal decision in *Héту c. Notre-Dame de Lourdes (Municipalité de)*, [2005] J.Q. no 796 (Q.C.C.A.).

⁹⁴ *Supra*, note 22.

⁹⁵ *Supra*, note 22.

⁹⁶ *Supra*, note 22 (LeBel J. dissenting).

focus on alternatives to dispute resolution and outline the obligations of the parties to consider private prevention and resolution processes before referring their dispute to the courts.

This article chose, however, to follow a different path. Instead of outlining the important inroads Justice LeBel's decisions have made on several distinct areas of substantive procedural law, a cross-cutting thematic approach was adopted. This approach has focused on a particular, but very important, legacy of Justice LeBel evidenced in some key decisions that cut across a wide array of procedural topics, ranging from discovery to privilege, from professional secrecy to class actions. An examination of these decisions discloses a clear ideological stance — one that prioritizes civilian methodology, interpretation and sources in the analysis of procedural cases emanating from Quebec, even if the issues arising in those cases originated in, or were borrowed from, the common law.

The prioritization of the civilian tradition, its codal interpretation and its methodological framework is one of Justice LeBel's ultimate legacies. But it goes beyond a personal legacy for which he will surely go down in history. Justice LeBel has also helped to shape the overall orientation of the Supreme Court as an institution which today, as is evidenced in decisions such as *Reference re Supreme Court Act*,⁹⁷ seeks to preserve the duality of Canada's legal traditions while at the same time acknowledging the mutual influence these traditions can have on each other.

⁹⁷ *Reference re Supreme Court Act*, *supra*, note 63.