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## From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929

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The author describes how *le droit civil canadien* was profoundly transformed, if not discontinued, during the early decades of the twentieth century as faith in the plenitude of local positive law and concern with preserving its "integrity" gradually supplanted the late nineteenth-century belief that it was necessary for judges to ground their interpretations of the *Civil Code of Lower Canada* in the dictates of the "universal law". A variety of factors are shown to have contributed to this process of involution. One was the displacement of the notion of law as an art, the art of rhetoric, by the idea of law as "science". Another was historical forgetfulness — a trait especially noticeable in the judgments of Pierre-Basile Mignault. The third and perhaps most important factor that led to the demise of the late nineteenth-century tradition of "judicial nomadism" or "principled eclecticism" was recalcitrance on the part of the English-speaking jurists of the rest of Canada, who failed to reciprocate the respect with which their civilian counterparts, in their search for "universal law", contemplated and (where appropriate) applied certain teachings of the common law.

L'auteur décrit la transformation, sinon la rupture, dans le droit civil canadien au début du vingtième siècle, alors que la confiance dans la complétude du droit positif local et le souci de conserver son « intégrité » ont peu à peu remplacé la nécessité perçue par les juges de la fin du dix-neuvième siècle de fonder leurs interprétations du *Code civil du Bas-Canada* dans les préceptes du « droit universel ». Plusieurs facteurs, selon l'auteur, contribuent à expliquer ce phénomène. Le premier facteur est le déplacement de la notion de droit en tant qu'art, l'art de la rhétorique, au profit de la notion de droit en tant que « science ». Il y a eu en second l'oubli de l'histoire — un trait caractéristique des jugements de Pierre-Basile Mignault. Le troisième facteur, et peut-être celui qui aide le plus à comprendre le déplacement de la tradition de « nomadisme juridique » ou d'« éclectisme déterminé » prévalant à la fin du dix-neuvième siècle, est la réticence des juristes anglophones des autres provinces du Canada à donner contrepartie aux juristes civilistes, qui n'hésitaient pas, dans leur recherche du « droit universel », à considérer, et même, dans des situations appropriées, à appliquer les enseignements de la *common law*.

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\*Of the Department of Sociology and Anthropology, Concordia University. My intellectual debt to Professors G. Blaine Baker, H.P. Glenn, and John Brierley is evident throughout the pages of this essay. I wish to thank them for their guidance. I also wish to thank those members of my class — particularly A. Roberge, R. Metcalfe, M. Voyer and I. Fraser — who taught me about *l'esprit civiliste*.

*Synopsis*

**Introduction**

- I. "Babel légale": The Multiplicity of the Sources of Law before and after Quebec's Civil Law Codification
- II. "On cite ces arrêts comme on signale des écueils": The Polyjurality of Sir Henri-Elzéar Taschereau
- III. "N'oublions pas le cas de la Louisiane": The Monojurality of Pierre-Basile Miguault

**Epilogue: Monotonous Jurisprudence**

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Il n'est peut-être pas un pays au monde soumis à plus de règles de droit, empruntées à des systèmes divers.

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Quel esprit assez vaste pourrait embrasser et connaître cette variété infinie d'édits, de coutumes, de brocards, d'ordonnances, de statuts, de jurisprudence de tout genre?<sup>1</sup>

**Introduction**

This essay is a reconnaissance of the legal thought of two Quebec judges: Sir Henri-Elzéar Taschereau (1836-1911) and Pierre-Basile Mignault (1854-1945). Both Taschereau and Mignault sat on the Supreme Court of Canada, the former from 1878 to 1906, the latter from 1918 to 1929. Both were "Conservative ... Roman Catholic", to use the language of *The Canadian Who's Who*.<sup>2</sup> However, a great gulf separates their respective *Rechtsanschauung* (legal views). This gulf can be ascribed in part to Mignault's making of Quebec law into something quite contrary to its original nature and structure. It will be argued that the originality of Quebec law was thought most illuminatingly by Taschereau, and that this originality has now been

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<sup>1</sup>M., "De la codification des lois du Canada" (1846) 1 R. de L. 337 at 337-38.

<sup>2</sup>Vol. 1 (London: Times Publishing, 1910) at 219, and Sir C.G.D. Roberts & A.L. Tunnell, eds, vol. 2 (Toronto: Trans-Canada Press, 1936-1937) at 782.

lost. Indeed, the conceptual world of Taschereau is practically unthinkable to us — educated, as we are, the other side of the Mignault divide.<sup>3</sup>

The time span of this essay was dictated by the creation of the Supreme Court of Canada (1875) and Mignault's retirement from it (1929). However, in keeping with the Taschereau spirit, these limits will constantly be exceeded.

Part I begins with a discussion of Jean-Louis Baudouin's 1975 essay on the interpretation of the *Civil Code of Lower Canada* by the Supreme Court of Canada,<sup>4</sup> but then reverts to 1857, the year of *An Act to Provide for the Codification of the Laws of Lower Canada Relative to Civil Matters and Procedure*.<sup>5</sup> Taschereau was called to the Bar that same year. This makes him one of those to whom Mignault would have referred as "les anciens": "Lorsque je faisais mon droit, j'ai connu bien des anciens qui avaient étudié le droit civil avant la confection du Code. Je vous assure que leur tâche n'était pas facile."<sup>6</sup> If one is to understand Taschereau's polyjurality — the subject of Part II — it is essential that one have a firm grasp of the "Babel légale" that reigned in Quebec in the period prior to codification, the period during which his legal thought took shape.

What is meant by the term "polyjurality" is a tendency to regard other legal traditions (or cultures) as presenting "alternatives for us" as opposed to "alternatives to us".<sup>7</sup> The latter disposition, with all the exclusivity it implies, is more characteristic of Mignault, given his emphasis on preserving intact "la pureté de notre droit".<sup>8</sup> Mignault's monojurality will be the subject

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<sup>3</sup>A similar divide has been shown to separate the present-day Ontario Bar from its 19th century roots, from which it follows that "the origins of the two Canadian legal solitudes of the 1980s can be located in the decades surrounding the turn of the century": G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law and Hist. Rev.* 219 at 263-64. See also D. Howes, Book Review (1986) 35 *U.N.B.L.J.* 231 at 233-34; M. Tancelin, "Introduction: How Can a Legal System Be a Mixed System?" in F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* [1907] (Toronto: Butterworths, 1980) 1 at 20-23.

<sup>4</sup>J.-L. Baudouin, "L'interprétation du code civil québécois par la Cour suprême du Canada" (1975) 53 *Can. Bar Rev.* 715.

<sup>5</sup>S.C. 1857, c. 43.

<sup>6</sup>P.-B. Mignault, "L'avenir de notre droit civil" (1923) 1 *R. du D.* 56 at 57.

<sup>7</sup>See C. Geertz, "The Uses of Diversity" (1986) 25 *Mich. Q. Rev.* 105 at 111. I coined the term "polyjurality" with the Freudian notion of the "polymorphous perverse" disposition of the child in mind. See S. Freud, *On Sexuality*, Pelican Freud Library, vol. 7, trans. J. Strachey (Toronto: Penguin, 1977) at 109 and 155-58. The opposition polyjurality/ monojurality corresponds to the distinction between the "principled eclecticism" of the 19th century and the "ungrounded, inarticulate conceptualism" of today in Baker, *supra*, note 3, and to the idea of "persuasive authority" as opposed to "binding authority" in H.P. Glenn, "Persuasive Authority" (1987) 32 *McGill L.J.* 261.

<sup>8</sup>*Supra*, note 6 at 60.

of Part III. In the Epilogue, "Monotonous Jurisprudence", an attempt will be made to account for the transformation described in Parts II and III in terms of Marcel Mauss' famous "Essai sur le don".<sup>9</sup>

### I. "Babel légale": The Multiplicity of the Sources of Law before and after Quebec's Civil Law Codification

The very idea of a Supreme Court of Canada hearing cases on appeal from both common and civil law jurisdictions seems like a contradiction in terms.<sup>10</sup> How can judges trained in the common law be competent to decide civil law cases, or vice versa? According to Jean-Louis Baudouin, this problem is exacerbated by the fact that the court "s'est fixée un rôle d'unification des solutions juridiques canadiennes", at least at the outset.<sup>11</sup> Consider, for example, *Magann v. Auger*, which involved a dispute regarding the time and place of the formation of a contract by post. The *Civil Code* itself is silent on this matter, but three equally valid theories from a civilian point of view (information, reception or expedition) were available. The Court opted for the third theory, that of expedition, its *motif* being as follows: "By the conclusion we have reached ... we declare the law to be in the Province of Quebec upon the same footing as it stands in England, and in the rest of the Dominion, a fact ... of great importance specially in commercial matters."<sup>12</sup>

Consider also *Canadian Pacific Railway Co. v. Robinson*, which raised the question of whether damages by way of *solatium doloris* could be claimed in an action for the death of a person under article 1056 C.C.L.C. One of the *considérants* which led the Court to decide this question in the negative was that: "It cannot have been intended by this legislation that if a man was killed in Upper Canada, no solatium should be granted to his wife or legal representatives by way of damages, but that if he was killed in Lower Canada, such a solatium should be given."<sup>13</sup>

It will be observed that in both of the above cases the "harmonization of solutions" proceeded along a one-way track, from Ontario to Quebec. Note also that in neither instance does any attention seem to have been

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<sup>9</sup>See *infra*, note 176 and accompanying text.

<sup>10</sup>The best history of this seeming contradiction is P.H. Russell, "The Supreme Court of Canada as a Bilingual and Bicultural Institution" in Canada, Royal Commission on Bilingualism and Biculturalism, *Documents of the Royal Commission on Bilingualism and Biculturalism* (Document 1) (Ottawa: Queen's Printer, 1969) at 6-7, 13-17 and 20-21.

<sup>11</sup>*Supra*, note 4 at 718.

<sup>12</sup>(1901), 31 S.C.R. 186 at 193, Taschereau J. [hereinafter *Magann*]. Compare P.-B. Mignault, "L'autorité judiciaire" (1900) 6 R.L.(n.s.) 145 at 174-75.

<sup>13</sup>(1887), 14 S.C.R. 105 at 124, Taschereau J. [hereinafter *Robinson*]. Compare L. Baudouin, "Le solatium doloris" (1955) 2 C. de D. 55.

paid to "l'économie générale du droit civil québécois". Indeed, as Baudouin, unable to find a single example of a solution being generalized in the opposite direction,<sup>14</sup> concluded:

Il ne s'agissait aucunement, ce qui eut été éminemment profitable, d'un véritable échange entre les deux systèmes, aboutissant à une règle mieux adaptée, plus socialement utile ou reflétant plus fidèlement un certain pancanadianisme. Au contraire, la réciprocité de l'échange n'existant pas, la *common law* devenait en quelque sorte le droit supplétif du droit civil.<sup>15</sup>

The above examples could be multiplied, but we confine ourselves to them because they are illustrative of the reasoning of an uncommon, eminently civil, mind — that of Sir Henri-Elzéar Taschereau. It might occasion some shock that a French-Canadian judge could display such indifference with respect to the defence of the civil law tradition against common law encroachments. But it should be noted that Taschereau was not unique in this regard: "None of the early Quebec members of the Supreme Court [Télesphore Fournier, Désiré Girouard, Louis-Philippe Brodeur] were militant upholders of the civil law."<sup>16</sup> If this claim is accurate, it follows that turn-of-the-century civilians did not hold as exclusive a conception of the sources of law as is current nowadays. It also follows that what informed their reasoning was the very spirit the court as a whole is presently thought to have lacked — namely, "un certain pancanadianisme".

It is essential to guard against presentism when one is writing history. A presentist interpretation of the rules that Taschereau laid down in *Magann* and *Robinson* would represent them as "judge-made law" which sought to impose a spurious uniformity on the laws of central Canada (Ontario and

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<sup>14</sup>*Supra*, note 4 at 722. This proposition must be qualified. The civil law has frequently inspired legislative reform of the common law: *Re Philip* (1979), [1979] 3 W.W.R. 554 at 559 (Man. C.A.); T. Rinfret, "Reciprocal Influences of the French and English Laws" (1926) 4 Can. Bar Rev. 69. Its superior logic has also informed some extremely cogent dissenting opinions in common law cases: *Hobbs v. Esquimalt & Nanaimo Railway Co.* (1899), 29 S.C.R. 450 at 452-53, Taschereau J.; *Harrison v. Carswell* (1975), [1976] 2 S.C.R. 200 at 209, 62 D.L.R. (3d) 68, Laskin J. As for Baudouin's main point, *J. Nunes Diamonds Ltd v. Dominion Electric Protection Co.* (1972), [1972] S.C.R. 769, 26 D.L.R. (3d) 699, Pigeon J., and *Central Trust Co. v. Rafuse* (1986), [1986] 2 S.C.R. 147, 69 N.R. 321, Le Dain J., can be read as exceptions to the rule of common law cases never being decided in a civil fashion.

<sup>15</sup>Baudouin, *ibid.* at 723.

<sup>16</sup>J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 130. These three judges also made extensive use of non-binding and non-national sources of law in their opinions. See, e.g., *Benning v. Thibaudeau* (1891), 20 S.C.R. 110 at 122-25; *Ross v. Hannan* (1891), 19 S.C.R. 227 at 235; *St. Louis v. R.* (1896), 25 S.C.R. 649 at 681-83; *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595 at 599; *Banque d'Hochelaga v. Waterous Engine Works Co.* (1897), 27 S.C.R. 406 at 432; *Renaud v. Lamothe* (1902), 32 S.C.R. 357 at 364-70; *City of Montreal v. Montreal Street Railway Co.* (1904), 34 S.C.R. 459 at 475.

Quebec). An historicist interpretation, by contrast, would treat them as merely "declaratory of the law", which is, of course, what they were, in that the *Civil Code of Lower Canada* was enacted by the legislature of the united Canadas (1841-1867), and it cannot reasonably be supposed that the intention of that legislature was to put the law of one of its divisions on a significantly different footing from that of the other. This, in any event, was how Taschereau interpreted the intent of the legislation in question.

We moderns tend to overlook the fact that the *Code* was a product of the Union period. This oversight is reflected in what is currently thought to have been the aim of codification: "The purpose was to construct a Code which, embodying the past, would serve as a defence against outside influences which threatened the integrity of the Civil Law ...".<sup>17</sup> No such purpose can be read into the Act of 1857 that set up the Codification commission.<sup>18</sup> On the contrary, codification was undertaken for purely technical or legal reasons, as will be shown presently. What is more, some of those directly connected with the project even entertained the idea that the final product could serve as a "standard of assimilation and unity",<sup>19</sup> that is, "that the *droit civil*, organized into a code, might be suitable as a body of law to be adopted by the rest of British North America."<sup>20</sup> This idea was first put forward in 1846:

Dans cette reconstruction [the piecing together of a code], on devrait avoir en vue l'avenir de l'Amérique-britannique, dont le Bas-Canada doit être le centre, et songer à un système qui pourrait convenir à toutes les populations qui devront composer un jour un vaste empire [the "Kingdom of Canada"], en leur donnant des institutions uniformes propres à en faire un seul et même peuple, distinct de celui qui l'avoisine.<sup>21</sup>

The same idea was still being promoted as late as 1890.<sup>22</sup>

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<sup>17</sup>Quebec, Civil Code Revision Office, *Report on the Quebec Civil Code: Draft Civil Code*, vol. 1 (Québec: Éditeur officiel, 1978) at xxiv-xxv.

<sup>18</sup>See J.E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 520; J.W. Cairns, *The 1808 Digest of Orleans and the 1866 Civil Code of Lower Canada: An Historical Study of Legal Change*, vols 1, 2 (Doctoral thesis in law, University of Edinburgh, 1981) [unpublished]. It appears that the use of codification for "national" or "political" purposes did not occur to anyone until there was wind of confederation.

<sup>19</sup>T. McCord, *The Civil Code of Lower Canada* (Montreal: Dawson Bros, 1867) at II.

<sup>20</sup>Brierley, *supra*, note 18 at 530.

<sup>21</sup>*Supra*, note 1 at 340-41 (the neighbouring people in question were the inhabitants of the United States).

<sup>22</sup>See, e.g., N.W. Trenholme, ["The New Chief Justice"] (1890) 13 Legal N. 44.

Codification was not, therefore, undertaken for purposes of defence or self-preservation but for purposes of export and enlightenment.<sup>23</sup> Those most in need of enlightenment were (as always) the English, whose unilingualism rendered the vast majority of the laws in force in the province unintelligible to them. The *Québécois* also suffered though since there were “portions of the Laws of England [introduced] in peculiar cases” that had never been translated into French.<sup>24</sup> The production of a bilingual and, in a sense, bijuridical code would obviously help to resolve this problem.

If we read the preamble to the enabling Act of 1857 correctly, the second problem codification was meant to redress was the technical one of the law's general inaccessibility. As John Brierley has pointed out, “the actual *content* of the legal system of Lower Canada was not easily ascertainable ... [since] the *substance* of the law was only to be gathered from a multiplicity of different sources ...”.<sup>25</sup> These sources included elements of Roman law, the *Coutume de Paris*, *ordonnances*, *édits*, *ancienne jurisprudence*, out-of-print *commentaires*, English public, commercial and criminal law, and much, much more.<sup>26</sup> The plethora of sources constituted a veritable “Babel légale”.<sup>27</sup> Hence the importance of coordinating and consolidating them. Besides, “great advantages” were said to result from codification, which made it “manifestly expedient” (in the words of the preamble) to follow the example of France and Louisiana. However, in contrast to these foreign models, it was never dreamed that the *Civil Code of Lower Canada* would be an improvement on the pre-existing law, which explains why article 2712

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<sup>23</sup>The *Code* was exported to the Caribbean isle of Saint Lucia. See N.J.O. Liverpool, “The History and Development of the Saint Lucia Civil Code” in R.A. Landry & E. Caparros, eds, *Essays on the Civil Codes of Québec and St. Lucia* (Ottawa: University of Ottawa Press, 1984) 303. On the notion of the *Code* serving as “a prototype for federal uniformity under section 94 of the *British North America Act* . . .”, see Baker, *supra*, note 3 at 226-27 and 241-42. Compare *infra*, note 148.

<sup>24</sup>*Supra*, note 5, “Preamble”.

<sup>25</sup>*Supra*, note 18 at 542. The currency in circulation in the province was no less heterogeneous in origin than the law. It is interesting to compare how unification proceeded on both fronts at once. See D.C. Masters, “The Establishment of the Decimal Currency in Canada” (1952) 33 *Can. Hist. Rev.* 129; P.N. Breton, *Illustrated History of Coins and Tokens Relating to Canada* (Montreal: P.N. Breton, 1894). I am indebted to my colleague, Michael Oppenheim, for this insight, which clearly deserves further study.

<sup>26</sup>See Brierley, *ibid.* at 534-35 and 547-54; M. Tancelin, *supra*, note 3 at 8-9; H.M. Neatby, *The Administration of Justice under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937); J.E.C. Brierley, “The Co-existence of Legal Systems in Quebec: ‘Free and Common Socage’ in Canada’s ‘pays de droit civil’” (1979) 20 *C. de D.* 277.

<sup>27</sup>*Supra*, note 1 at 337. See also E. Kolish, *Changement dans le droit privé au Québec et au Bas-Canada, entre 1760 et 1840: Attitudes et réactions des contemporains* (Doctoral thesis in legal history, Université de Montréal, 1980) [unpublished]; J.-M. Brisson, *La formation d'un droit mixte: L'évolution de la procédure civile de 1774 à 1867* (Montreal: Thémis, 1986); A. Morel, “La réception du droit criminel anglais au Québec (1760-1892)” (1978) 13 *R.J.T.* 449.

C.C.L.C. "leaves open the possibility of a continued appeal to the former law" for purposes of more than just interpretation.<sup>28</sup>

The completed *Code* of 1866 was hailed by Montreal's burgeoning middle class as a great achievement.<sup>29</sup> This is understandable in view of the numerous ways it advanced their interests.<sup>30</sup> But to the deposed seigneurial class it was not such a "bienfait",<sup>31</sup> and the latter occasionally took pleasure in picking it apart. Thus, in *Miller v. Demeule*, Taschereau, who was of seigneurial stock, gleefully pointed out that while articles 1305ff. of the French *Civil Code* (concerning lesion) had occasioned some controversy in France on account of their obscurity, articles 1002ff. C.C.L.C. were no more lucid "malgré ce qu'en disent nos codificateurs", who thought they had succeeded in rendering "en termes non équivoques la règle qui prévaut dans notre droit."<sup>32</sup> "Mais comme ils [the articles] nous sont donnés comme loi préexistante", Taschereau went on, "nous avons l'avantage d'avoir pour nous guider ... les commentateurs sous la Coutume de Paris, et la jurisprudence sous l'ancien droit français, en même temps que l'opinion des commentateurs sous le code Napoléon."<sup>33</sup>

Evidently, for a nomadic mind such as Taschereau's, there "was no problem with the mass of the law."<sup>34</sup> He positively enjoyed searching it out

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<sup>28</sup>Brierley, *supra*, note 18 at 541 and 556-57. According to art. 2712 C.C.L.C. (formerly art. 2613), it is only in the event of inconsistency or duplication that the *ancien droit* is abrogated. See also arts 11 and 12 C.C.L.C. Compare A. Watson, *The Making of the Civil Law* (Cambridge, Mass.: Harvard University Press, 1981); G. Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Cambridge, Mass.: Harvard University Press, 1975).

<sup>29</sup>This is the interpretation forwarded by McCord, *supra*, note 19 at i-iii, but see A. Morel, "La codification devant l'opinion publique de l'époque" in J. Boucher & A. Morel, eds, *Livre du centenaire du Code civil: Le droit dans la vie familiale*, vol. 1 (Montréal: Presses de l'Université de Montréal, 1970) 27; J.E.C. Brierley, *Arbitrage conventionnel au Canada et spécialement dans le droit privé de la province de Québec* (Doctoral thesis in law, Université de Paris, 1964) [unpublished]; G. Bouchard, "Les systèmes de transmission des avoirs familiaux et le cycle de la société rurale au Québec du XVIIe au XXe siècle" (1983) 16 Soc. Hist. 35.

<sup>30</sup>See B. Young, *George-Étienne Cartier: Montreal Bourgeois* (Kingston: McGill-Queen's University Press, 1981) at 95-100 and 104.

<sup>31</sup>Mignault's term, *supra*, note 6 at 58. See generally B. Young, *In Its Corporate Capacity: The Seminary of Montreal as a Business Institution, 1816-76* (Kingston: McGill-Queen's University Press, 1986); J.-P. Wallot, "Le régime seigneurial et son abolition au Canada" in *Un Québec qui bougeait: Trame socio-politique du Québec au tournant du XIXe siècle* (Montréal: Boréal Express, 1973) 225; F. Ouellet, "L'abolition du régime seigneurial et l'idée de propriété" in *Éléments d'histoire sociale du Bas-Canada* (Montreal: Hurtubise H.M.H., 1972) 297.

<sup>32</sup>(1873), 18 L.C. Jurist 12 at 13.

<sup>33</sup>*Ibid.* See also *Meloche v. Simpson* (1899), 29 S.C.R. 375. Taschereau claimed to have spent "many pleasant hours" over this case regarding the ir/revocability of substitutions in gifts *inter vivos*. His remarks are pregnant with the innuendo that the codifiers had violated the maxim *Ponderantur, non numerantur* in the process of determining what the law was previously on this question.

<sup>34</sup>Glenn, *supra*, note 7 at 267.



in all its diverse embodiments, which may explain why he, and virtually all the other judges of Quebec, took no apparent interest in the work of the codifiers.<sup>35</sup> The judges' attitude towards the *Code* may best be inferred from the remarks of Justice Sanborn in a case concerning the liability of common carriers: "Our own law is too explicit to render it necessary to resort to the general law applicable to common carriers, except to show that it [what the Code says on the matter] is not exceptional in principle."<sup>36</sup>

The *Code* was thus merely one source among others, and rarely treated as controlling *per se* because — by its own terms — it was but a partial expression of the laws in force in the province.<sup>37</sup> Judges therefore went on inquiring into the "general" or "universal law" just as they had done before codification. And they found it in such diverse places as the writings of Cicero and Lord Mansfield,<sup>38</sup> the treatises on contract, tort and railway law of such American authors as Story, Saunders and Angell,<sup>39</sup> and, of course, the decisions of the courts of England.<sup>40</sup>

Given this state of affairs, one is tempted to concur in Lord Durham's finding: "The law itself is ... a patch-work ... part French, part English, and

<sup>35</sup>See Brierley, *supra*, note 18 at 572 n. 159. Perhaps the judges considered it an insult to their intelligence to have all the sources "at their fingertips", as it were, in the form of a *Code*. Compare D.R. Kelly, *Historians and the Law in Postrevolutionary France* (Princeton, N.J.: Princeton University Press, 1984); C.M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, Conn.: Greenwood Press, 1981).

<sup>36</sup>*Rutherford v. Grand Trunk Railway Co.* (1875), 20 L.C. Jurist 11 (Q.B.) at 18. Regarding the universal law prevailing over the local law where the latter had not been enacted in accordance with the former, see *Quebec Street Railway Co. v. City of Quebec* (1888), 15 S.C.R. 164 at 176-77, Strong J. See also T. Aquinas, *Summa Theologica*, Questions 94 (arts 2 and 3), 95 (art. 2) and 96 (arts 5 and 6).

<sup>37</sup>Or, *primus inter pares*, if you will. See *Lewis v. Jeffrey* (1874), 18 L.C. Jurist 132 (Sup. Ct) at 133 (where, on a single page, reference is made to Story, art. 1530 *C.C.L.C.*, Delamarre & Le Poitvin, Benjamin and various judgments of the Cour de Cassation as well as the Exchequer Court of England, in that order; the codal article was merely interpolated). See further Brierley, *supra*, note 18 at 557; Glenn, *supra*, note 7 at 269-71 and 294.

<sup>38</sup>"It is not needful to add that the most accomplished civilians have drunk deeply of the spirit of Cicero and of the stoic philosophy . . . . It is to be remembered that Mansfield had the instincts and education of a civilian . . .": *Jetté v. McNaughton* (1875), 19 L.C. Jurist 153 at 155 (Sup. Ct), Torrance J., and reproduced on appeal in (1876), 27 R.J.R.Q. 8 at 11. All this for the purpose of deciding whether the use of puffers at an auction sale rendered it void! The first words of this quotation point to the existence of an "invisible discourse" which it may no longer be possible to reconstruct: see Baker, *supra*, note 3 at 222.

<sup>39</sup>See, e.g., *Chartier v. Compagnie du grand tronc de chemin de fer du Canada* (1872), 17 L.C. Jurist 26, 23 R.J.R.Q. 31 (Sup. Ct); *Cuvillier v. Gilbert* (1873), 18 L.C. Jurist 22, 23 R.J.R.Q. 311 (Sup. Ct in Review); *Lussier v. Anderson* (1876), 20 L.C. Jurist 279, 28 R.J.R.Q. 585 (Sup. Ct).

<sup>40</sup>See Walton, *supra*, note 3 at 118-29; *Macfarlane v. Dewey* (1870), 15 L.C. Jurist 85 at 91 and 98, 21 R.J.R.Q. 388.

with the line between each very confusedly drawn.”<sup>41</sup> The interesting thing here is that the same observation could have been made of the case law of Upper Canada in 1839 (the year of Durham’s Report),<sup>42</sup> which makes what has been called “le phénomène de l’implosion juridique nationale”,<sup>43</sup> the manner in which the two legal systems turned back and in upon themselves in subsequent years, a profound mystery. However, this mystery can be enucleated, at least in part, by studying the evolution of Taschereau’s legal views.

## II. “On cite ces arrêts comme on signale des écueils”: The Polyjurality of Sir Henri-Elzéar Taschereau

Henri-Elzéar Taschereau was born 7 October 1836 at Sainte-Marie de la Beauce. As the eldest son of Pierre-Elzéar Taschereau — Seigneur of Sainte-Marie, *avocat* and representative of Beauce County from 1830 to 1845 — Henri-Elzéar came into each of these vocations “by descent”, as it were. He was elected to the Legislative Assembly of the Province of Canada in 1861, and there came to be known as a “Bleu”. He supported, among other things, the Macdonald-Cartier plan for confederation, but at the last moment voted against this scheme in accordance with what he took to be his constituents’ interests.<sup>44</sup> The latter promptly voted him out of office and elected an anglophone Protestant “Rouge” of German descent, William Pozer, in his stead.<sup>45</sup>

In 1871 Taschereau was appointed a Superior Court judge for the districts of Saguenay and Chicoutimi. In 1873 he was transferred to the district of Kamouraska where, during his “moments de loisir”,<sup>46</sup> he prepared an

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<sup>41</sup>G.M. Craig, ed., *Lord Durham’s Report* (Toronto: McClelland and Stewart, 1963) at 69 (of course, Durham was referring to the statute law, not *la jurisprudence*).

<sup>42</sup>“Citations to [Justinian, Domat, Pothier, and the *Code Napoleon*] appear with some frequency in the published reporting series [of Old Ontario], normally in connection with statements of general principle”: Baker, *supra*, note 3 at 239-40. See also D. Howes, “Property, God and Nature in the Thought of Sir John Beverly Robinson” (1985) 30 McGill L.J. 365 at 377-78 and 402.

<sup>43</sup>H.E. Glenn, “Le droit comparé et la Cour suprême du Canada” in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* [forthcoming].

<sup>44</sup>Province of Canada, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (10 March 1865) at 893-94 [hereinafter *Confederation Debates*].

<sup>45</sup>M. Ferron & R. Cliche, *Les Beaucerons ces insoumis [suivi de] Quand le peuple fait la loi*, rev’d ed. (LaSalle, Que.: Hurtubise H.M.H., 1982) at 178-79.

<sup>46</sup>H.E. Taschereau, *Le Code de procédure civile du Bas-Canada, avec annotations et décisions des tribunaux* (Québec: A. Coté, 1876) at iii.

annotated consolidation of the criminal law<sup>47</sup> and a new edition of the Quebec *Code of Civil Procedure*. In 1878 he was called to replace his cousin, Jean-Thomas Taschereau, on the bench of the Supreme Court. Shortly thereafter a chair was created for him in the Law Faculty at the University of Ottawa, and in 1895 he succeeded Sir John Thompson as Dean. In 1902, Taschereau was appointed Chief Justice of the Supreme Court of Canada. Later that same year he was created a knight bachelor, and in 1904 a privy councillor. He attended several sittings of the Judicial Committee, and apparently was “thinking of going again to England to attend the Coronation” when in 1911 “his illness took a fatal turn”.<sup>48</sup>

Taschereau’s judicial worldview has yet to be the subject of a detailed study, although it has attracted fleeting comment in the recent spate of Canadian legal-historical writings. For example, it has been said of his contribution to the criminal law that the annotated consolidation of 1874

was no doubt a handy collection for the busy practitioner, but it is somewhat flattering by today’s standards to call it an annotation, let alone scholarship. ... Most of the cases [and authorities] cited were English. Taschereau’s work was typical of a period when English authorities and decisions were held in awe.<sup>49</sup>

Regarding his contribution to Canadian constitutional law, it has been observed that in his earlier judgments he “demonstrated a strongly centralist interpretation of the British North America Act.”<sup>50</sup> Witness the following passages from *Citizens’ Insurance Co. v. Parsons*:

There [in the United States] the right to regulate commerce *in* the State is given to the State, not to the Federal power [as here]... .

....

The respondent would seem to treat the Dominion laws as foreign laws. He forgets that before the laws enacted by the federal authority [under section 91] ... the provincial lines disappear; that for these laws we have a *quasi* legislative union.<sup>51</sup>

As for Taschereau’s civil law scholarship, it has been claimed that he “seemed easily drawn into the common law approach” with all its emphasis on “precedent or *stare decisis*”.<sup>52</sup> Such an approach is, of course, an abomi-

<sup>47</sup>*The Criminal Law Consolidation and Amendment Acts of 1869*, vols 1, 2 (Montreal: Lovell, 1874); *The Criminal Statute Law of the Dominion of Canada*, 2d ed. (Toronto: Carswell, 1888); *The Criminal Code of the Dominion of Canada*, 3d ed. (Toronto: Carswell, 1893).

<sup>48</sup>[n.a.], “Sir Elzéar Taschereau” (1911) 47 *Canada L.J.* 284 at 285.

<sup>49</sup>G. Parker, “The Origins of the Canadian Criminal Code” in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 249 at 260.

<sup>50</sup>Snell & Vaughan, *supra*, note 16 at 26.

<sup>51</sup>(1880), 4 S.C.R. 215 at 299 and 306-7. See also *City of Fredericton v. R.* (1880), 3 S.C.R. 505 at 557-60.

<sup>52</sup>F. Vaughan, “Civil Code Influences on the Supreme Court of Canada, 1875-1980: Particularly in Contract and Negligence” (1986) 20 *L. Soc. Gaz.* 48 at 50-53.

nation from a civilian point of view: "A French judge has to give articulate grounds or *motifs* for his decision and he is not allowed to give a previous case as a *motif*".<sup>53</sup>

Before proceeding to a discussion on the merits of each of the above claims, it should be noted that the last one involves a slight anachronism since the doctrine of *stare decisis* did not receive express formulation by the Supreme Court of Canada until 1909, three years after Taschereau retired.<sup>54</sup> It should also be noted that Taschereau's common law scholarship may well have been superior to that of his common law brethren, including Chief Justice Ritchie.<sup>55</sup>

To sum up, according to the claims made by various contemporary legal scholars, Taschereau was as a rather unimaginative, "anglophilic" (or imperialist) jurist with strong formalist and centralist tendencies.<sup>56</sup> In the present author's view, this image is seriously flawed. The argument to be advanced below is that it would be more accurate to portray the first French Canadian to hold the position of Chief Justice as a brilliant, "cosmophilic" jurist with a strong subversive and de-centralist streak.<sup>57</sup> As a preliminary indication; consider the fact that Taschereau wrote virtually all of his decisions in English, the most notable exception being *Barrett v. City of Winnipeg* (the Manitoba Schools Question) where he used his French to advantage.<sup>58</sup> Consider also the fact that he made "direct intrusion[s] into the political arena" twice in the course of his judicial career.<sup>59</sup> Finally, con-

<sup>53</sup>Walton, *supra*, note 3 at 104. But see L. Baudouin, "Méthode d'interprétation judiciaire du Code civil du Québec" (1950) 10 R. du B. 397; P-B. Mignault, "The Authority of Decided Cases" (1925) 3 Can. Bar Rev. 1.

<sup>54</sup>See *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516.

<sup>55</sup>See, e.g., *Sweeny v. Bank of Montreal* (1885), 12 S.C.R. 661 at 670 (a civil law case, ironically enough).

<sup>56</sup>Witness his remarks on "the British flag" in *Glengoil Steamship Co. v. Pilkington* (1897), 28 S.C.R. 146 at 155-56; on "the fountain of honours" (that is, Her Majesty) in *Lenoir v. Ritchie* (1879), 3 S.C.R. 575 at 628; or his letter to Laurier emphasizing that puisne judges "devraient être knighted" cited in Snell & Vaughan, *supra*, note 16 at 68. See also Young, *supra*, note 30 at 41-48 on G.-É. Cartier's desire for British social status and C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism: 1867-1914* (Toronto: University of Toronto Press, 1970).

<sup>57</sup>That is, as above either anglophilism or francophilism, a truly "cosmopolitan man" in the archaic sense of "a man who moves comfortably in diversity". See R. Sennett, *The Fall of Public Man* (New York: Knopf, 1977). Significantly, Taschereau had to be "summoned from France" in 1888, was off "holidaying in India" in 1896, and went to Washington in 1901 "to study the American Supreme Court": Snell & Vaughan, *supra*, note 16 at 45, 68 and 81.

<sup>58</sup>(1891), 19 S.C.R. 374 at 409ff. See also *R. v. Doutre* (1881), 6 S.C.R. 342 at 400.

<sup>59</sup>See Snell & Vaughan, *supra*, note 16 at 71-73 and 95-96; Parker, *supra*, note 49 at 273-76. In modern times judges simply do not do such things. See J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger" (1984) 29 McGill L.J. 369.

sider his letter to Wilfrid Laurier of 1882 suggesting "that appeals from Quebec should cease in all cases except those involving criminal, constitutional, or election law ...".<sup>60</sup> Evidently, his experience on the bench had simply confirmed what he had already suspected on the eve of confederation:

[W]e Lower Canadians cannot hope to find the same justice from such a tribunal as we should receive from one consisting of judges from Lower Canada; for our laws being different from the laws of those provinces, they will not be able to understand and appreciate them as Lower Canadians would. (Hear, hear.) And, moreover, when this new Court of Appeals is instituted, the appeal to England will not be abolished, so that we shall have one more means of producing delay and increasing the costs of suitors.<sup>61</sup>

Subservience to Parliament or, for that matter, the Privy Council was not therefore a feature of Taschereau's judicial outlook. It would seem that this independence was inspired by his "commitment to a particular, rational view of law, which placed it beyond definitive enactment or stipulation and rather in an on-going, imperfect process of inquiry" — in short, his anti-positivism.<sup>62</sup> It has already been seen how the *Civil Code* was not for him (as it is for us) an "intellectual 'why-stopper'".<sup>63</sup> He truly delighted in lifting the veil of codification and rummaging about among all manner of arcane and exotic sources.<sup>64</sup> Let us now turn to consider some of the further expressions of his anti-positivism.

*Monaghan v. Horn* merits scrutiny because, though the action arose in Ontario, Taschereau's (dissenting) opinion is one of the most beautiful civil law judgments ever written. At issue in this case was the question of whether a mother, by invoking her capacity as mistress to her "son and servant" (a minor), could recover damages "for the loss of her servant" against the

<sup>60</sup>Snell & Vaughan, *ibid.* at 47.

<sup>61</sup>*Confederation Debates*, *supra*, note 44 at 896.

<sup>62</sup>Glenn, *supra*, note 7 at 267.

<sup>63</sup>R.A. Macdonald, "Understanding Civil Law Scholarship" (1985) 23 Osgoode Hall L.J. 573 at 580. See also *Dubuc v. Kidston* (1889), 16 S.C.R. 357 at 364-65:

The opposants may have strong grounds to urge that [art. 2075 *C.C.L.C.*] should not be law [there being no corresponding article in the *Code Napoleon*], but on that point their adversary has not to join issue with them. That such is the law disposes of this contestation.

Then there are good reasons to support the equity of the view adopted by [our] codifiers [which Taschereau proceeded to give].

What modern judge would feel compelled to go on to convince a litigant of the *equity* (or *reason*) inherent in a given codal article? Would not most be content to state (without further ado) that "the courts are obliged to apply the law however harsh it may seem"? *Grand Trunk Pacific Railway Co. v. Earl* (1923), [1923] S.C.R. 397 at 408, Mignault J. See, e.g., *A.G. Quebec v. Lapierre* (1983), [1983] C.A. 631 at 633-34 and 636, *aff'd* (1985), [1985] 1 S.C.R. 241.

<sup>64</sup>See *supra*, notes 32 and 33. Taschereau's attitude toward sources may usefully be compared to Walter Benjamin's attitude toward books: see "Unpacking my Library" in H. Arendt, ed., *Illuminations*, trans. H. Zohn (New York: Schocken Books, 1969) 59.

party whose negligence had caused the boy's death. Taschereau had to overcome three objections. The first was that according to the majority opinion of the Exchequer Court of England in *Osborn v. Gillett*,<sup>65</sup> "a master cannot maintain an action for the immediate death of his servant." Undaunted, Taschereau disposed of this case by noting that "it is clearly not ... binding upon this court" and that "in my opinion, the weight of reasoning and logic is entirely with Baron *Bramwell*, the dissenting judge in that case."<sup>66</sup>

The second obstacle was "Lord *Campbell's* Act and our corresponding statutes" which, in the very act of articulating a cause of action for the families of persons killed by negligence, had declared that no such action existed at common law. This objection too was easily met:

The relation of master and servant cannot, it seems to me, be affected by these acts, or the declaration they contain as to the previous state of the law ... . Moreover, if our Act 10 & 11 *Vic*, ch. 6, was held to declare that previous to its enactment no action was given in any case for the death of any one ... [that] would be a most flagrant untruth, as to *Lower Canada* at least, to which this statute applied as well as to *Upper Canada*; for under the French civil law an action unquestionably lies ... .

....

[T]he law of *Scotland* is [also] clear upon this point, and recognizes, under the term *assythment*, the right to recover damages caused by the wrongful killing of a person.<sup>67</sup>

As for the third objection, based upon the maxim *actio personalis moritur cum persona*, Taschereau responded:

What action dies with the person? Clearly the action of the one who dies. Well the one who died never had an action for being killed. ... But the present plaintiff's action is ... purely and simply for injuries and damages caused to herself [not to her son] ... . How then can it be contended that her right of action died with him? How could her action die before it came to existence ... before the fact that created it happened?<sup>68</sup>

The inexorable logic, the disdain for any authority which failed (rationally) to persuade, the subtle re-definition of the pertinent relationship (from

<sup>65</sup>(1873), L.R. 8 Ex. 88, [1861-73] All E.R. Rep. 923, 28 L.T. 197, 21 W.R. 409.

<sup>66</sup>*Monaghan v. Horn* (1882), 7 S.C.R. 409 at 437 [hereinafter *Monaghan*].

<sup>67</sup>*Ibid.* at 439-40 and 445. The "leading case" in Quebec on this same point is *Regent Taxi v. Congrégation des Petits Frères de Marie* (1929), [1929] S.C.R. 650, [1930] 2 D.L.R. 353 [hereinafter *Regent Taxi* cited to S.C.R.].

<sup>68</sup>*Monaghan, ibid.* at 441-42. Imagine the impact on the master-servant law of Ontario had Taschereau's reasoning prevailed: masters would have had a pecuniary interest in their servants' lives (as opposed to their mistakes). Compare R.C.B. Risk, "This Nuisance of Litigation": The Origins of Workers' Compensation in Ontario" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: University of Toronto Press, 1983) 418 (on the defence of common employment).

mother-child to master-servant) — these are the characteristics of a Taschereau judgment.

It will be observed that Taschereau's reasoning in *Monaghan* is consistent with his reasoning in *Robinson*: it is the same reasoning, only in reverse. It is important to study how judges reason and not just what they decide.<sup>69</sup> For example, Taschereau could be classified as a "centralist" on the basis of the result at which he arrived in *Mercer v. A.G. Ontario*.<sup>70</sup> However, a more careful study of his reasoning in that case reveals quite the opposite: "It seems to me that any argument which under the *British North America Act* does not and cannot apply equally to all the provinces must be contrary to the spirit and intent of the *British North America Act*."<sup>71</sup> Given that the doctrine of reversion of escheats as argued for by the respondent could not apply to the province of Quebec (its laws on this subject being "anterior to the feudal ages", that is, Roman), it followed that it could not apply to any of the other provinces; hence the estate in question could only revert to the federal power. What this case reveals is a mind in search of the most universal, rational construction it is possible to place on a set of facts, without in any way diminishing their heterogeneity. The respondent's argument fell because while it might have applied to Ontario or Nova Scotia, it could not apply to Quebec.

It is understandable that Taschereau's decision in *Mercer* was overturned by the Judicial Committee of the Privy Council.<sup>72</sup> The latter, being a common law tribunal, was *ipso facto* more accustomed to rendering decisions "by reason of authority than by authority of reason" (as the old civilian saying goes). It is also understandable that the Queen's privy councillors, never having had the experience of living under a written constitution, mistook the *British North America Act* for a mere "statute"; substituted the "plain meaning" of its words for all their rich, historical meanings;<sup>73</sup> proceeded to read any trace of the theory of "subordinate federalism" (on which the Act was framed) out of it; and finally succeeded in

<sup>69</sup>See Howes, *supra*, note 42 at 383-84.

<sup>70</sup>(1881) 5 S.C.R. 538 [hereinafter *Mercer*].

<sup>71</sup>*Ibid.* at 669. Compare Snell & Vaughan, *supra*, note 16 at 41-42; P. Romney, *Mr. Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature: 1791-1899* (Toronto: University of Toronto Press, 1986) at 248-55.

<sup>72</sup>Not to mention his decision in *Robinson*, *supra*, note 13, or (implicitly) *Lenoir v. Ritchie*, *supra*, note 56, or *City of Fredericton v. R.*, *supra*, note 51.

<sup>73</sup>See Lord Watson's speech in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892), [1892] A.C. 437 (P.C.). It is interesting to note that the Privy Council foisted much the same sort of presentist, plain-sounding interpretation on the *Civil Code of Lower Canada*, and that Mignault, in one of his less cautious moments, seems to have approved. See P.-B. Mignault, "Le Code civil de la province de Québec et son interprétation" (1935) 1 U.T.L.J. 104 at 116-18. However, compare Mignault, *supra*, note 6 at 107-13.

placing "the Dominion's residual power [under section 91] in a position of subordination to provincial legislative jurisdiction."<sup>74</sup>

Taschereau was not amused by the Judicial Committee's meddling. He stopped judging,<sup>75</sup> but then resumed again and duly cited the relevant Privy Council opinions, which were, after all, binding on the court. However, he consistently supplemented these citations with further references to Joseph Story's decisions on the United States Constitution,<sup>76</sup> which suggests that he did not regard the Privy Council's pronouncements as capable of standing on their own. Story's decisions may not have been binding, but at least they were persuasive, that is, rational.

It should not be difficult to comprehend why Taschereau admired Story's writings. For Story was not only steeped in Roman and civil law,<sup>77</sup> he was also the last great exponent of the Natural law tradition in America.<sup>78</sup> Story stood for the "old order",<sup>79</sup> or to put this idea in terms that we can more readily understand, for "exclusive monopolies", "settled expectations", and "the absolute conception of property".<sup>80</sup> Of course, all these juridical notions vanished in the wake of the majority opinion of the United

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<sup>74</sup>F.M. Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's" (1974) 9 U.B.C. L. Rev. 244 at 245. As has been shown elsewhere, it is quite common for the meaning of a legal text to get inverted when it crosses a cultural barrier: D. Howes, "La reconnaissance juridique d'un droit de 'capitaliser sur la personnalité', ou la déconstruction juridique de la notion de personne" in B. Dumas & D. Winslow, eds., *Construction/destruction sociale des idées: Récurrences, alternances, nouveautés* (Montreal: A.C.S.A.L.F., 1987) 161 at 168, 173-74; D. Howes, "Inverted Archetypes: A Comparative Study of the Foundation Myths of Two Southeast Moluccan Societies" (1987) 7(1) *Culture* [forthcoming].

<sup>75</sup>For example, he advised the appellant to go directly to London in *A.G. Canada v. A.G. Ontario* (1894), 23 S.C.R. 458 at 472, in view of the fact that "[c]onstitutional questions cannot be finally determined in this court. They never have been, and can never be under the present system."

<sup>76</sup>See, e.g., *Huson v. Township of South Norwich* (1895), 24 S.C.R. 145 at 156 and 161ff.

<sup>77</sup>See P. Stein, "The Attraction of the Civil Law in Post-Revolutionary America" (1966) 52 *Va L. Rev.* 403; M. Hoeflich, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer" (1985) 29 *Am. J. Leg. Hist.* 36.

<sup>78</sup>See J. McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman, Okla.: University of Oklahoma Press, 1971) at 65-117, or, we should say, the United States, for that tradition still lives in the writings of the Canadian philosopher George Grant. See G. Grant, *English-Speaking Justice*, rev'd ed. (Toronto: Anansi, 1985).

<sup>79</sup>Pothier similarly stood in this tradition in Taschereau's estimation, which rendered them both immune from modern criticism — "(it seems to be thought a mark of distinction nowadays, among a certain class of writers in France, to controvert Pothier.) But we adopt [Pothier's] opinion as a correct exposition of the law": *Rolland v. Caisse d'Économie Notre-Dame de Québec* (1895), 24 S.C.R. 405 at 411-12.

<sup>80</sup>See M.J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977) at 130-34.



States Supreme Court in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*.<sup>81</sup>

The Canadian equivalent of *Charles River Bridge* is *Corporation of Aubert-Gallion v. Roy*.<sup>82</sup> This case originated in the Beauce. Apparently, the corporation enacted a by-law in favour of Roy in 1880, granting him the privilege to construct a toll-bridge across the Chaudière. This by-law was confirmed by statute in 1881. Then, in 1891, in view of a new government subsidy programme for the construction of iron bridges, the corporation passed a second by-law authorizing the erection of a free bridge right next to Roy's. Roy's charter provided that "during thirty years no person shall erect, or cause to be erected, any bridge ... for the conveyance of any persons, vehicles or cattle for lucre or gain" and stipulated a penalty in the event of non-compliance.<sup>83</sup> Obviously, a free bridge is not a bridge "for lucre or gain", but then the enactment speaks of "any bridge".

How exclusive was the franchise? The answer to this question depended on whether the charter could be interpreted liberally (that is, in favour of the grantee). Counsel for the municipality observed that the "authorities are unanimous in declaring that the terms of grants conferred on individuals must always be applied and interpreted strictly", citing Endlich, Maxwell and Sedgewick on the interpretation of statutes, "*and also arts. 520, 542, 485, 460, 84 M.C. (P.Q.)*."<sup>84</sup>

Moreover, is it to be believed that if Roy had asked of the legislature an enactment forbidding the building of a free bridge by the corporation, such a monopoly would have been granted him? No, for it would have been manifestly unjust to make the interest of the whole public subservient to that of a simple individual.<sup>85</sup>

The above argument, which would no doubt carry much weight today in view of its appropriate use of English sources,<sup>86</sup> and the apparent soundness of the "policy" considerations invoked, failed utterly in 1892. Taschereau quoted liberally from Story's dissenting opinion in *Charles River Bridge*: "[I]n every case (says Story J.) the rule [of strict construction] is made to bend to the real justice and integrity of the case ... if the intention of the grant is obvious ...". And the intention of the grant (as expressed in

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<sup>81</sup>11 Peters 420 (1837) [hereinafter *Charles River Bridge*]. See also, S.I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (New York: W.W. Norton, 1971).

<sup>82</sup>(1892), 21 S.C.R. 456 [hereinafter *Aubert-Gallion*].

<sup>83</sup>*Ibid.* at 456.

<sup>84</sup>*Ibid.* at 460 [emphasis added]. Note how the Municipal Code articles are merely tacked on at the end of the argument; it is as if they were regarded as suppletive.

<sup>85</sup>*Ibid.* at 459.

<sup>86</sup>Quebec municipal law is English in origin.

its preamble) was obvious: to have a toll-bridge constructed “for the benefit of the public”.<sup>87</sup>

Taschereau also relied on Story for the proposition that “[w]henever the grant is upon valuable consideration [the strict] rule of construction ceases, and the rule is expounded, exactly as it would be in the case of a private grant, in favour of the grantee.”<sup>88</sup> The “consideration” in the instant case was, on the one hand, the municipality’s “considerations of public utility” as these stood in 1880, and, on the other, Roy’s “right to an exclusive toll for 30 years ...”.<sup>89</sup> Yet, Taschereau goes on to state:

This consideration the appellants would take away from him and leave nothing but the charges and obligations [of maintaining the bridge]. They have not the right to do so, in my opinion. The rights of a grantee are not to be extended by implication they say. Spoliation is not to be authorized by implication, I would say.

In France, as in England and the United States, as might well be expected, it is held that the right to a franchise of this nature called *droit de bac* and *de pontonage* must necessarily be exclusive and entitle the grantee *ex necessitate rei* to restrain all interference with his right.<sup>90</sup>

Of course, as an empirical generalization the last proposition in the above quotation is false. There was the *Charles River Bridge* case: “But the case is no authority in favour of the appellants here.”<sup>91</sup> There were also the cases in *Sirey* that had been determined “in a contrary sense”; but they “at most demonstrate, if demonstration was needed, that *Sirey*, like *Dalloz*, may well be termed: *Un arsenal du droit français où toutes les erreurs peuvent trouver des arrêts et tous les paradoxes des autorités*.”<sup>92</sup> As for the Quebec cases that were “the other way” (one of which, *Girard v. Bélanger*,<sup>93</sup> even used Blackstone to advantage), “[o]n cite ces arrêts comme on signale des écueils, says Boncenne”, and Taschereau evidently agreed.<sup>94</sup> So much for the au-

<sup>87</sup>*Supra*, note 82 at 471.

<sup>88</sup>*Ibid.*

<sup>89</sup>*Ibid.* at 472 and 480. Taschereau’s thoughts on the notion of “consideration” are complex. See *Rolland v. Caisse d’Économie Notre-Dame de Québec*, *supra*, note 79 at 408-09. Compare art. 984 C.C.L.C.

<sup>90</sup>*Aubert-Gallion, ibid.* at 480.

<sup>91</sup>*Ibid.* at 474.

<sup>92</sup>*Ibid.* at 482. (This is in addition, it seems, to having been overruled by more recent cases.)

<sup>93</sup>(1872), 17 L.C. Jurist 263. (It is true that this remarkable decision was reversed on appeal — (1874), Ramsay’s App. Cas. 712 — and that a declaratory act of the legislature had also eroded its authority.)

<sup>94</sup>*Supra*, note 82 at 477. See also *McFarran v. Montreal Park and Island Railway Co.* (1900), 30 S.C.R. 410 at 414.

thority of decided cases when their reasoning contradicted what Taschereau took to be the "real justice" of a case.<sup>95</sup>

The idea of "real justice" is a difficult one for us moderns to grasp. This is because our minds have become cluttered with all kinds of silly little dichotomies, such as policy/principle, law/morality or sin/crime<sup>96</sup> and because our powers of "thought", in the archaic sense of "steadfast attention to the whole", have atrophied.<sup>97</sup> "Que Dieu nous garde de l'équité des tribunaux",<sup>98</sup> we would say of a decision like Taschereau's in *Aubert-Gallion*. "Que Dieu nous garde de la volonté des législateurs", Taschereau would respond.

The case which best exemplifies the steadfastness of Taschereau's "attention to the whole" is *Glengoil Steamship Co. v. Pilkington*.<sup>99</sup> The Quebec Court of Appeal had held that a stipulation in a bill of lading exempting a party from liability for negligence was prohibited by article 1676 *C.C.L.C.* and, therefore, unlawful (or "against public order and good morals") under article 990 *C.C.L.C.* In so doing the court had merely affirmed the "uniform jurisprudence" in the province.

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<sup>95</sup>Thus, in a manner of speaking, *Aubert-Gallion* reverses *Charles River Bridge*, which suggests that the idea that unbridled competition is injurious and monopolies are in the public interest forms part of the "encompassing framework" of Canadian law. This suggestion is confirmed by *Dinner v. Humberstone* (1896), 26 S.C.R. 252 (a decision which is on all fours with *Aubert-Gallion* even though the case originated in the Northwest Territories). Canadian legal scholars and judges should reflect carefully on these sorts of differences between American and Canadian legal thought at the macro-level. If, as has been argued by Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) at 49-53, our jurists ought to develop a "principled perspective", they have only to recur to the judgments of a Taschereau for inspiration. There are signs that such a perspective is (re-)emerging in the Supreme Court. See Chief Justice Dickson's decision in *Edwards Books and Art Ltd v. R.* (1986), [1986] 2 S.C.R. 713, 71 N.R. 161. This sort of sensitivity to local conceptions of the good is markedly lacking among our legal scholars, though, who continue to embrace the latest American legal doctrines without determining the prior question of how best to distort such doctrines so as to make them fit. See, e.g., M. Bader and E. Burstein, "The Supreme Court of Canada 1892-1902: A Study of the Men and the Times" (1970) 8 Osgoode Hall L.J. 503; J.S. Russell, "The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy" (1986) 18 Ottawa L. Rev. 1. Compare Howes, *supra*, note 42 at 411-14; D.G. Bell, "The Birth of Canadian Legal History" (1984) 33 U.N.B.L.J. 312 at 313 and 318.

<sup>96</sup>Compare, e.g., J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971); R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978); A. MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, Ia: University of Notre Dame Press, 1984) or Lord Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965) at 1-11 (Taschereau would be closer to the latter).

<sup>97</sup>Grant, *supra*, note 78 at 87.

<sup>98</sup>The original form of this imprecation was "Que Dieu nous garde de l'équité des Parlements", wherein "Parlements" refers to the royal judges of pre-Revolutionary France.

<sup>99</sup>*Supra*, note 56.

Taschereau observed that “for us to blindly follow that jurisprudence here, though more pleasant and far less onerous, would be to forget our duties”.<sup>100</sup> He therefore proceeded to “scrutinize and review it”, mindful of the fact that such a stipulation was “undoubtedly licit in England” and even “sanctioned by law in six of the [seven] Provinces of the Dominion”. Had Taschereau’s reasoning stopped at this point, it would be remiss not to denounce his recourse to the common law to interpret such an unambiguous provision of the *Code*. But it did not. After weighing an extraordinary array of authorities, he concluded: “[I]t may be fairly asked, can there be anything immoral or against public order in a law that rules not only England, but also Scotland, Italy, [Germany,] Belgium and Louisiana, where the laws are derived from the same sources as those of the Province of Quebec?”<sup>101</sup> It was thus not the common law that proved controlling in Taschereau’s (re-)interpretation of article 1676 *C.C.L.C.*, but the “universal law”. Rational propositions derived from the latter necessarily prevailed over such empirical generalizations as could be advanced on the basis of the local *jurisprudence constante*.

According to one commentator, it was probably out of “intellectual laziness” that Taschereau made such “indiscriminate use of previously decided cases of common law jurisdictions to interpret civil law.”<sup>102</sup> However, in view of how selective he appears actually to have been in his use of foreign sources, the received wisdom concerning his motivation (or lack thereof) must now be discarded. It should be apparent that his judgments evidenced not an “indiscriminate” but a “principled eclecticism”, and that the reason for this had to do with the many hours he spent reflecting critically on “the indigenous core or identity against which choices for enrichment or refinement were [to be] made among external theories and doctrine.”<sup>103</sup>

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<sup>100</sup>*Ibid.* at 155-56.

<sup>101</sup>*Ibid.* at 158. Taschereau applied the same reasoning, only in reverse, in *Citizen’s Insurance Co. v. Parsons*, *supra*, note 51 at 296: “In Prussia, Belgium, Portugal, Spain, Holland and Wurtemberg, whose codes I have been able to refer to, the contract of insurance against fire is also held to be a commercial contract. Why, should it be considered otherwise in England . . . ?”

<sup>102</sup>J.-L. Baudouin, “The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec” in J. Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge, La: Louisiana State University Press, 1974) 1 at 20 and 17.

<sup>103</sup>Baker, *supra*, note 3 at 261 and 234, respectively. Consider his decision in *Bain v. City of Montreal* (1883), 8 S.C.R. 252 at 279: “Some English and American authorities have been cited in support of [the appellant’s] proposition . . . . These authorities are not applicable to actions *en répétition de l’indû* and to the present case, which is ruled exclusively by our own civil law . . . .” See also *Pion v. North Shore Railway Co.* (1887), 14 S.C.R. 677 at 690-92; *Allan v. Evans* (1900), 30 S.C.R. 416 at 422 and 426; and, in a different vein, *Bélanger v. Bélanger* (1895), 24 S.C.R. 678 at 681:

On the eve of the election . . . Charles as editor wrote an article, unknown to Arthur,

One thing is certain, whereas "the principle of the supremacy of legislation over other sources of law seems to be accepted as a premise" nowadays,<sup>104</sup> neither Taschereau nor most of his Quebec brethren would have elevated such a positivist assertion to the status of a principle. It was only on the basis of such "universally admitted rules of law" as they could discover in the course of their wanderings that Taschereau and the other juridical nomads of his time felt confident enough to rest their decisions. A prime example of such a "universal law" would be the English doctrine of estoppel.<sup>105</sup>

There is one last feature of Taschereau's judgments that deserves comment, and that is their polyphony or dialogical character.<sup>106</sup> Taschereau not only "heard the other side", he frequently voiced it. What is meant here is not that he quoted from the parties' factums, but that he invented speeches for them and argued with them in his judgments.<sup>107</sup> Sometimes his heteroglossia got so out of hand that his own voice came back at him in quotation marks: "I say then to the respondent: 'If legislation on insurance is left to the provincial legislatures ... then you were never insured.'"<sup>108</sup> The multiplicity of voices, like the multiplicity of sources, can be ascribed to his polyjurality.

After 1902, there is no more polyphony. Indeed, by the end of his career Taschereau had come to sound almost as dry and tedious, as monological, as his common law counterparts.<sup>109</sup> We must inquire into the reasons for

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in which he abused the Liberal party in unmistakable terms, concluding by saying that in Sherbrooke the Liberals were "*rari nantes in gurgite vasto*," which is cruelly translated in Sherbrooke French by: "*Ils sont comme les pois dans une soupe claire*." Such conduct on the part of Charles deserved dismissal, and he cannot complain if he got it.

Taschereau was thus highly sensitive to local legal, cultural and even linguistic particularity. The same could be said of Fournier, Brodeur, Girouard and Strong. As for the other Supreme Court justices of this era, see *infra*, notes 112 and 113.

<sup>104</sup>Baudouin, *supra*, note 102 at 8.

<sup>105</sup>See, e.g., *R. v. Belleau* (1880), 7 S.C.R. 53 at 140-41; *Lionais v. Molson's Bank* (1883), 10 S.C.R. 526 at 559.

<sup>106</sup>See T. Todorov, *Mikhail Bakhtine: Le principe dialogique* (Paris: Seuil, 1981); K. Clark & M. Holquist, *Mikhail Bakhtin* (Cambridge, Mass.: Belknap Press, 1984). See also J.-F. Lyotard, *Le différend* (Paris: Minuit, 1983) at 18-19, 24-26 and 38-49.

<sup>107</sup>See, e.g., *Union St. Joseph de Montréal v. Lapierre* (1879), 4 S.C.R. 164 at 180; *West v. Parkdale* (1886), 12 S.C.R. 250 at 260; *Aubert-Gallion*, *supra*, note 82 at 480. Compare *V. Hudon Cotton Co. v. Canada Shipping Co.* (1883), 13 S.C.R. 401 at 414 [hereinafter *Hudon Cotton*] (where Henry J. tried to imitate Taschereau, and failed.)

<sup>108</sup>*Citizen's Insurance Co. v. Parsons*, *supra*, note 51 at 312 (there are no close quotation marks).

<sup>109</sup>Compare, e.g., *McCorkill v. Knight* (1879), 3 S.C.R. 233 and *Hastings v. Le Roi No. 2, Ltd* (1903), 34 S.C.R. 177. See generally R.C.B. Risk, "Sir William R. Meredith, C.J.O.: The Search for Authority" (1983) 7 *Dalhousie L.J.* 713.

this transformation, this disappearance of dialogue from within his judgments.

It is noteworthy that Sir Samuel Henry Strong retired in 1902. Strong, a kind of Canadian Lord Mansfield, was the only common law judge with whom Taschereau could have carried on a reasonable dialogue about the civil law.<sup>110</sup> As for the others, when Chief Justice Ritchie wrote (after citing a long line of English cases), "I can discover nothing in the law of the Province of *Quebec* at variance with these principles, which, after all, are only the principles of common law and common justice",<sup>111</sup> or that arch-fool William Henry wrote, "I am not sufficiently acquainted with the administration and procedure of the law in Quebec, but I believe I am justified in saying ...",<sup>112</sup> they give us no cause not to take their words at face value. It should be remembered that there were virtually no French civil law books in the Supreme Court library at the time of these pronouncements, and that what ones there were were of little use, since these judges were ignorant of French.<sup>113</sup>

Evidently, under such circumstances there could not be "un véritable échange entre les deux systèmes" (civil and common), as Baudouin has suggested,<sup>114</sup> and Strong's retirement put an end to what little communi-

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<sup>110</sup>Strong's appointment to the Supreme Court in 1875 was applauded on the grounds of his "knowledge of civil law and familiarity with the French language . . .". See W.D. Ardagh & H. O'Brien, "Judicial Appointments to the Supreme Court" (1875) 11 Can. L.J. 265 at 266. Of course, Strong was a complete anachronism from an Ontarian perspective, where the spirit of monojurality had already come to inform most judges' thinking by 1875. See Baker, *supra*, note 3 at 262-70. There are signs that Quebec law was also just about to implode. See, e.g., S., "Quebec Jurisprudence" (1878) 1 Legal N. 88. However, this moment was averted by Taschereau (among numerous others), and thus had to await the ascension of Mignault.

A significant parallel can be traced between the transformation of legal thought as described here and the transformation of Quebec philosophical thought. According to Yvan Lamonde, the period 1853-1917 was characterized by "un éclectisme d'idées", whereas the period 1917-1936 witnessed the triumph "des adeptes du thomisme": "Orthodoxe, leur thomisme officiel et militant constituait un point de référence culturelle inexistant auparavant; il délimitait un seuil en-deçà duquel quelque chose de différent de l'éclectisme antérieur permettait enfin de proclamer l'établissement et l'omniprésence d'une doctrine." See *Historiographie de la philosophie au Québec (1853-1970)* (Montréal: Hurtubise H.M.H., 1972) at 28-29.

<sup>111</sup>*Chapman v. Larin* (1879), 4 S.C.R. 349 at 358.

<sup>112</sup>*Hudon Cotton, supra*, note 107 at 416. Perhaps it is not fair to characterize Henry as the arch-fool, for John Wellington Gwynne was even more committed to the common law. See, e.g., *Dupuy v. Ducondu* (1881), 6 S.C.R. 425; *Harrington v. Corse* (1883), 9 S.C.R. 412 at 429ff.; *Drysdale v. Dugas* (1896), 26 S.C.R. 20 at 28. See also Vaughan, *supra*, note 52 at 51-55. Gwynne's monojurality may have been related to his chronic inability to converse rationally with the other members of the Court: see Snell & Vaughan, *supra*, note 16 at 56.

<sup>113</sup>H.H. Bligh, ed., *The Supreme Court Library Catalogue* (Ottawa: [n.p.], 1897); Snell & Vaughan, *ibid.* at 20-21 and 112; Russell, *supra*, note 10 at 21.

<sup>114</sup>*Supra*, note 4 at 723 (albeit for the wrong reasons).

cation there was. Jules Deschênes is perhaps right in claiming that Quebec's 'juridical separatism' was forced upon it from without.<sup>115</sup>

A second reason for the decline of polyphony, closely connected to the first, was that the *considérants* Taschereau invoked in his common law judgments were for the most part treated as *obiter dicta* by common lawyers, if they registered at all. Thus, for example, his decision in *Monaghan* was a complete waste of effort. There could be no enriching the common law, or so it must have seemed, which may explain the despondent tone of some of his later judgments.<sup>116</sup>

Finally, there was the fact that all of his best decisions in constitutional and civil law cases were reversed by the Privy Council, thus forcing him to reverse himself.<sup>117</sup> In the face of such illogic, the only way to preserve one's sanity is to put aside one's reason and start using the language of one's colonizers:

As said by Sir Montague Smith, in the Privy Council, in the case of *Bell v. Corporation of Quebec*, English and American decisions are not governing authorities in the province. Except as to the rules of evidence, art. 1206 C.C., and ... as to promissory notes ... (art. 2340), ... the commercial law of the province of Quebec, as a general rule, is the French law.<sup>118</sup>

There are three unusual things about this judgment of Taschereau's: its exclusiveness, its reliance on the *Code*, and the fact that it is wrong:

With great respect it would appear to be more correct to say with our Commissioners that our system of commercial law is neither French nor English

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<sup>115</sup>"On Legal Separatism in Canada" in *The Sword and the Scales* (Toronto: Butterworths, 1979) 31 at 32. This point is illustrated in an interesting way by *Wadsworth v. McCord* (1886), 12 S.C.R. 466. The reason both Taschereau and Fournier dissented in this conflict of laws case is that they knew there would be no choice of laws in future had they not. There can be no reconciling English and French private international law; there can be only *renvoi*. See H. Batiffol, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956) and Taschereau's dissenting opinion in *Ross v. Ross* (1894), 25 S.C.R. 307 at 354 (on the difference between *renvoi* and "reasoning in a [closed] circle").

<sup>116</sup>See, e.g., *Molson v. Lambe* (1888), 15 S.C.R. 253 at 268: "[1]t is useless for me and I think wrong to express an opinion, as what I would say would be merely *obiter dictum*"; *Lamb v. Cleveland* (1891), 19 S.C.R. 78 at 86: "I see with a sense of relief that whatever conclusion I reach in this case will not affect the result, so I will not take part in the judgment." It was fortunate for Taschereau that there is no equivalent to art. 11 C.C.L.C. at common law. He was, perhaps, the most reticent Chief Justice we have ever had.

<sup>117</sup>Compare, e.g., *Citizen's Insurance Co. v. Parsons*, *supra*, note 51 at 299 and 306-7 and *Huson v. Township of South Norwich*, *supra*, note 76 at 155 and 161.

<sup>118</sup>*Young v. MacNider* (1895), 25 S.C.R. 272 at 283. It seems doubtful that Taschereau was not alive to the self-referential character of the first sentence, which involves a "strange loop" indeed. See D.R. Hofstadter, "Nomos: A Self-Modifying Game Based on Reflexivity in Law" in *Metamagical Themas: Questing for the Essence of Mind and Pattern* (New York: Basic Books, 1985) 70.

but that from the first our judges have impartially considered authorities from all the commercial countries and have felt free to adopt the rule which appeared to be best suited to the practice of merchants in this province.<sup>119</sup>

Of course, the transition “from nation to colony”, intellectually speaking, was never achieved during Taschereau’s time on the bench, for he preserved his native intelligence (despite occasional lapses).<sup>120</sup> This transition, for which Justice Lyman P. Duff was primarily responsible,<sup>121</sup> would have to await, at least in the case of Quebec, the ascension of Pierre-Basile Mignault.

### III. “N’oublions pas le cas de la Lonisiane”: The Monojurality of Pierre-Basile Mignault

What can one say about Mignault that has not already been said by Professor J.-G. Castel in “Le juge Mignault défenseur de l’intégrité du droit civil québécois”?<sup>122</sup> The following discussion will be brief, limited to those points where Mignault’s thought detracted from Taschereau’s. The justification for this procedure is that Taschereau had already adopted, for different reasons and at different times, every position it is possible to take in relation to such subjects as confederation, the civil law, and the use of external sources and doctrine.

Mignault was born 30 September 1854 in Worcester, Massachusetts.<sup>123</sup> As the son of a doctor, he was no doubt encouraged to aspire to one or other of the professions. He was educated at St Mary’s College, Montreal, and went on to get a B.C.L. from McGill University in 1878.<sup>124</sup> He taught part-time, practised extensively (including numerous appearances before the Supreme Court of Canada),<sup>125</sup> played a leading role in the Montreal Bar, served as an editor of the *Rapports judiciaires officiels* and, of course, pub-

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<sup>119</sup>Walton, *supra*, note 3 at 128-29. This quotation expresses nicely what is meant by “polyjurality”.

<sup>120</sup>Baker, *supra*, note 3 at 274. See also *R. v. Grenier* (1899), 30 S.C.R. 42 at 51-53.

<sup>121</sup>See D.R. Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia, 1984) at 77-78; Howes, *supra*, note 3 at 239-40; Vaughan, *supra*, note 52 at 57-61.

<sup>122</sup>(1975) 53 Can. Bar Rev. 544. It must be emphasized that the following pages are written from the perspective of a 19th-century observer, which explains why our conclusions are different from Castel’s.

<sup>123</sup>It would be interesting to compare Mignault’s life to that of the founder of *La Vérité*, J.-P. Tardivel, “le père de la pensée séparatiste au Québec”, since the latter was also born in the U.S.A. See M. Girard, “La pensée politique de Jules-Paul Tardivel” (1967) 21 Rev. d’hist. de l’Amérique française 397 at 397.

<sup>124</sup>A total of four honorary doctorates were eventually conferred on Mignault (Laval, McGill, Montréal, Paris) whereas Taschereau only received two (Ottawa, Laval).

<sup>125</sup>Mignault also appeared before the Privy Council. See Walton, *supra*, note 3 at 75.



lished many manuals.<sup>126</sup> In 1914 he was appointed to the Chair of Civil Law at McGill, and in 1918 he went to the Supreme Court, which is said to have been “never stronger than during the period of his incumbency”.<sup>127</sup> He retired in 1929 at the age of seventy-five and returned to Montreal, where he died in 1945. Concerning his personality, it is interesting to note that he was, apparently, “untroubled by doubt” and that he “never lost time; it was saved, not only in the regularity and continuity of his effort but by habits of order and accuracy.”<sup>128</sup>

Mignault's first major publication, *Manuel de droit parlementaire*, re-pays scrutiny because in it is contained his “opinion personnelle” on the constitution:

[L]es provinces n'ont pas été créées par cette charte ... . La confédération n'est que la légalisation d'un pacte conclu entre quatre provinces ... . Il semble donc qu'on pourrait conclure *a priori* que les provinces ont fait tout comme des marchands qui contractent une société, elles ont mis en commun une partie de leurs biens, elles ont gardé tout le reste.<sup>129</sup>

There can be no more bourgeois conception of the meaning of confederation.<sup>130</sup> It will be noted how this view is the inverse of Taschereau's.<sup>131</sup>

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<sup>126</sup>*Manuel de droit parlementaire* (Montréal: Librairie de droit et de jurisprudence, 1889); *Code de procédure civile du Bas-Canada annoté* (Montréal: J.M. Valois, 1891); *Le droit paroissial* (Montréal: C.O. Beauchemin & Fils, 1893).

<sup>127</sup>[n.a.], “Pierre Basile Mignault” (1945) 23 Can. Bar Rev. 707 at 709.

<sup>128</sup>*Ibid.* at 710. Compare Glenn, *supra*, note 7 at 267-69 and 279. Significantly, Mignault described the study of law as a “travail déliéat, minutieux, microscopique même” in the “Préface” (at vii) to his *magnum opus, infra*, note 132. This particularism contrasts starkly with Taschereau's “attention to the whole” (or globalism). See further Parker, *supra*, note 49 at 274.

<sup>129</sup>*Supra*, note 126 at 220-21. Of course, if Confederation was a pact, it involved three provinces, not four, since at the time the “Province of Canada was politically united within itself”: Brierley, *supra*, note 18 at 532.

<sup>130</sup>Compare the “compact theory” of David Mills: see M. Greenwood, “David Mills and Co-ordinate Federalism, 1867-1903” (1978) 16 U.W.O. L. Rev. 93. See also J.M. Fecteau, “Prologomènes à une étude historique des rapports entre l'État et le droit dans la société québécoise, de la fin du XVIIIe siècle à la crise de 1929” (1986) 18 Sociologie et Sociétés 129 at 134-35; D. Monière, *Ideologies in Quebec: The Historical Development*, trans. R. Howard (Toronto: University of Toronto Press, 1981).

<sup>131</sup>This inversion is readily explicated: Taschereau received his legal education during the Union period whereas Mignault came afterwards. It follows that the theory of “subordinate federalism” would have agreed with the structure of Taschereau's experience while the theory of “co-ordinate federalism” would have seemed more plausible to Mignault. The problem with the first theory is that it cannot account for the independent existence of the Maritime provinces prior to 1867. The chief deficiency of the second theory is that it fails to explain the non-existence of Ontario and Quebec from 1841 to 1867.

Mignault's best known work is *Le droit civil canadien*.<sup>132</sup> This work is difficult to classify: is it a "condensation", a "traité général", a "commentaire", or simply an "édition annotée" of a French student manual?<sup>133</sup> According to its subtitle it is *Basé sur les "Répétitions écrites sur le code civil" de Frederic Mourlon avec revue de la jurisprudence de nos tribunaux*.<sup>134</sup> In any event, Mignault derived his frame of reference from Mourlon's work and then proceeded to use this frame, rather like a sieve, to isolate (and coordinate) the contents of Quebec civil law.<sup>135</sup> It was what passed through the sieve that interested him; the coarser matter (all the "universally admitted rules of law" of the Taschereau era) he rejected.<sup>136</sup>

One can gain a sense of how this work of isolating and expunging progressed by studying the evolution of Mignault's thought while on the bench. It must be constantly borne in mind that after the work was over he was able to look back and remark with satisfaction:

Une cloison étanche et infranchissable sépare les deux grands systèmes juridiques.

....

Il n'y a pas immixtion ou absorption de l'un au profit ou au détriment de

<sup>132</sup>Vols 1-9 (Montreal: Whiteford & Théoret, 1895-1916) [hereinafter *D.C.C.*].

<sup>133</sup>All of these terms are used in the "Préface" to *Le droit civil canadien*, vol. 1 (Montréal: Whiteford & Théoret, 1895), which Mignault himself describes as "un ouvrage distinct".

<sup>134</sup>Mourlon's "Définition de la loi" is interesting. See *D.C.C.*, *ibid.*, c. 1 at 1-2. In this section even natural law theory is made to sound like command theory. In support of his definition Mourlon cites Portalis: "[La loi est] la déclaration solennelle de la volonté du souverain sur un objet d'intérêt commun." Of course, that is not exactly what Portalis said, or not all of it anyway: "Les lois ne sont pas de purs actes de puissance; ce sont des actes de sagesse, de justice et de raison."; see Portalis, "Discours préliminaire prononcé lors de la présentation du projet" in P.A. Fenet, ed., *Recueil complet des travaux préparatoires du Code civil*, vol. 1 (Paris: Au Dépôt, rue Saint-André-des Arcs, 1827) 463 at 466. It is significant that Mourlon set this portion of Portalis aside. As for the attitude of late 19th-century Quebec jurists towards the command theory of "justice" (i.e., positivism), this may best be inferred from the remarks of Justice Badgley in *Brown v. Curés et marguilliers de l'oeuvre et de la Fabrique de la Paroisse de Montréal* (1871), 17 L.C. Jurist 89 at 117, 3 R.L. 179 (Q.B.):

[T]he marvel to lawyers and judges is, that everything is taken for granted in favour of authority, . . . the judgment is decreed pretty much upon the same authority as that which influenced the Roman lady who had ordered her slave to be crucified and upon being remonstrated with, that he was innocent, answered, — "my command, my will; let that for a reason stand."

See further E. Lareau, *Histoire du droit canadien*, vol. 2 (Montréal: A. Périard, 1889) at 514 ("Le rôle de la loi s'identifie d'ailleurs, avec celui de la raison qui tend chaque jour au perfectionnement d'elle-même."); Howes, *supra*, note 3 at 243-45.

<sup>135</sup>It is important to study the impact of the form of a legal narrative on its content, as the works of P. Bourdieu, "La force du droit: Éléments pour une sociologie du champ juridique" (1986) 64 *Actes de la recherche en sciences sociales* 3 at 14-18 and M. Lemieux, "La récente popularité du plan en deux parties" (1987) R.R.J. [forthcoming] well illustrate.

<sup>136</sup>A prime example would be estoppel. See *infra*, note 145.

l'autre. Et toujours, me semble-t-il, pouvons-nous nous féliciter d'être un champ fertile pour le développement du droit comparé.<sup>137</sup>

There was, of course, no such "fence" in place when he went to the Supreme Court in 1918. Indeed, as he "regretted" having to say in *Mile End Milling Co. v. Peterborough Cereal Co.*:

[L]es avocats de l'intimée, lors de l'audition de la cause, ont persisté à ne citer, outre les articles du code, que des autorités tirées du *common law*. Ce n'est pas ainsi que l'on conservera dans toute son intégrité le droit civil dans la province de Québec. Et j'ajoute qu'il est grandement temps que l'on se convainque que ce droit est assez riche en doctrine et en jurisprudence pour fournir une solution conforme à son génie à toutes les difficultés qui se rencontrent dans la pratique.<sup>138</sup>

Or as he felt obliged to point out to counsel for the respondents in *Colonial Real Estate Co. v. Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal*, who had invoked the authority of a Privy Council decision on a case from Nova Scotia:

I would deprecate, on a question under the Quebec law, relying upon a decision, even of the Privy Council, rendered according to the rules of the English law ... . Very earnestly, I am of the opinion that each system of law should be administered according to its own rules and by reference to authorities or judgments which are binding on it alone.<sup>139</sup>

It seems doubtful that the lawyers of the early 1920s (or at least those schooled in the nineteenth century) would have understood what Mignault was talking about. The language of "binding authority" would have been new to them, something vaguely associated with the way the common law had gone. The idea of "system" would also have seemed foreign, one of those ideas bandied about in Paris where "science légale" was all the rage.<sup>140</sup> To them law was rhetoric.<sup>141</sup> One has only to open any volume of the

<sup>137</sup>"Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" (1932) 11 R. du D. 201 at 206 and 211. Baudouin, *supra*, note 102 at 3 brings out nicely the paradox (apparently invisible to Mignault) on which the last sentence rests: "being a comparatist implies the ability to judge one's own system through another; [but in the case of Quebec] the system of reference is, to a certain degree, already integrated in the object of comparison." See also Tancelin, *supra*, note 3 at 21-22; *Lord Durham's Report*, *supra*, note 41.

<sup>138</sup>(1923), [1924] S.C.R. 120 at 129, [1924] 4 D.L.R. 716.

<sup>139</sup>(1918), 57 S.C.R. 585 at 603, 45 D.L.R. 193.

<sup>140</sup>See *D.C.C.*, vol. 1, *supra*, note 133, at v. See also "The Authority of Decided Cases", *supra*, note 53 at 19: "The civil law is a complete system of juridical science, founded on reason..."

<sup>141</sup>"Rhetoric" not in the pejorative sense of the term but in the meaning it has when associated with the name of Cicero. See generally H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 175-81; M. Bloch, "Introduction" in M. Bloch, ed., *Political Language and Oratory in Traditional Society* (London: Academic Press, 1975) 1 at 12-28; B. McLeod, "Rules and Rhetoric" (1985) 23 Osgoode Hall L.J. 305. Compare *City of Montreal v. Dupré* (1924), [1924] S.C.R. 246 at 265, [1924] 4 D.L.R. 1.

*Supreme Court Reports* (up to 1906) to be convinced of this: all of the speeches of counsel are recorded, or at least summarized, and their quality is often superior to that of the judgments. Rhetoric is an art, not a science, the art of persuasive speaking or writing. This confirms, if confirmation was needed, that “persuasive authority — authority which attracts adherence as opposed to obliging it” was the only kind of authority nineteenth-century jurists knew.<sup>142</sup>

It is a testimony to Mignault’s greatness that he succeeded in displacing this whole way of speaking in a little over a decade. How did he do it? His strategy seems to have been as follows: first, deflect their attention from the past and focus it on the future; second, sensitize them to the bastardy of other traditions and convince them of the purity of their own; third, demonstrate a divergence in the common and civil law solutions to a problem wherever possible; and fourth, emphasize the hierarchy of sources.

With regard to the first point, the title of Mignault’s best-known article, “L’avenir de notre droit civil”, is indicative of his general bent. His dim view of the past was also reflected in his discourse on the force of French ordonnances proclaimed after 1663:

La question a aujourd’hui ... un *intérêt plutôt historique que légal*, car le conseil privé ... s’est prononcé en faveur de l’opinion qui voulait que l’enregistrement au greffe du conseil souverain de Québec fût une formalité indispensable pour que les ordonnances subséquentes à 1663 eussent force de loi en ce pays.

[And this opinion] est tellement entrée dans notre jurisprudence, que ce serait toute une révolution que d’enseigner et mettre en pratique maintenant la doctrine contraire.<sup>143</sup>

The cumulative effect of such “historical” pronouncements as this one cannot be underestimated: the (already) receding past is supplanted by an “advancing presentism” while everything proceeds as usual.<sup>144</sup> Consider also Mignault’s viewpoint on the English doctrine of estoppel: “Elle n’est pas encore entrée dans notre jurisprudence et elle n’y entrera pas, si je puis l’empêcher.”<sup>145</sup> Compare Girouard J.’s remarks in *Banque d’Hochelaga v. Waterous Engine Works Co.* (decided in 1897): “Estoppel is not peculiar to the English system of law, it is known in Quebec by the name of *acquiescement*.”<sup>146</sup> It was thus partly by design, and partly out of ignorance, that

<sup>142</sup>Glenn, *supra*, note 7 at 263.

<sup>143</sup>*D.C.C.*, vol. 1, *supra*, note 133 at 21-22 [emphasis added]. But see *Groulx v. Bricault* (1921), 63 S.C.R. 32 at 40-41 and 46-48.

<sup>144</sup>Baker, *supra*, note 3 at 221. See further *Legault v. Desève* (1920), 61 S.C.R. 65 at 72-73, 58 D.L.R. 601.

<sup>145</sup>*Supra*, note 6 at 64. Mignault was true to his word in *Grace and Co. v. Perras* (1921), 62 S.C.R. 166 at 173, 61 D.L.R. 61.

<sup>146</sup>*Supra*, note 16 at 432. See also *supra*, note 105.

Mignault succeeded in purifying the civil law of Quebec of all the “universally admitted rules of law” of the Taschereau years.

This brings us to the second point in his plan to curtail the nomadism and polyjurality of those who still participated in the ethos of the nineteenth century. This involved, first of all, convincing the Bar of the integrity of the civil law of Quebec, which entailed keeping one’s discussion of the English (and other) sources upon which the codifiers relied to a bare minimum.<sup>147</sup> More effective, however, was the technique of alerting the Bar to the “DANGERS QUI NOUS MENACENT”:

Les huit provinces qui nous entourent sont régies par le droit anglais ... . Le danger, c’est que les principes de ce droit, qui pour nous est un droit étranger, s’infiltrent insensiblement chez nous ... l’effet serait d’altérer la pureté de notre droit.

N’oublions pas le cas de la Louisiane.<sup>148</sup>

What “the case of Louisiana” signified to Mignault (and would come to signify for others) was the danger of indiscriminate citation. It was rumoured that the “bulk of the practical law now in force” in Louisiana was “derived from common law sources” and that the “connection with the law of France” had accordingly diminished to the point of being “almost nonexistent.”<sup>149</sup> “Assurément, en matière de législation, il est permis de prendre son bien là où on le trouve”<sup>150</sup> — but not in the business of judging.

Thus did the standard practice of the nineteenth century come to be recast as a “pratique vicieuse”, and the idea that “la doctrine et la jurisprudence de notre propre droit” constitute “une mine inépuisable” slowly begin to percolate.<sup>151</sup> To bolster up this process Mignault made extensive

<sup>147</sup>See, e.g., Mignault, *supra*, note 137 at 204-5 and *supra*, note 73 at 588, as well as *Gilbert v. Lefèvre* (1928), [1928] S.C.R. 333 at 338-39, 10 C.B.R. 385 (where the “other” sources are not even mentioned). The extent to which it is currently believed that only certain specific and rather “exceptional” articles of the *Civil Code* were inspired by English (and other) sources is the measure of Mignault’s success. See, e.g., Baudouin, *supra*, note 4 at 731 (where arts 831, 1235 and 981a ff. are listed). Compare F.P. Walton, “The Civil Law and the Common Law in Canada” (1899) 5 R.L.(n.s.) 329 at 338-39: “In Scotland as in Quebec and in Louisiana the law occupies a position midway between the common law and the civil law. It has drawn largely from both sources.” See generally, *Lower Canada, Reports of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters*, 10 vols (Québec: Desbarats, 1861-1866).

<sup>148</sup>*Supra*, note 6 at 60 and 116. Compare *supra*, notes 14, 20, 21 and 38-42.

<sup>149</sup>*Ibid.* at 105. Compare Taschereau in *Price v. Mercier* (1891), 18 S.C.R. 303 at 324: “As well said by the Supreme Court of Louisiana in a recent case under the article of their code corresponding with our art. 1485 . . .”.

<sup>150</sup>Mignault, *supra*, note 137 at 210 (*i.e.*, in the manner of a Taschereau).

<sup>151</sup>Mignault, *supra*, note 6 at 61 and 63.

use of the technique of deprecation.<sup>152</sup> But the desired transformation could not be effected by holding up “les monuments de la jurisprudence française” and belittling “foreign” case law and doctrine alone.<sup>153</sup> It was also necessary to show the latter to be in conflict with the former — the third point in Mignault’s plan. To establish this point called for considerable tact, and involved, first, substituting “the common law” for “the universal law” (thus greatly facilitating the task), and second, convincing one’s audience that there did indeed exist a conflict between “the civil law” and “the common law” solution(s) to a given problem.

Before turning to consider some examples of this style of argument, it is instructive to reflect upon how a nineteenth-century judge, such as Taschereau, would have responded. First of all, it is doubtful that Taschereau would have agreed to participate in a debate the limits of which were so narrowly defined: “And what is the law on this point in Belgium, Portugal or Wurtemberg, Maître Mignault?” he would have asked.<sup>154</sup> Secondly, he would probably have demanded that Mignault determine whether the English case or other authority had been decided rightly before relying upon it as stating a legal proposition.<sup>155</sup> Now, consider Mignault’s argument in *Desrosiers v. R.*:

Si les articles 1716 et 1727 du Code civil [on mandate] étaient empruntés à la fois de Pothier et du droit anglais, ce ne serait pas une raison de dire que les principes généraux du droit anglais doivent être adoptés pour résoudre les questions auxquelles ces articles donnent lieu. ... [L]es codificateurs ne disent pas que ces articles sont *empruntés* au droit anglais, mais, au sujet de l’article 1727 C.C., ils font remarquer que cet article est basé sur l’exposé de la doctrine de Pothier, laquelle, ajoutent-ils, *est d’accord avec* les lois anglaise, écossaise et américaine.<sup>156</sup>

Mignault proceeded to demonstrate how certain recent English cases were not in accord with Pothier. But he did not give the least consideration to

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<sup>152</sup>See, e.g., *Canadian National Railways v. Clark* (1923), [1923] S.C.R. 730 at 737-38, [1923] 4 D.L.R. 727 (on the common law doctrine of contributory negligence); *supra*, note 139 (on the case law of other jurisdictions); Mignault, “Le Code civil de la province de Québec et son interprétation”, *supra*, note 73 at 106-7 (on the terminology of the civil law of Scotland).

<sup>153</sup>*Desrosiers v. R.* (1920), 60 S.C.R. 105 at 126, 55 D.L.R. 120 (e.g., Pothier, Fuzier-Herman, *etc.*).

<sup>154</sup>As in *Citizen’s Insurance Co. v. Parsons*, see *supra*, note 101.

<sup>155</sup>As in *Monaghan* (with regard to *Osborn v. Gillett*): see *supra*, note 66.

<sup>156</sup>*Supra*, note 153 at 126. There can be no disputing the first proposition in this quotation. Our problem is with the second proposition, which implies that the answer is to be found *in* Pothier as opposed to in the *Gestalt*, the organized whole, of all the sources read together. The only way to recollect that whole is to approach it in the same spirit as those who drafted it, namely, as a *bricoleur* (not a “legal scientist”). See C. Lévi-Strauss, *The Savage Mind*, trans. S. Wolfram (Chicago: University of Chicago Press, 1966) at 16-36.

what the Scottish civil law had to say on the subject. Taschereau would therefore have regarded this little demonstration as incomplete.

Similarly, in *Curley v. Latreille*, Mignault expressed his disapproval of the Court of Appeal having “assimilé notre droit, quant à la responsabilité des maîtres et commettants, au droit anglais ...”.<sup>157</sup> Of course, what that Court had actually done was to gather its interpretation of the last paragraph of article 1054 *C.C.L.C.* from a previous decision of the Supreme Court, an English case and the jurisprudence under the corresponding article of the French *Code civil*. Unimpressed, Mignault fastened on a minute difference in the wording of articles 1384 *C.C.F.* and 1054 *C.C.L.C.*, which impose liability on masters for damages caused by servants “dans les fonctions auxquelles ils les ont employés” and “dans l’exécution des fonctions auxquelles ces derniers sont employés” respectively. The master was accordingly relieved of any responsibility for the consequences of his chauffeur’s fateful “joy-ride” since these consequences were attributable to “un acte accompli entièrement en dehors de ces [the servant’s] fonctions ...”.<sup>158</sup>

Taschereau would have regarded Mignault’s reading of article 1054 as highly irresponsible; but in Mignault’s own estimation, “[l]a revue très complète que mon honorable collègue, M. le juge Anglin, fait de la jurisprudence tant française qu’anglaise démontre combien il vaut mieux s’en tenir au texte de notre article, texte qui ne prête à aucun équivoque, que de chercher à dégager une règle ou un principe d’une infinité d’arrêts d’espèce.”<sup>159</sup> Narrow in scope, always faithful to “the text”, tending on the whole to occlude responsibility (in the strict sense of the term) — these are the characteristics of a Mignault judgment.<sup>160</sup>

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<sup>157</sup>(1919), 60 S.C.R. 131 at 176, 55 D.L.R. 461.

<sup>158</sup>*Ibid.* at 178. Compare Brodeur’s (dissenting) opinion in this case.

<sup>159</sup>*Ibid.* at 177-78. This quotation expresses nicely what is meant by “monojurality”. With regard to the trustworthiness of Francis Anglin’s grasp of the principles of the civil law, see the excerpts from his judgments collected in R. Boulton, “Aspects des rapports entre le droit civil et la ‘common law’ dans la jurisprudence de la Cour suprême du Canada” (1975) 53 Can. Bar. Rev. 738 (many of which seem to be in conflict with those of other judges). See also Tancelin, *supra*, note 3 at 22-23.

<sup>160</sup>While one must be wary of generalizing any of the conclusions reached in the present essay to subsequent epochs, it is nevertheless striking to observe how closely this description of the distinguishing characteristics of Mignault’s judgments fits the jurisprudence of today. Mignault can therefore be regarded as “le père de la jurisprudence québécoise modérée”. This accords in an interesting way with “the supposition that the sexual instinct [read: legal instinct] of adults arises from a combination of a number of impulses of childhood into a unity, an impulsion with a single aim”; see Freud, *supra*, note 7 at 156. Significantly, Glenn, *supra*, note 7 at 264, has hypothesized that “reception of law [read: polyjurality] . . . has occurred invariably in the primary stages of the development of a legal tradition”, but then, as the mass of legal literature produced by the local system grows, tends to be replaced by a more unified conception of the sources of law. Of course, it does not explain anything to be able to point to this

Space does not permit an examination of how Mignault's "hidden agenda" entailed lowering our expectations of each other on other fronts as well, such as our responsibility for damage caused by things under our care,<sup>161</sup> or our responsibility for our errors.<sup>162</sup> However, no reconnaissance of his legal thought would be complete without some account being taken of his conception of "une jurisprudence digne de ce nom" in *Regent Taxi*, the swansong of his judicial career. In this case, Mignault saw the need to "harmonise" the interpretation of articles 1053 and 1056 *C.C.L.C.*, as entailing a reduction in the scope of the term "autrui" to include only the person *directly* injured by one's fault. This "argument de texte", as he called it, was in flagrant conflict with what everyone here and in France had always taken for granted: "Toute faute ... trouble l'ordre social, et une indemnité doit être payée à tous ceux qui en souffrent."<sup>163</sup> But where would one's responsibility to others cease under such a system, Mignault wondered, as if irresponsibility were the norm.<sup>164</sup>

The idea that "les articles du code s'interprètent les uns par les autres, en donnant à chacun le sens qui résulte de l'ensemble de ses dispositions"

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congruence between our own analysis of the transformation of Quebec law and the Freudian account of the development of the individual sexual cycle since "impulses and emotions explain nothing: they are always *results*": C. Lévi-Strauss, *Totemism*, trans. R. Needham (Boston: Beacon Press, 1963) at 71 [emphasis added]. Thus, following Lévi-Strauss, it could be argued that the cause of Mignault's monojurality is to be sought in the structure of his intellect and that his intellect was a reflection of the structure of his society; see *infra*, notes 177 and 183 and A.B. McKillop, "So Little on the Mind" (1981) 19 *Royal Soc. of Canada, Proceedings and Transactions* 183.

<sup>161</sup>See *Canadian Vickers, Ltd v. Smith* (1922), [1923] S.C.R. 203 at 211, [1923] 2 D.L.R. 301, (note the complicity of the Privy Council) and *City of Montreal v. Lesage* (1923), [1923] S.C.R. 355. The "reasoning", rather than the result, is important in these cases, particularly the substitution of a new standard ("unable by reasonable means" to prevent the accident from happening) for the previous one ("absolute inability"). This substitution is typical of the modern era, and betrays how much lower our sights are than were those of the ancients.

<sup>162</sup>See *W.T. Rawleigh Co. v. Dumoulin* (1926), [1926] S.C.R. 551 at 555, [1926] 4 D.L.R. 141 at 145 (which forever severed the link with Roman law). See also *D.W. Ogilvie & Co. v. Davie* (1920), 61 S.C.R. 363 at 405-6, where Mignault gave the Court's sanction to a real estate deal that quite obviously defrauded the government.

<sup>163</sup>*Supra*, note 67 at 684. In the instant case a religious community sought recovery for the temporary loss of one of its members' services as a result of the injuries he suffered while travelling in a vehicle belonging to the appellant.

<sup>164</sup>Compare D. Lee, "Responsibility among the Dakota" in *Freedom and Culture* (Englewood Cliffs, N.J.: Prentice-Hall, 1959) 59. It is fortunate that the other justices of the Supreme Court were not swayed by Mignault's "logic" and, save for Rinfret, sided with Anglin. Had they not, a regime of pure monojurality would have been instituted instead of the regime of qualified monojurality that survived this, Mignault's final attempt to create a body of law sufficient unto itself. See also Glenn, *supra*, note 43 and P.-G. Jobin, "Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d'une affaire de famille" (1980) 21 *C. de D.* 257.



is well entrenched nowadays.<sup>165</sup> It has inspired judgments that, from a formal (if not an historical) point of view, are quite stunning.<sup>166</sup> It has even inspired rapture: "There is, if I may so call it, an orchestration of the civil law, a great harmony among the parts, with all parts always speaking, not in contradiction but in assonance, so that each illuminates the other."<sup>167</sup> This idea is helped along by the fact that most modern versions of the *Code* have dropped the annotations (the references to the sources invoked by the codifiers) from their margins.<sup>168</sup> This is a further reason for the decline of polyphony, the "Babel légale" of the nineteenth century.

The final point in Mignault's plan for the re-constitution of Quebec law was to emphasize the hierarchy of its sources (and thus consolidate his position). He was obsessed with authority and lectured on it repeatedly. But it is not necessary for us to review all of his pronouncements on this subject since his views are identical with contemporary conventional wisdom. As every law student knows, the *Code* ranks first, *la doctrine* (or is it *la jurisprudence*) a distant second, and so on. The following discussion is therefore limited to his thoughts on the authority of decided cases. Of particular interest are his words of advice to inferior court judges who find themselves having to grapple with a precedent laid down by a court of superior jurisdiction:

Que l'un ou l'autre de ces hauts tribunaux [the Supreme Court of Canada and the Privy Council] se soient prononcés sur une question, il est inutile d'espérer qu'ils changeront d'avis, ou qu'ils puissent même le faire.

Voici donc l'alternative. Ou bien un juge ou une cour de la Province de Québec refusera de suivre une décision du Conseil privé ou de la Cour suprême, et alors les parties seront exposées aux frais d'un appel qu'on ne manquera pas d'interjeter de sa décision; ou bien, le juge suivra le précédent tout en le croyant erroné.

Ce sont là des raisons de haute convenance, pour me servir de cette expression dans le sens qu'elle a en anglais (*convenience*).<sup>169</sup>

<sup>165</sup>See *Regent Taxi*, *supra*, note 67 at 686-87.

<sup>166</sup>See, e.g., *A.G. Quebec v. Lapierre*, *supra*, note 63.

<sup>167</sup>W.S. Johnson, "The Codification of the Common Law" (1957) 17 R. du B. 165 at 177.

<sup>168</sup>Compare, e.g., the McCord version, *supra*, note 19, with the authoritative version of today, P.-A. Crépeau, ed., *Les Codes civils: Édition critique* (Montréal: Chambre des Notaires du Québec, 1986).

<sup>169</sup>"Le Code civil de la province de Québec et son interprétation", *supra*, note 73 at 136. It is curious that the doctrine of comity, or convenience, is the only common law doctrine Mignault appears ever to have looked upon with approval. It will be appreciated that in doing so he violated one of his own first "principles": "Citez toujours ce qui *convient* à notre droit et qui a droit de cité chez nous". See Mignault, *supra*, note 6 at 65 [emphasis added]. While the idea that the administration of justice should be conventional (rather than natural) does not alarm most of us moderns, there are still those among us who react strongly against such complacency. See J.E. O'Donovan, *George Grant and the Twilight of Justice* (Toronto: University of Toronto Press, 1984) at 132-53. The Supreme Court decision in *Lapierre v. A.G. Quebec*, *supra*, note 63 confirms that their agitation is well-founded. For a comparison of this case with *Cité de Québec v. Mahoney* (1901), 10 B.R. 378 (a classic example of 19th-century polyjurality), see D. Howes, "Dialogical Jurisprudence" [unpublished manuscript].

Thus did the ponderous hierarchy of sources (and of courts) come to displace what Taschereau in *Monaghan v. Horn* called “the weight of reasoning and logic”.<sup>170</sup> But as Mignault said in *Regent Taxi* (admittedly in another connection): “Il me semble qu’un raisonnement qui se résigne aussi facilement au reproche d’illogisme perd beaucoup de sa force persuasive.”<sup>171</sup> Clearly, what Mignault meant, and what Taschereau understood, by the word “logic” are two quite different things. As for the regard in which Mignault held the concept “reason”, this is best inferred from a passage in “L’autorité judiciaire” (published in 1900):

Mais quand tout le monde a tort, tout le monde a raison! Si un juge se voit en face de plusieurs jugements conformes, formant une longue suite de choses jugées ... son devoir est de s’incliner ... .

[L]’unité et la fixité de la jurisprudence exigent que les opinions individuelles s’effacent.<sup>172</sup>

There was a time when it was thought that to adopt such a course would be “to forget our duties”.<sup>173</sup> But that was before the demise of reason. As for what Taschereau understood by the concept “reason”, this “question a aujourd’hui un intérêt plutôt historique que légal”, as Mignault would say. A Taschereau would have to agree.

### Epilogue: Monotonous Jurisprudence

The way to approach the nineteenth century is not as an historian in search of origins but as an anthropologist, for the natives of that era have little in common with us moderns.<sup>174</sup> As the present essay demonstrates, there has been a massive “rupture épistémologique” in the history of Quebec law, a Rubicon not only in how we know but what we know about the law.<sup>175</sup> To recollect the *Rechtsanschauung* of a Taschereau there is only one strategy: *Oublier Mignault*. But we cannot forget Mignault. Mignault is ourselves. Thus are we forced to distance ourselves from Taschereau.

<sup>170</sup>See *supra*, note 66 at 437.

<sup>171</sup>*Supra*, note 67 at 686. It is telling that even logic had lost its persuasive power for Mignault.

<sup>172</sup>*Supra*, note 12 at 176-77. Compare Taschereau in *Monaghan*, *supra*, note 66 at 450-51: “It must be conceded . . . that if the cases are to be counted merely, the defendant’s contention must prevail. But if, on the contrary, they are to be weighed, if we are to be guided in the determination of this question by the best established principles of justice, this doctrine appears to me utterly indefensible.”

<sup>173</sup>*Supra*, note 100.

<sup>174</sup>Compare MacIntyre, *supra*, note 96 at 1-5.

<sup>175</sup>See C. Atias, *Épistémologie juridique* (Paris: Presses universitaires de France, 1985). On the methodological point at issue, see L. Febvre, *Le problème de l’incroyance au XVI<sup>e</sup> siècle: La religion de Rabelais* (Paris: Albin Michel, 1942); M. Foucault, *L’archéologie du savoir* (Paris: Gallimard, 1969). Compare J. Baudrillard, *Oublier Foucault* (Paris: Galilée, 1977).

No society can exist in the absence of reciprocity.<sup>176</sup> A society is defined by its "community of ideas".<sup>177</sup> It has been shown that there was "un véritable échange d'idées entre les deux systèmes", civil and common, prior to 1875,<sup>178</sup> and that this dialogue continued, though only within the confines of the Supreme Court and only as between Strong and Taschereau, until 1902. Then the dialogue ceased and with it the *raison d'être* of the Supreme Court. Taschereau must thus be recognized as "the great delayer" of Canadian law.<sup>179</sup> That is, he knew that the judicial systems of the other provinces had imploded, and yet he persuaded a whole generation of Quebec lawyers to the happy conclusion that the principles on which *le droit civil canadien* rested were the same as those of the "universal law".<sup>180</sup> It followed that there could be no *a priori* limits to the search for authority.

Mignault was the undertaker of *le droit civil canadien*.<sup>181</sup> He replaced it with *un droit civil québécois*,<sup>182</sup> which is what he was obliged to do, because a one-sided exchange can only go on for so long. Of course, he saw his mission as one of preserving "l'intégrité de notre droit". But as anthropologists we are able to see that all he was really doing was controlling for the absence of reciprocity in the Canadian legal system generally. It must be emphasized that this he had to do, because there is no integrity in receiving without being able to give in return, only dishonour: "Le don non rendu rend encore inférieur celui qui l'a accepté, surtout quand il est reçu sans l'esprit de retour."<sup>183</sup> The modern day conception of "l'économie générale

<sup>176</sup>M. Mauss, "Essai sur le don: Forme et raison de l'échange dans les sociétés archaïques" in *Sociologie et anthropologie* (Paris: Presses Universitaires de France, 1950) 143 at 205 and 264. It must be emphasized that in every exchange there are always "trois obligations: donner, recevoir, rendre". Compare arts 1472, 1492 and 1532 C.C.L.C.

<sup>177</sup>Devlin, *supra*, note 96 at 9.

<sup>178</sup>See *supra*, notes 42 and 43.

<sup>179</sup>Was not his thought "the consummate expression of wanting it both ways"? See Grant, *supra*, note 78 at 78-79.

<sup>180</sup>His influence on Charles Fitzpatrick, counsel for the respondent in *Aubert-Gallion*, *supra*, note 82, is manifest in the latter's polyjurality, which deserves study in its own right. Fitzpatrick was Taschereau's successor on the Bench.

<sup>181</sup>To put it another way, he delivered us from reason and gave us "will". See Howes, *supra*, note 3 at 242-45; and the discussion *supra*, note 134.

<sup>182</sup>We speak of *un droit civil québécois* because there might have been others, based on, say, Aubry and Rau, or even Baudry-Lacantinerie instead of Mourlon; but then, to quote Mignault, "toute comparaison est odieuse". See *D.C.C.*, vol. 1, *supra*, note 133 at v-viii. See further R. Needham, "Polythetic Classification" in *Against the Tranquility of Axioms* (Berkeley: University of California Press, 1983); M. Douglas, "Pollution" in *Implicit Meanings: Essays in Anthropology* (London: Routledge & Kegan Paul, 1975) 47 at 57-58: "Other ways of dividing up and evaluating reality are [always] conceivable."

<sup>183</sup>Mauss, *supra*, note 176 at 258. Or, more to the point, one could say "sans l'espoir de retour", in that late 19th-century Quebec lawyers and judges received such parts of the common law as they knew to be in conformity with the "universal law" but all their return prestations were refused.

du droit civil québécois" must therefore be traced to the violation of the law of reciprocity (which rules all societies) on the part of the common lawyers of the rest of Canada, just as Deschênes has maintained.<sup>184</sup> There would have been no need for Mignault to emphasize the "supremacy of legislation" and the "hierarchy of sources" had the relations of intellectual production in this country continued to be informed by the same spirit after 1875, as they were before.<sup>185</sup>

There is one last question. Why is Mignault's *Le droit civil canadien* seen by so many of us as a monumental work? Perhaps it is because our minds are smaller and our sights are lower than were those of the ancients.

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<sup>184</sup>See *supra*, note 115. See also G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland & Stewart, 1965) at 20-24.

<sup>185</sup>How can this situation be corrected? Perhaps we should strive for the abolition of appeals to the Supreme Court of Canada in all matters not involving criminal, constitutional or election law, and demand that cases touching on these matters be referred to the Quebec Court of Appeal, regardless of their province (or territory) of origin. If this proposal seems lunatic, as it must, what does that tell us about ourselves? More importantly, how else is the lost competence of the courts in this province to be regained? Compare P-A. Crépeau, "Pour une Cour suprême du Québec en matière de droit civil" (1982) 49 *Assurances* 337.