Document generated on 12/26/2024 11:28 a.m.

Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

An Introduction to The Legal System of Quebec, Written for a Diplomat

Michel Morin

Volume 34, Number 2, 2021

URI: https://id.erudit.org/iderudit/1098441ar
DOI: https://doi.org/10.7202/1098441ar

See table of contents

Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)
2561-6994 (digital)

Explore this journal

Cite this article

Morin, M. (2021). An Introduction to The Legal System of Quebec, Written for a Diplomat. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *34*(2), 101–130. https://doi.org/10.7202/1098441ar

© Société québécoise de droit international, 2023

This document is protected by copyright law. Use of the services of Érudit (including reproduction) is subject to its terms and conditions, which can be viewed online.

https://apropos.erudit.org/en/users/policy-on-use/

érudit

This article is disseminated and preserved by Érudit.

Érudit is a non-profit inter-university consortium of the Université de Montréal, Université Laval, and the Université du Québec à Montréal. Its mission is to promote and disseminate research.

https://www.erudit.org/en/

AN INTRODUCTION TO THE LEGAL SYSTEM OF QUEBEC, WRITTEN FOR A DIPLOMAT

Michel Morin[*]

What makes Quebec's legal system unique in Canada? What are its essential features? The author was asked these questions by Mr. Jae-woo Kim, Consul of the Republic of Korea in Montreal, who was hoping for something akin to a magazine article. The result was rather more detailed, but perhaps it will be helpful to foreigners who need a basic knowledge of the applicable law in Quebec.[1]

In many ways, the distinct character of Quebec's institutions is at the root of the federal union created in 1867. Federalism assumes that provincial legislatures and governments will have the power to adopt their own policies and priorities within their spheres of exclusive jurisdiction, no matter the criticisms expressed by other provinces or by the federal government. Federalism therefore allowed Quebec to maintain its civil law heritage in matters of private law, while all the other provinces adopted the common law in private law matters.[2]

The differences between the legal system of Quebec and those of other provinces also reflect a collective or national identity–indeed, in 2006, the House of Commons recognized that the "*Québécois* form a nation within a united Canada".[3] In 2021, it acknowledged "the will of Quebec to enshrine in its constitution that Quebeckers form a nation, that French is the only official language of Quebec and that it is also the common language of the Quebec nation".[4] However, there are other nations within Canada. Indigenous Peoples, for instance, are commonly termed "First Nations" in federal legislation. They are also considered "peoples" in the *Canadian Constitution*.[5] Canada, then, is a multi-national state.

---

[*] Michel Morin is a Full Professor at the Faculty of Law of the University of Montreal. He would like to express his gratitude to Jean Leclair and Bradley Wiseman for their comments on a previous draft of this paper, and to Mr. Jae-woo Kim, who asked him to write this document.

[1] For previous overviews that focus on the Civil Law, see Frederick Parker Walton, "The Legal System of Quebec" (1913) 13:3 Colum L Rev 213; Denis Le May, "The Quebec Legal System : An Overview" (1992) 84 Law Libr J 189; Pawel Laidler, "The Distinctive Character of Quebec Legal System" in Magdalena Paluszkiewicz-Misiaczek, Anna Reczyńska and Anna Śpiewak, dir, *Place and memory in Canada : Global Perspectives / Lieu et mémoire au Canada: Perspectives Globales* (Kraków: Polska Akademia Umiejętności, 2005) 277; the references given below are just a starting point for those in search of additional information.

[2] France Allard, "La disposition préliminaire du Code civil du Québec, l'idée de droit commun et le rôle du Code en droit fédéral" (2009) 88:2 Can Bar Rev 275–312; Robert Vipond, "1867: Confederation" in *Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2018) 83.

[3] *House of Commons Journals*, 39-1, No 90 (24 November 2006).

[4] *House of Commons Journals*, 43-2, No 119 (16 June 2021) [*House of Commons Journals*, 43-2].

[5] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c11 [*Constitution Act, 1982*]. See also *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UN Declaration on the Rights of Indigenous Peoples Act*]; the Supreme Court of Canada declined the invitation to decide whether Quebecers and Aboriginal Peoples can be considered "peoples" from an

Nonetheless, the status of Quebec within Canada has been the subject of intense controversies. At first glance, these may appear to be political in nature, but they have exerted a profound influence on the evolution of Canadian constitutional law. For that reason, they will be mentioned below. Historically, Quebec's national identity has been defined by the French language, the Catholic religion and the civil law tradition, with the understanding that other languages and religions were an important part of Quebec society and could not be denied recognition. This consensus was achieved after many decades of political conflicts and a rebellion. We will recount these events in Part II of this document.

Part III will examine the Canadian federal system, focusing on legislative and judicial powers. From the sixties, Quebec began its quest for increased responsibilities. This culminated with two failed attempts to obtain a mandate for the negotiation of a secession. In this turbulent period, the *Constitution Act*, *1982*[6] established an amending procedure entirely controlled by Canadian actors. As well, the *Canadian Charter of Rights and Freedoms*[7] (*Canadian Charter*') empowered the judiciary to address controversial social issues.

After this general presentation, Part IV will focus on some distinctive features of the legal landscape in Quebec: a dynamic civil law tradition prospering in the midst of common law jurisdictions, and the special protection given to the French language, both at the institutional level and in the educational sphere. In this regard, the *Canadian Charter* included novel linguistic rights; for instance, parents belonging to the Francophone or Anglophone minority of a province were entitled to have their children educated in their native language.[8] As a result, some legislative provisions adopted earlier in Quebec were found to be unconstitutional, although many remain in place.

Part V will discuss the negative reactions after some important laws were struck down by the courts because a fundamental right or freedom had been infringed. In 1975, Quebec adopted the *Charter of Human Rights and Freedoms*[9] (*Quebec Charter*), thereby signalling its commitment to the protection of fundamental freedoms. However, with the advent of the *Canadian Charter*, Canadian courts assumed a more controversial role. For instance, the wide interpretation given to freedom of expression in respect of the language of commercial advertising, or to freedom of religion, has been strongly criticized. At times, the Quebec legislature used the "notwithstanding clause" to elude the *Canadian Charter* by preventing some constitutional challenges for a period of five years.[10]

In 2019, a law on laicity adopted this approach. This legislation prohibits

international law perspective: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 125 [*Secession of Quebec*].

6 *Constitution Act, 1982*, *supra* note 5.

7 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*].

8 *Ibid*.

9 *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*].

10 *Canadian Charter*, *supra* note 7, art 33.

persons appointed to some important public positions from wearing a religious symbol while performing their functions.[11] This illustrates the willingness of Quebec politicians to chart a completely different course. Another controversial issue concerns aboriginal and treaty rights, which are protected by the *Constitution Act, 1982*.[12] This means that the federal and provincial governments can no longer disregard the constitutional rights of Indigenous Peoples, on pain of seeing their decisions declared unconstitutional. Although this issue is not specific to Quebec, its importance cannot be underestimated.

I. COLONIAL EXPERIENCE UNTIL 1867

This section will briefly review the development of the legal system of Quebec prior to Confederation. Although French explorers and traders made trips to North America in the 16th century, the first attempt at settlement failed, in 1542-1543. The French colony began in earnest in 1608. At that point, the Indigenous people living in this area prior to 1543 had disappeared. The French were looking for providers of furs and military allies; the homeland of their partners was not located on the shores of the Saint-Lawrence River (except below Tadoussac, downstream from Quebec on the North Shore, where the Innus, formerly called the Montagnais, lived). Since the French were not numerous, there was little or no conflict over land. Relations with Indigenous Peoples were generally peaceful, except with the Haudenosaunees (called Iroquois at the time) who lived in what is now the state of New York and whose hunting territories included the island of Montreal. However, they entered into a peace treaty with the French and their allies, most notably in 1701; this "Great Peace" lasted until the final years of the colony. By 1760, there were about 65 000 people living in New France, a colonial government and a small but effective judicial system.[13]

Following the British Conquest (1760), the Royal Proclamation (1763) provided that English law would apply in the new Province of Quebec.[14] This led to many complaints. In 1774, the British Parliament adopted the *Quebec Act*, which restored the law in force in New France, but only for "property and civil rights", i.e. private law.[15] Criminal law was to remain English, as well as public law. The *Quebec*

---

[11] *Act respecting the laicity of the State*, CQLR c L-03 [*Act respecting the laicity*].

[12] *Constitution Act, 1982*, *supra* note 5, s 35.

[13] Philip Girard, Jim Phillips & R Blake Brown, *A History of Law in Canada*, Osgoode Society for Canadian Legal History (Toronto: Published for The Osgoode Society for Canadian Legal History by University of Toronto Press, 2018) [*History of Law*] 83-112 and 175-183.

[14] *Royal Proclamation* (1763), RSC 1985, App II, no 1; Michel Morin, "The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774" (2013) 36:2 Dal LJ 581.

[15] *An Act for making more effectual Provision for the Government of the Province of Quebec in North America 1774* (UK), 14 Geo III, c 83; Michel Morin, "Choosing between French and English Law: The legal Origins of the Quebec Act" in Ollivier Hubert and François Furstenberg, eds, *Entangling the Quebec Act, Transnational Contexts, Meanings, and Legacies in North America and the British Empire* (Montréal & Kingston, McGill-Queen's University Press, 2020) 101.

Act[16] itself and subsequent legislation adopted specific rules and principles of English law, such as testamentary freedom, optional trial by jury in commercial matters or cases of personal injury, rules of evidence for business transactions, adversarial trial, corporations, etc.

By 1791, following the influx of Loyalists who had fled the new United States, the British Parliament established a colonial legislature in Quebec with an elected House and a Legislative Council whose members were appointed for life (*Constitution Act, 1791*).[17] Quebec was renamed Lower Canada. A new colony was also created for the Loyalists, called Upper Canada (the future province of Ontario), with its own bicameral legislature. [18] In both colonies, disagreements between the two Houses were frequent and bills were regularly rejected by governors. In Lower Canada, attempts to replace parts of the French civil law with English law, or to limit the use of the French language, were among the controversies of the day, as well as various government policies adopted by the Governor and its councillors or by the British Government, with little or no regard for the opinions expressed in the elected House. All this led to the Rebellions of 1837-38, which were easily quashed.[19]

In 1840, the British Parliament adopted the *Union Act*[20], which merged Lower Canada and Upper Canada into a single province, with a single legislature and a single government. The idea was to assimilate French Canadians by, among other things, placing their elected representatives in a minority within the Lower Chamber. However, many representatives from the former colony of Upper Canada formed a coalition with Francophone members. By 1848, the British Government agreed to implement the principle of responsible government in the colony (i.e. ministers forming the government would remain in office only if they enjoyed the support of the lower House). As a result, many more Francophones served as cabinet ministers, judges and in other high positions of the government.[21]

As for legislation, in theory, the differences between Lower Canada and Upper Canada could have been eliminated gradually. For political reasons, this was not done, and most laws adopted from 1840 to 1867 applied only in one of the former provinces. One notable example was the *Civil Code of Lower Canada* of 1866,[22] a bilingual text that restated the law in force using the French *Civil Code* as a model, but with some important differences, including a book on commercial laws (Quebec never enacted a *Code of Commerce* as France did). [23] On the other hand, many statutes

[16] *Ibid.*

[17] *An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intituled, An Act for making more effectual Provision for the Government of the Province of Quebec, in North America; and to make further Provision for the Government of the said Province 1791*, (UK) 31 Geo III, c 31.

[18] *History of Law*, *supra* note 13 at 184-185.

[19] *Ibid* at 507-508.

[20] *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada* (UK), 1840, 3 & 4 Vict, c 35.

[21] *History of Law*, *supra* note 13 at 516-524.

[22] *An Act respecting the Civil Code of Lower Canada*, SPC 1865, 29 Vict, c 41.

[23] *History of Law*, *supra* note 13 at 425-437

applied to the whole colony, such as legislation pertaining to criminal law, commercial corporations, militia, customs and railroads. The 1840 regime was the predecessor of what would become, in 1867, a full-blown federal system.[24]

As for Indigenous Peoples, at that time they were considered too primitive for self-government or autonomy. Legislation provided for their settlement in reserves. The natural resources located on their ancestral lands (which were much larger than reserves), included lumber, minerals, fish and game. These lands were exploited intensively without their consent. Indeed, Indigenous people were fined and jailed for fishing or hunting without licenses.[25]

By 1867, Francophones had been able to preserve their language (which was regularly used in the legislature, in court and in official documents, because these were published in both English and French).[26] They had secured their place in government and among public officials, because they held the balance of power in the Lower House. Their religion, which the British had tolerated from the start, was thriving (indeed, the Catholic hierarchy quickly became a staunch supporter of the new regime). However, political instability, military problems during the American War of Secession and financial instability due to the ever-increasing cost of railroads led to the formation of a federal union (improperly called a confederation at the time, and even today) with the Maritime colonies. At that point, in Quebec, about a quarter of the population was Anglophone due to immigration from the British Isles.[27] In 1871, the French-speaking Acadians of New Brunswick represented about 16 % of the population; elsewhere, it was much lower.[28]

II. THE CONSTITUTION OF CANADA AND THE QUEST OF QUEBEC FOR INCREASED POWERS

In 1867, the UK Parliament adopted the *British North America Act* (known since 1982 as the *Constitution Act, 1867*).[29] Its preamble acknowledged that colonial representatives had expressed a "Desire to be federally united into One Dominion […] with a Constitution similar in Principle to that of the United Kingdom".[30] Lower Canada and Upper Canada would now be called, respectively, Quebec and Ontario. Six more

---

[24] Jim Phillips & Tom Collins, "The Colonial Origins of the Division of Powers in the British North America Act" in *Law, Life and the Teaching of Legal History: Essays in Honour of G Blaine Baker* (Montreal and Kingston: McGill-Queen's University Press, 2022) 212.

[25] *History of Law*, *supra* note 13 at 449-465 and at 608-614.

[26] Michel Morin, "Blackstone et le bijuridisme québécois de la Proclamation royale de 1763 au Code civil du Bas Canada" in Stéphane Rousseau, ed, *Un juriste sans frontières*, Mélanges Ejan Mackaay (Montréal: Thémis, 2015) 585.

[27] Paul-André Linteau, "Québec Since Confederation" in *The Canadian Encyclopedia* (2006), online: <www.thecanadianencyclopedia.ca>.

[28] Caroline-Isabelle Caron, *The Acadians*, Booklet 33 (Ottawa: Canadian Historical Association, 2015).

[29] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

[30] *Ibid*, preamble.

provinces joined the Federation between 1871 and 1949.[31] Responsible government was undoubtedly included in the principles of the *British Constitution*, even though the executive power vested in the representatives of the Crown (i.e. the Governor General of Canada and the provincial lieutenant governors). In practice, the Prime Ministers and Ministers continued to be in charge of government decisions.[32]

At the time, federalism was widely understood as an answer to the demands of Quebec. For certain sensitive issues such as education and modifications of the private law, its Catholic and Francophone majority would not submit to the will of an Anglophone and Protestant majority. For this reason, the new *Canadian Constitution* divided the legislative and executive powers between the federal and provincial governments, as we shall see in part II A. However, the judicial system does not reflect this division, because one court often has jurisdiction over cases involving either federal or provincial law (sometimes both); we shall discuss this problem in part II B.

After a century or so, a strong movement favouring an increase in the powers of the Quebec government developed. This could be accomplished either by means of a constitutional reform that would include a new amending formula, or by seceding from Canada. Indeed, two referenda were held on this last issue. The first one, held in 1980, led to the adoption of the *Constitution Act, 1982*, while the second, held in 1995, led to a clarification of the principles governing the secession of a province. We will recount these developments in part II C.

A. FEDERAL AND PROVINCIAL POWERS

The *Canadian Constitution* grants to the Canadian Parliament jurisdiction over an idiosyncratic list of subjects. For the most part, a national consensus would normally be easier to achieve on such issues, although in 1867, some of these were certainly considered local (fisheries) or divisive (divorce). Today, the main areas of exclusive federal jurisdiction are international and interprovincial trade and commerce; unemployment insurance; taxation in general; the military and national defence; navigation and shipping; quarantine and marine hospitals; fisheries; ferries; transportation and communication lines extending beyond the limits of a province; banking; bills of exchange and promissory notes; companies with national objects; insolvency; intellectual property; Indians and lands reserved for them; naturalization and aliens; marriage and divorce; criminal law and criminal procedure "except the Constitution of Courts of Criminal Jurisdiction"; and penitentiaries.[33] Finally, the Canadian Parliament is also endowed with a residual power under its "Peace, Order, and good Government" jurisdiction.[34]

---

[31] For a chronological presentation, see Government of Canada, "The Constitutions Acts, 1867 to 1982", online: *Justice Laws* <https://laws-lois.justice.gc.ca/eng/const/page-1.html> at fn 6.

[32] Jacques-Yvan Morin & José Woehrling, *Les Constitutions du Canada et du Québec du Régime français à nos jours* (Montréal: Thémis, 1992) at 164–165; Vipond, *supra* note 1 at 94.

[33] *Constitution Act, 1867*, *supra* note 19, art 91.

[34] *Ibid*.

As for provincial legislatures (in Quebec it is called, somewhat confusingly, the "National Assembly"), their exclusive jurisdiction extends to direct taxation and the borrowing of money; the management of public lands; prisons; hospitals (other than marine hospitals), asylums, charities; municipal institutions; businesses that are open to the public and local undertakings, including purely provincial lines of transportation or communication; companies with provincial objects; solemnization of marriage; property and civil rights; administration of justice and civil or criminal courts; penalties or imprisonment for enforcing a provincial law; matters of local nature; education.[35] For each level of government, the sphere of action of the executive power is also coterminous with its legislative jurisdiction.

The *Canadian Constitution* has created several intertwining fields of jurisdiction, such as taxation in general (federal), in contradistinction to direct taxation (provincial); marine hospitals (federal) and ordinary hospitals (provincial); companies with national (federal) or provincial objects (provincial); transportation and communication lines wholly within (provincial), or partly without (federal), a province; marriage (federal) and the solemnization of marriage (provincial); criminal law and criminal procedure (federal), as opposed to the constitution of criminal courts (provincial); penitentiaries (for the more serious crimes) (federal) and prisons (provincial). The *Canadian Constitution* also explicitly provides for a concurrent jurisdiction over old age pension, immigration and agriculture; for the last two matters, federal legislation prevails over incompatible provincial legislation.[36]

The reader would be forgiven for thinking that this hodgepodge of subjects can only be explained by political bargaining (perhaps late at night, after more than a few drinks...).[37] Despite the ambiguity of the written *Canadian Constitution*, courts decided early on that provincial legislatures and lieutenant-governors were in no way subordinate to the national government: within the jurisdictional and geographical limits assigned by the *Canadian Constitution*, "the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of [Canada]".[38] This remains true today: "[w]ithin their respective spheres, the legislative authority of the Parliament and the provincial legislatures is supreme (subject to the constraints established by the Constitution, […])".[39]

This division of legislative powers creates difficulties for international relations. The federal government cannot bind the provinces when it enters into a treaty that requires changes to provincial law, nor can it compel them to make such a change.[40] Conversely, for subjects that fall under provincial jurisdiction, provincial governments can enter into agreements with other national or sub-national governments, (such as one of the 50 American States, a German Länder, etc.). Some

---

35 *Ibid,* arts 92-3.
36 *Ibid*, ss 94A, 95.
37 Christopher Moore & François Droüin, "Trois semaines à Québec, une Conférence pour la Confédération" (2014) 119 Cap-aux-Diamants 13–17.
38 *Hodge v The Queen*, [1883] 9 AC 117 at 132.
39 *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 21.
40 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 149.

authors consider that these documents are treaties recognized in international law, while others strongly disagree.[41] Whatever their nature, their practical importance cannot be doubted. They cover issues of critical importance, such as child abductions, reciprocal enforcement of judicial orders, driving regulations, etc.[42] As well, since the sixties, Quebec has developed a network of 34 government offices located in 19 countries.[43] Although other provinces have done the same, this illustrates the importance for the Quebec Government of establishing a presence at the international level and of asserting a distinct identity. As mentioned above, this coincided with a claim for increased powers that prompted important constitutional developments in Canada. Before discussing these events, it will be necessary to explain briefly the mains features of the court system.

B. JUDICIAL SYSTEM

It is almost impossible to understand the Canadian judicial system, as opposed to simply describing it. Explaining it to foreigners is, to say the least, a challenge. This is because it does not conform to any known principle, least of all the division of powers between the federal and provincial levels of government. Only one thing is certain: courts exercise the jurisdiction granted to them by statute. The legislature that constitutes a court and the government that appoints its judges are not indicators of the law that this court will apply (with the exception of the Federal Court, which can apply only federal law).

All the colonies that subsequently became a Canadian province had one or more superior court, bearing various names. Based on the British model, these courts have original and general jurisdiction, even in the absence of a specific legislative grant, as long as no other court or tribunal is competent to hear a case. Superior courts can also review the decisions of administrative tribunal and boards, as well as those of "inferior" courts, if these acted without having the power to do so, or if their decision was unreasonable.[44] This still offers a welcome protection to citizens confronted with irrational bureaucratic decisions, or with State entities overstepping the bounds of their authority.[45] As well, since 1867, at the request of any litigant, a superior court can declare Canadian or provincial legislation unconstitutional, on the ground that it encroaches on a field reserved to the other level of government

---

41 See for instance Hugo Cyr & Armand de Mestral, "International Treaty-Making and Treaty Implementation" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2018) 595; Daniel Turp, "L'approbation des engagements internationaux importants du Québec: la nouvelle dimension parlementaire à la doctrine Gérin-Lajoie" (2016) Hors-série RQDI 9; Stéphane Beaulac, "The Myth of Jus Tractatus in La Belle Province: Quebec's Gérin-Lajoie Statement" (2012) 35:2 Dal LJ 237.

42 "Ministère des Relations internationales et de la Francophonie" (last modified 30 September 2020), online: *Government of Quebec* <www.quebec.ca/gouvernement/ministere/relations-internationales/>.

43 "Québec government offices abroad" (last visited 17 August 2022), online: *Government of Quebec* <www.international.gouv.qc.ca/en/general/representation-etranger>.

44 Mark Walters, "The British Legal Tradition in Canadian Constitutional Law" in *Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2018) 105 at 119–110 and 116–117.

45 See for instance *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

(provincial or federal, as the case may be).[46] Appellate courts are also considered "superior courts".[47]

Since 1867, provincial legislatures can modify the title, nature, territorial organization, and jurisdiction of superior courts; they are responsible for the administration of justice, courthouses, and staff. However, superior court judges are appointed by the federal government. Their salaries are determined by the Canadian Parliament and paid by the federal government. They hold office during good behaviour and cannot be removed without an address to this effect from the Canadian House of Commons and Senate.[48] In short, these courts are the most prestigious in Canada. They are the cornerstone of the judicial system envisioned by the *Canadian Constitution*, which assumes their existence. Indeed, the core aspect of their jurisdiction cannot be removed by legislation (notably the power to declare laws unconstitutional).

The jurisdiction of superior courts is mostly defined by legislation. For instance, the Quebec Superior Court hears civil cases in which the value of property or the amount claimed equals or exceeds $85,000, as well as in family matters, except adoption.[49] In such civil cases, it applies the *Civil Code of Quebec*.[50] Specific Quebec legislation grants jurisdiction to the Superior Court, for example in cases of land use planning.[51] But numerous federal laws also grant jurisdiction to the Superior Court: the *Divorce Act*[52], the *Bankruptcy and Insolvency Act*[53], the *Canada Business Corporations Act*[54], the *Criminal Code*[55] (but only for the most serious crimes), the *Extradition Act*[56], etc.

On the other hand, all provinces have constituted provincial courts that are not considered "superior courts". They appoint and pay the judges of these courts, who are protected by the constitutional principle of judicial independence.[57] Their jurisdiction derives from both Canadian legislation and provincial legislation. For instance, the Court of Quebec has jurisdiction over civil cases in which the value of property or claim does not exceed $85,000, as well as in matters of adoption.[58] In such civil cases, it applies the *Civil Code of Quebec*. Specific Quebec legislation also grants jurisdiction to this court (*Highway Safety Code*[59], *Code of Penal Procedure*[60] for trying provincial

---

46 *Kingstreet Investments Ltd v New Brunswick (Finance), 2007 SCC 1*, [2007] 1 SCR 3.
47 *Quebec (Attorney General) v Canada (Attorney General), 2015 SCC 14*, [2015] 1 SCR 693.
48 *Constitution Act, 1867*, *supra* note 29, art 99.
49 *Code of civil procedure*, CQLR, c C-25.01, art 35.1 [*Code of civil procedure*]. For claims above $66,000, this limit has been declared unconstitutional, because it reduces the core jurisdiction of the Quebec Superior Court: *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27.
50 *Civil Code of Quebec*, SQ 1991, c 64 [*CcQ*].
51 *Act respecting land use planning and development*, CQLR c A-191, art 227.
52 *Divorce Act*, RSC 1985, c 3, s 3(1).
53 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 183 (1.1).
54 *Canada Business Corporations Act*, RSC 1985, c C-44, s 2(1).
55 *Criminal Code*, RSC 1985 c C-46, s 2 s.v. "superior court of criminal jurisdiction".
56 *Extradition Act*, SC 1999, c 18, art 69.
57 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3.
58 *Code of civil procedure*, *supra* note 49, art 35.
59 *Highway Safety Code*, CQLR c C-24.2, s 76.1.6.
60 *Code of Penal Procedure*, CQLR c C-25.1, art 3.

offences, *Youth Protection Act*[61], municipal or school board taxes, *Taxation Act*[62] and *Tax Administration Act*[63], etc.) The same holds true for various federal laws (*Criminal Code* for less serious crimes,[64] *Youth Criminal Justice Act*[65], *Mutual Assistance in Criminal Matters Act*).[66]

To muddy further the waters, the Canadian Parliament can constitute a special Court having jurisdiction over some specific federal legislation. This jurisdiction may be exclusive, or concurrent with the superior courts of the various provinces. Examples include intellectual property law, maritime law, immigration law, income tax law, citizenship.[67] The most important of these courts is the Federal Court; apart from the jurisdiction granted by the acts just mentioned, it can review some administrative decisions.[68] The Tax Court of Canada and military courts have also been constituted by federal legislation.[69]

In each province, a court of appeal reviews the judgments of the superior court of the province and of the provincial court, within the limits imposed by federal or provincial legislation (for instance, the *Criminal Code*[70] or the *Quebec Code of Civil Procedure*).[71] The Federal Court of Appeal hears appeals from judgments of the Federal Court and the Tax Court of Canada; it can review decisions made by various tribunals and agencies.[72] The justices of all these courts are appointed by the federal government.

Until 1949, the Judicial Committee of the Privy Council sitting in London was the Court of last resort for Canada.[73] Since 1949, judgments of the Supreme Court of Canada can no longer be appealed. That same year, an amendment provided that three of the nine justices must be appointed from the Quebec Bar or from the courts of the province of Quebec.[74] The composition of the court and its essential features are protected by the *Constitution Act, 1982*;[75] these include its independence and its status as a court of last resort, including in matters of constitutional interpretation.[76]

The Court can grant leave to appeal from any judgment rendered by a provincial Court of Appeal, by the Federal Court of Appeal and even, in exceptional circumstances, by a lower court whose decision is final, because no appeal is legally

---

61 *Youth Protection Act*, CQLR c P-34.1, s 1 (g).
62 *Taxation Act*, CQLR c I-3; *Code of civil procedure*, *supra* note 49, art 36.
63 *Tax Administration Act*, RSQ c A-6002; *Code of civil procedure*, *supra* note 49, art 36.
64 *Criminal Code*, *supra* note 55, s 2 s.v. “court of criminal jurisdiction”.
65 *Youth Criminal Justice Act*, SC 2002, c 1, s 14 (6).
66 *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c 30 (4th Supp), s 22.02 (2).
67 *Citizenship Act*, RSC, 1985 c C-29, s 2 (1).
68 *Federal Courts Act*, RSC, 1985 c F-7, arts 18-28.
69 *Tax Court of Canada Act*, RSC 1985, c T-2; *National Defence Act*, RSC 1985, c N-5, arts 167-75, 234.
70 *Criminal Code*, *supra* note 55, arts 673-96.
71 *Code of civil procedure*, *supra* note 49, arts 29, 30.
72 *Federal Courts Act*, *supra* note 68, ss 27(1), 27(1.1), 28.
73 *An Act to amend the Supreme Court Act*, SC 1949 (2nd Sess), c 37, art 3 [*An Act to amend the Supreme Court Act*].
74 *An Act to amend the Supreme Court Act, supra* note 57, art 1.
75 *Constitution Act, 1982*, *supra* note 5, s 41(d).
76 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

possible.[77] In a few cases, an appeal as of right is provided, such as when a justice dissents in a criminal case heard by a Court of Appeal.[78] The Supreme Court of Canada can decide to hear cases in any area of the law, whether provincial or federal, including cases in which the *Civil Code of Quebec*[79] must be interpreted. It hears about 60 cases per year and issues lengthy judgments, like courts of last resort in other common law countries.

Finally, it should be mentioned that a plethora of federal or provincial boards, agencies and tribunals administer specific legislative regimes (Canada Pension Plan, *Employment Insurance Act*, health and safety legislation, preservation of agricultural lands and agricultural activities, etc.).

C. REFERENDA, THE COURTS AND THE *CONSTITUTION ACT, 1982*

In 1976, the Parti Québécois won the provincial election in Quebec. Its first objective was to achieve the independence of Quebec following a successful referendum. It hoped to obtain a mandate to negotiate the terms of the accession of Quebec to the status of a sovereign State. The argument was that this would guarantee the survival of the Quebec culture and the French language; the government would also be in a better position to pursue different socio-economic policies. However, in the 1980 referendum, 59,56 % of voters answered no to the question asked.[80] This set the stage for the complicated process that would lead to the "patriation" of the *Constitution*, in 1982.

Until 1982, only the British Parliament could amend the core provisions of the *Canadian Constitution*,[81] at the request of the Canadian Government, the Senate and the House of Commons, because the federal Government and the provinces could not agree on a local amending formula. Prime Minister Pierre Elliot Trudeau made it a personal priority to rectify this embarrassing situation and to give a constitutional status to fundamental rights and freedoms. On the eve of the 1980 referendum, he made a solemn pledge to reform the *Canadian Constitution*.[82]

In 1981, the first attempt at reforming the *Canadian Constitution* garnered only the support of two provinces. This unilateral patriation project having been challenged by some provinces, the Supreme Court of Canada declared that there was a constitutional convention requiring "a substantial degree of provincial consent" to constitutional amendments, although the fulfilment of this condition was "to be

---

77 *Supreme Court Act*, RSC (1985), c S-26, art 40.

78 *Criminal Code*, *supra* note 55, s 692(3)a).

79 *CcQ*, *supra* note 50.

80 Robert Hudon, Dominique Millette & Emmanuelle Lambert, "Quebec Referendum (1980)" (last modified March 6 2017), online: *The Canadian Encylopedia* <www.thecanadianencyclopedia.ca/en/article/quebec-referendum-1980> [Robert Hudon, Dominique Millette & Emmanuelle Lambert].

81 *Constitution Act, 1867*, *supra* note 29.

82 See Noura Karazivan & Jean Leclair, eds, *L'héritage politique et constitutionnel de Pierre Elliott Trudeau* (Markham: LexisNexis, 2020).

determined by the politicians and not the courts".[83] Further negotiations between the Prime Minister and the provincial premiers resulted in a proposal that was approved by all provinces, except Quebec. One important concession that the provincial premiers obtained was the notwithstanding clause of the *Canadian Charter of Rights and Freedoms* (see below, subpart V B).[84] All the parties represented in the National Assembly of Quebec condemned the agreement, but in the Canadian Parliament, the vast majority of members who represented Quebec ridings supported Trudeau (most were Liberals like him; they had been elected in 1980).

After its approval by the Senate and House of Commons, the *Constitution Act, 1982* was passed by the U.K. Parliament, which solemnly declared that no act that it adopted subsequently "shall extend to Canada as part of its law".[85] A few months later, the Supreme Court of Canada declared that there was no constitutional convention granting Quebec the power to veto a proposal to amend the *Canadian Constitution*.[86] The new *Constitution* did contain an amending formula, as well as the *Canadian Charter of Human Rights and Freedoms*[87], which has played such an important role for Canadian citizens of all walks of life.

In a nutshell, there are four classes of constitutional amendments: (1) those that require the consent of the House of Commons, the Senate and all provincial legislative assemblies; (2) those that require the consent of the Commons, the Senate and two-thirds of provincial legislative assemblies representing at least 50 % of the Canadian population; (3) those that require the consent of the Commons, the Senate and the assemblies of the provinces to which the amendment applies. In all these cases, the consent of the Senate can be dispensed with 180 days after the adoption of an amending resolution by the Commons; (4) the fourth class comprises amendments made by ordinary legislation.[88]

Class (1) applies to modifications pertaining to the crown and its representatives (i.e. the Governor General in Ottawa and the lieutenant governors in the provinces); the right of a province to a minimum number of members in the House of Commons; the use of French and English in all provinces and in Canada generally; the composition of the Supreme Court of Canada; and the amending formula.[89] Class (2) is the default rule.[90] Class (3) covers such issues as the boundaries between provinces, some linguistic provisions and the protection of the educational institutions of religious

83 *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 904-05; François Boulianne, "Le rapatriement constitutionnel de 1982: existait-il une coutume constitutionnelle nécessitant l'accord unanime des provinces pour modifier la Constitution" (2014) 55:2 C de D 329.

84 *Canadian Charter*, *supra* note 7, art 33.

85 *Constitution Act, 1982*, *supra* note 5.

86 *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793.

87 *Canadian Charter*, *supra* note 7.

88 *Constitution Act, 1982*, *supra* note 5; Benoît Pelletier, "La valse-hésitation des cours de justice en ce qui touche à l'interprétation des modalités de modification constitutionnelle au Canada" (2017) 47:1 RDUS 57.

89 *Constitution Act, 1982*, *supra* note 5, art 41.

90 *Ibid*, art 38.

minorities (see below, subpart IV C).[91] Finally, examples of class (4) modifications include electoral laws and changes to the names or responsibilities of government departments, both for federal and provincial institutions.[92]

This power of unilateral amendment has generated some controversy recently, because of a Quebec statute adding two sections to the *Constitution Act, 1867*.[93] The first one would provide that "Quebecers form a nation"; the second, that French is "the only official language of Quebec" and "the common language of the Quebec nation". This enactment could apply only to issues governed by provincial law. For this reason, the House of Commons has acknowledged that the National Assembly can make this change.[94]

No amendment ever received the unanimous support of the provinces. In 1984, an amendment concerning the rights of Aboriginal Peoples was adopted using the class (2) procedure.[95] Some amendments applicable to one province only were approved, but they were not controversial.[96] One should also mention the 1987 *Meech Lake Accord*, which tried to assuage the concerns of Quebec by reforming the composition of federal institutions and by adding to the *Canadian Constitution* an interpretive clause recognizing that Quebec was a distinct society within Canada. In 1990, it failed to obtain the consent of 10 legislative assemblies within the three-year deadline imposed for all constitutional amendments.[97] In 1992, the *Charlottetown Accord* substantially modified the *Meech Lake Accord* and included an important commitment to put in place Aboriginal governments. It was rejected in a national referendum (which was consultative only).[98]

In 1995, the Parti Québécois government organized a second referendum on full sovereignty. The "no" side garnered only 50,58 % of the ballots cast.[99] Following this, the federal government asked the Supreme Court of Canada to clarify the rules applicable to a unilateral attempt at secession.[100] The result was unexpected: although the Court did not recognize a right to secede unilaterally, it declared that if there ever was "a clear majority vote in Quebec on a clear question in favour of secession",[101] the

---

[91] *Ibid*, art 43.

[92] *Ibid*, arts 44–45; many sections of the *Constitution Act, 1982* can be amended by ordinary legislation: see *Constitution Act, 1867*, *supra* note 29 arts 12, 18, 40-41, 45, 51-52, 63-64, 78-80 and 83; see, however, Michel Morin, *Une province peut-elle modifier la Partie V de la Loi constitutionnelle de 1867 portant sur les constitutions provinciales? Une analyse historique* (forthcoming, 2023).

[93] *An Act respecting French, the official and common language of Québec*, SQ 2022, c 14, art 166.

[94] *House of Commons Journals*, 43-2, *supra* note 4.

[95] *Constitution Amendment Proclamation,* 1983, SI/84-102.

[96] See e.g. *Constitutional Amendment*, 1997 (Québec), SI/97-141.

[97] Gerald L Gall, Gord McIntosh, Richard Foot and Andrew McIntosh, "Meech Lake Accord" (last modified 27 April 2020), online: *The Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/meech-lake-accord>.

[98] Gerald L Gall, Gord McIntosh, Richard Foot and Andrew McIntosh, "Charlottetown Accord" (last modified 4 August 2022), online: *The Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/the-charlottetown-accord>.

[99] Hudon, Millette & Lambert, *supra* note 80.

[100] *Secession of Quebec*, *supra* note 5.

[101] *Ibid* at para 150.

underlying principles of the *Canadian Constitution* demanded that the other provinces and the federal government enter into good faith negotiations with Quebec. These negotiations could fail but holding them was a constitutional imperative for both sides. The Court would exercise no supervisory role over the political aspects of these negotiations or ascertain if there was indeed a clear majority on a clear question; this would be subject only to political evaluation. On the other hand, a good faith but ultimately unsuccessful attempt to negotiate the terms of secession "would weigh in favour of international recognition".[102] Many believe that these events have left profound scars on the body politic. Currently, no politician seems willing to contemplate a constitutional amendment that will ultimately fail after heated controversies.

Another objective of the 1982 reform was to prevent legislative interference with fundamental rights and freedoms or their outright suppression. Therefore, part I of the *Constitution Act, 1982*, contains the *Canadian Charter of Rights and Freedoms*. It protects freedom of religion, of conscience, of expression, of assembly and of association, the right to vote and to be a candidate, mobility rights, rights of persons detained, charged or otherwise threatened with penal sanctions, equality rights (i.e. protection against discrimination) and linguistic rights.[103] It applies to legislation and governments (both federal and provincial), but not to private citizens, whose fundamental rights are protected by human rights codes or similar legislation and, in Quebec, by the *Charter of Human Rights and Freedoms* (see below, subpart V A).[104] Since the *Charter* is part of the "supreme law of Canada", any law that conflicts with its provisions is, "to the extent of the inconsistency, of no force or effect".[105]

This part has focused on constitutional developments related to the aspirations of Quebec to strengthen and increases its legislative and executive powers.[106] The division of powers ensures that it controls the development of its private law, educational system, natural resources (except fisheries), health care, labour relations, etc. Its policies may differ from those of other provinces, and within its sphere of competence, it may ignore the priorities of the federal government. It can influence economic development, although the federal government plays an important role in this field, notably through grants or subsidies. As for the court system, the Superior Court and the Court of Quebec can apply almost any law that grants them jurisdiction over an issue, no matter if it is federal or provincial. However, the jurisdiction of the Federal Court is restricted to federal legislation. A court of last resort, the Supreme Court of Canada may hear cases pertaining to federal or provincial law (and, of course, the *Canadian Constitution*).

---

[102] *Ibid* at para 143. See also *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26; *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, CQLR c E-202; Jean Leclair, "Constitutional Principles in the Secession Reference" in Oliver, Macklem & Des Rosiers, *supra* note 41, 1009; Anthony Beauséjour & Daniel Turp, "Affaire Henderson sur la constitutionnalité de la Loi 99: la relecture fédérale du Renvoi relatif à la sécession du Québec" (2019) 53:3 RJTUM 367.

[103] *Canadian Charter*, *supra* note 7.

[104] *Quebec Charter*, *supra* note 9.

[105] *Constitution Act, 1982*, *supra* note 5, art 52.

[106] *Constitution Act, 1867*, *supra* note 29.

This part has also described the momentous changes that resulted from the 1980 referendum and led to the adoption of the *Constitution Act, 1982*.[107] A formula was devised whereby the Senate, the House of Commons and a number of legislative assemblies (in a few cases, all of them) can amend the *Canadian Constitution*. Following the almost successful 1995 referendum, the Supreme Court of Canada declared that "a clear majority vote in Quebec on a clear question in favour of secession" would impose on the federal government and on the provinces a duty to negotiate in good faith with the Quebec Government.[108] Furthermore, controversial judicial rulings have become common in Canada with the advent of the *Canadian Charter of Rights and Freedoms*:[109] access to abortion, the legalization of same-sex marriage and medical assistance for inducing the death of the terminally-ill were all made possible in Canada because of court judgments.[110]

III. THE JURIDICAL FEATURES OF QUEBEC'S DISCTINCT SOCIETY

Thanks to its sovereign legislative powers, Quebec has been able to protect some distinctive features of its society. Notwithstanding the pressures of neighbouring common law jurisdictions, it has consolidated its civil law heritage; this will be discussed in subpart A. As for language, it has moved from mandatory bilingualism to an official recognition of the French language. However, as we will explain in subpart B, important parts of this legislation have been struck down. In the realm of education, provisions on linguistic rights have also been jeopardized by the adoption of the *Canadian Charter of Human Rights and Freedoms*, as will be seen in subpart C.

a) CIVIL LAW AND COMMON LAW

Since 1866, when the *Civil Code of Lower Canada* came into force, the civil law tradition has been strengthened and modernized in Quebec.[111] In the sixties, during

---

107 *Constitution Act, 1982*, *supra* note 5.

108 *Secession of Quebec*, *supra* note 5 at para 150.

109 *Canadian Charter*, *supra* note 7.

110 See *infra,* subpart V b).

111 John E C Brierley & Roderick Macdonald, eds, *Quebec Civil Law - An Introduction to Quebec Private Law* (Toronto: Emond Montgomery Publications, 1993); Sylvio Normand, "An Introduction to Quebec Civil Law" in Aline Grenon and Louise Bélanger-Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Carswell, 2008) 25 [Normand, "Introduction"]; Michel Morin, "Dualism, mixedness and cross-breeding in legal systems: Quebec and Canadian law" in Jean Paul Saucier Calderón, ed, *Viajes y fronteras de la enseñanza del derecho comparado* (Lima: Pontifica Universidad Católica del Perú, Departamento Académico de Derecho y Centro de Investigación, Capacitación y Asesoría Jurídica, 2019) 151 [Morin, "Dualism"]; Sylvio Normand, "La célébration du centenaire du Code civil du Bas-Canada: moment propice à l'écriture d'un nouveau récit" (2021) 55:1 RJTUM 193 [Normand, "La célébration"].

the Quiet Revolution, the Catholic religion waned.[112] College, universities and health institutions became public and were funded or largely subsidized by the Quebec government, who tightly controlled their activities. Like other western countries, Quebec became very liberal on moral issues. The law reflected these new values: the right to divorce was recognized for the first time in 1968 (by way of a federal statute);[113] that same year, civil marriage became possible.[114] The law became much more protective of persons considered vulnerable when they entered into a contract, such as consumers,[115] tenants,[116] and insurers.[117] Labour law now protected more effectively the right to unionize and to strike.[118]

All these changes led to the decision to recodify the civil law, a process that began in 1955 and culminated with the adoption in 1991 of the *Civil Code of Quebec*.[119] The new *Code* came into force in 1994. Its contents are what you would expect if you were even vaguely familiar with the civil law tradition. It comprises ten books that deal, respectively, with the law of persons (including birth, marriage and death certificates), family, successions, property, obligations and contracts, securities for the performance of obligations, evidence, prescription, publication of rights and private international law. In the other provinces and territories, rules on these subjects are scattered in judge-made law or in legislation. As an aside, we note that when parties live or do business in different provinces the question arises as to which provincial law will apply to their legal relations, and which jurisdiction will be competent if there is a dispute between them? The answer depends on the provincial rules of private international law.

The structure and contents of the *Quebec Civil Code* do not differ markedly from those of other civil codes, although there are some original features: the trust, introduced by legislation in 1879[120], is now regulated by the code; using civil law concepts, securities have been redefined so that their scope can be equivalent to those of common law jurisdictions; the *Code of Civil Procedure*[121] empowers the Superior

---

[112] René Durocher & Dominique Millette "Quiet Revolution" (last modified 4 March 2015), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/quiet-revolution>.

[113] *Divorce Act*, SC 1968-1969, c 24.

[114] *An Act respecting civil marriage*, SQ 1968, c 82.

[115] *Consumer Protection Act*, RSQ, c P-40.

[116] *An Act to establish the Régie du logement and to amend the Civil Code and other legislation*, SQ 1979, c 48.

[117] *An Act respecting insurance*, SQ 1974, c 70.

[118] *Labour Code*, CQLR c C-27.

[119] *CcQ*, *supra* note 50; John E C Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec" (1992) 42 UTLJ 484; Jean-Louis Baudouin, "Quo Vadis?" (2005) 46:1-2 C de D 613; Serge Lortie, Belley Kasirer & Jean-Guy Belley, eds, *Du Code civil du Québec. Contribution à l'histoire immédiate d'une recodification réussie* (Montréal: Éditions Thémis, 2005); Normand, "Introduction", *supra* note 111; Normand, "La célébration", *supra* note 111; Jean-Louis Baudouin, "What does the future hold for the Civil Code of Quebec?" (2009) 88:1 Can Bar Rev 506; Jean Pineau, "A Very Brief History of a Recodification and Its Problems" (2009) 88:1 Can Bar Rev 223; Morin, "Dualism", *supra* note 111; Michel Morin, "Reinforcing the French legacy while borrowing from the common law: the Civil Code of Quebec (1991)" in Michele Graziadei & Lihong Zhang, eds, *The Making of the Civil Codes: A Twenty-first Century Perspective* (Singapore: Springer Nature Singapore Pte, forthcoming) [Morin, "Reinforcing"].

[120] *An Act respecting Trusts*, SQ 1879, c 29.

[121] *Code of civil procedure*, *supra* note 49, arts 509-15.

Court to grant injunctions, a common law remedy. Nonetheless, the phraseology is typical of civil-law jurisdictions: its articles are brief, general, elegant (in most cases) and open-ended. Its outline is very logical, systematic, even user-friendly.

The influence of the common law is also apparent in the style of judgments rendered in Quebec, whether written in French or in English. These decisions contain a lengthy review of the facts, arguments, case law and legal literature. This is true both for public law issues (i.e. common law) and for civil law issues. In this regard, as well as for rules of civil procedure and evidence, there is little difference between Quebec courts and their counterparts in other provinces. On the other hand, there is little resemblance to French courts, or with courts in other civil law jurisdictions.[122]

As for their contents, the reasoning is much more logical, focuses on concepts and pays high regards to doctrinal opinions. Indeed, since 1918, following repeated complaints from Quebec's legal community, the Supreme Court of Canada has stressed that in civil law cases, common law precedents do not carry any particular weight.[123] Furthermore, it underlined that civil law methodology should be closely adhered to, even if this leads to a result that would have been completely different in a case coming from another province.

Legal practitioners are generally proud of the *Civil Code*. The civil law tradition has also taken root and prospered in the anglophone community, most notably at McGill University[124], but also because many anglophone students from Quebec complete their law degree in a Francophone law school. On the other hand, the civil law literature of France has played an essential role in the modernization of the legal system of Quebec.

For public law issues, legislation and court decisions are anchored in the common law tradition. This is the case for the criminal law, even though a Canadian *Criminal Code* was adopted in 1892.[125] However, it was based on the English draft prepared by James Fitzjames Stephen in 1877, which was never adopted by the British Parliament. The Canadian *Criminal Code* contains procedural as well as substantive rules, but is not structured logically like continental codes, nor does it contain short and illuminating articles, far from it.[126] Moreover, "[e]very rule and principle of the

[122] Jean-Louis Baudouin, "L'art de juger en droit civil: réflexion sur le cas du Québec" (2016) 57:2 C de D 327–338; Pierre Dalphond, "Le style civiliste et le juge: le juge québécois ne serait-il pas le prototype du juge civiliste de l'avenir ?" in Nicholas Kasirer, ed, *Le droit civil, avant tout un style?* (Montréal: Éditions Thémis, 2003) 81.

[123] Rosalie Jukier, "Canada's Legal Traditions: Sources of Unification, Diversification, or Inspiration?" (2018) 11:1 J Civil L Studies 1; Daniel Jutras, "Cartographie de la mixité: la common law et la complétude du droit civil au Québec" (2009) 88:2 Can Bar Rev 247; Morin, "Dualism", *supra* note 111; Morin, "Reinforcing", *supra* note 119.

[124] Ian C Pilarczyk, *A Noble Roster: One Hundred and Fifty Years of Law at McGill* (Montreal: McGill University Press, 1999).

[125] *Criminal Code*, SC 1892, 55-56 Vict, c 29; Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: Osgoode Society, 1989).

[126] Michel Morin, "*Portalis v. Bentham*? The Objectives Ascribed to Codification of the Civil Law and Criminal Law in France, England and Canada" in Law Commission of Canada et al, eds, *Perspectives*

common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force".[127]

Therefore, many fundamental rules and principles are nowhere to be found in the *Criminal Code*; rather, they are located in case law (i.e. court decisions). For instance, an accused cannot be convicted unless his or her guilt is proven beyond reasonable doubt. However, this rule does not appear in the *Criminal Code*; it is purely judge-made law. So criminal cases in Quebec involve both incomplete legislation (i.e. the Canadian *Criminal Code*) and common law rules. As we shall see presently, the criminal law is also administered in both French and English.[128]

b) LINGUISTIC RIGHTS

In 1867, the *Canadian Constitution* recognized few linguistic rights. Canadian and Quebec legislation had to be adopted in both French and English, as well as parliamentary documents.[129] In the Canadian Parliament and in the Quebec legislature, members could use either of these languages. Lawyers, judges and lay persons could do the same before the courts of Quebec and before courts constituted by Parliament (nowadays, the Federal Court, Tax Court of Canada, military courts, the Federal Court of Appeal and the Supreme Court of Canada). In 1870, this regime was rendered applicable to the new province of Manitoba, where a majority of the population was Francophone (this would soon change because of immigration).[130] Elsewhere, the official language was English, both in the legislature and before the courts of the province. However, in 1978, the *Criminal Code* was amended to recognize the right of an accused to choose to be tried in either French or English, everywhere in Canada.[131]

Since the sixties, Francophones in Quebec and in Canada have waged political battles, with some success, to increase or strengthen their right to use the French language or to receive their instruction in French, because in most provinces, after one or two generations, many descendants of Francophones became Anglophones. In 1969, Canada adopted the *Official Languages Act*[132], to ensure that governmental services would be available in both languages where it was justified locally by the size of the linguistic minority. The new law encouraged civil servants to learn another official language and to increase the number of Francophones holding high-level governmental positions. It also provided for the translation of government documents and judgments

on Legislation: Essays form the 1999 Legal Dimensions Initiative (Ottawa: Law Commission of Canada, 2000) 139.

[127] *Criminal Code*, *supra* note 55, s 8(3).

[128] See Nicholas Kasirer, "The Annotated Criminal Code en version québécoise: Signs of Territoriality in Canadian Criminal Law" (1990) 13 Dal LJ 520, see especially Part II.

[129] *Constitution Act, 1867*, *supra* note 29; Michel Doucet & Michel Bastarache, eds, *Les droits linguistiques au Canada*, 3rd ed (Montréal: Yvon Blais, 2014).

[130] *Manitoba Act*, 1870, SC 1870, c 3; Emmet Collins & Clayton May, "Francophones of Manitoba" (last modified 30 November 2020), online: *The Canadian Encylopedia* <www.thecanadianencyclopedia.ca/en/article/francophones-of-manitoba>.

[131] *An Act to amend the Criminal Code*, SC 1977-1978, c 36, ss 1, 6(7).

[132] *Official Languages Act*, SC 1968-1969, c 54.

from the Federal Court and the Supreme Court of Canada. That same year, similar legislation was passed in New Brunswick,[133] where Francophones represent about a third of the population.[134] Ontario followed suit in 1986,[135] even though Francophones account for around 5 % of the population in that province.[136] However, these laws do not form part of the *Canadian Constitution*.

In 1977, the National Assembly of Quebec adopted the *Charter of the French Language* (colloquially known as *Bill 101*).[137] This legislation contained some measures that would prove to be extremely contentious. First, legislative bills were to be drafted, passed and assented to in French. Although an English version would be published, only the French text of statutes and regulations would be considered official. In 1979, the Supreme Court of Canada struck down this disposition, based upon the 1867 constitutional requirement that laws be adopted in both languages.[138] Restrictions to the right to draft court documents in English were also found to be unconstitutional. Second, the *Charter of the French Language* required documents pertaining to marketing or administrative matters in the private sector, as well as signs, posters and commercial advertising, to be written in French (with some exceptions).[139] In 1988, the Supreme Court of Canada also declared these provisions to be invalid (see subpart V B). Finally, the *Charter of the French Language* prevented some parents from sending their children to an English-language school (see subpart IV C).

In 1982, the *Canadian Charter of Rights and Freedoms* gave constitutional protection to some linguistic rights at the federal level and in New Brunswick. These drew on provisions found in the *Constitution Act of 1867*[140] that applied to both federal and Quebec institutions (and which are still applicable), as well as on the *Official Languages Act*[141] in force in each of these jurisdictions. It also contained educational rights which we will examine in the next subpart.

c) RELIGION AND LANGUAGE IN THE SCHOOL SYSTEM

The *Constitution Act, 1867*[142] had no provision on the language of education. At the time, schools were organized and managed along religious lines. The *Canadian Constitution* protected the existing rights and privileges of the Protestant minority in Quebec, and of Catholic minorities in other provinces.[143] In Quebec, almost all Protestants were Anglophones; indirectly, this had the effect of ensuring the existence of Anglophone schools (Catholic schools in Quebec were overwhelmingly

---

133 *Official Languages of New Brunswick Act*, SNB 1969, c 14.
134 Daniel Bourgeois & al, *Provincial and Territorial Government Contributions to the Development of Francophone Minority Communities: Assessment and Projections* (Moncton: Canadian Institute for Research on Linguistic Minorities, 2007) at 19.
135 *French Language Services Act*, RSO 1990, c F.32.
136 Bourgeois et al., *supra* note 134 at 19.
137 *Charter of the French Language*, CQLR c C-11.
138 *Quebec (AG) v Blaikie et al*, [1979] 2 SCR 1016.
139 *Charter of the French Language*, *supra* note 137, arts 22, 24, 58, 208.
140 *Constitution Act, 1867*, *supra* note 29.
141 *Official Languages Act*, *supra* note 132; *Official Languages of New Brunswick Act*, *supra* note 133.
142 *Constitution Act, 1867*, *supra* note 29.
143 *Constitution Act, 1867*, *supra* note 29, art 93.

Francophone, although they were some Anglophone ones). Subsequently, the courts held that the constitutional rights and privileges of religious minorities did not include the language of instruction.[144] Indeed, in public schools, teaching in French was prohibited in New Brunswick (1871-1875), Manitoba (1916-1955) and Ontario (1912-1927).[145] In 1997, a constitutional amendment repealed the protection granted to Quebec religious schools.[146] Schools in Quebec are now organized and managed along linguistic lines.

In 1977, the *Charter of the French Language* provided that, at the elementary and secondary level, a child could be educated in English only if at least one of his or her parent had received his or her elementary instruction in that language in Québec.[147] Parents who had been educated in English elsewhere in Canada, those who had been educated abroad (whether in English or in another language), and those who had been educated in French in Quebec, were obligated to send their children to a French public school. On the other hand, all those who could afford to do so could send their children to private schools operating in English.

In 1982, the *Canadian Charter of Human Rights and Freedoms* included educational rights for linguistic minorities. Canadian citizens who have learned outside of Canada the language of the English or French minority of the province where they now reside and who still understand it are entitled to have their children receive their primary and secondary school education in that language and in that province.[148] However, an exception reflects the perceived vulnerability of the French language in Quebec. In that province, immigrants who recently became Canadian citizens are not entitled to have their children receive their education in English, as long as the implementation of the relevant provision is not authorized by the legislative assembly or the government of Quebec, a possibility that has never been envisioned in the last 40 years.[149]

Another provision, which applies to all provinces, guarantees the rights of the children of Canadian citizens who have received their elementary education in Canada to receive education in the language of the minority of the province where they reside.[150] This conflicted with the requirement found in the *Charter of the French language* that this education be received in Quebec, rather than in Canada.[151] The relevant provisions were quickly declared unconstitutional in 1984.[152]

In general, the *Canadian Charter* qualifies the right to receive instruction in the language of the minority by the requirement that the number of potential beneficiaries be sufficient to warrant this expenditure of public funds, and large enough

---

144 *Ottawa Separate Schools Trustees v Mackell*, [1917] AC 62.

145 For references, see Michel Morin, "Introduction: la reconnaissance juridique de la diversité au Canada et au Maroc" in Frédéric Bérard, Jean Leclair & Michel Morin, eds, *La diversité culturelle et linguistique au Canada et au Maroc en droit interne et en droit international* (Montréal: Thémis, 2018) 1 at 6-7.

146 *Constitution Act, 1867*, *supra* note 29, s 93A; *Constitutional Amendment*, *supra* note 96.

147 *Constitution Act, 1867*, *supra* note 29, art 76.

148 *Constitution Act, 1982*, *supra* note 5, s 23(1) a).

149 *Ibid*, art 59.

150 *Ibid*, s 23(1) b).

151 *Charter of the French Language*, *supra* note 137.

152 *Quebec (AG) v Quebec Association of Protestant School Boards et al*, [1984] 2 SCR 66.

to justify providing educational facilities. Numerous judgments have forced provincial governments to provide these services or facilities to Francophone minorities. In Quebec, Anglophone institutions have also benefitted from the relevant provision. So, this document is associated by many Quebecers with the curtailing of the *Charter of the French language*.[153]

In this part, we have seen that recodification has strengthened the civil law tradition of Quebec. In Canada, linguistic rights were initially limited to the legislative and judicial contexts, in Quebec and at the federal level, as well as in Manitoba. In 1969, the federal *Official Languages Act*[154] substantially increased the obligations to provide services and documents in both French and English. For Quebec laws and regulations, the *Charter of the French language*[155] declared that only the French version would be official, but this was held unconstitutional by the Supreme Court of Canada. *The Canadian Charter* provided added constitutional protection to the linguistic rights of all Canadian citizens at the federal level, and for the people of New Brunswick. In Quebec, the *Charter of the French language*[156] also imposed the use of this language for advertising, public signs, and administrative matters in a commercial context, with some exceptions, but it was struck down in 1988.

In 1867, educational rights did not extend to language but were associated to religious rights. Since 1982, the *Canadian Charter* guarantees the right of linguistic minorities to have their children educated in their language where their numbers warrant this. In Quebec, this is qualified by the requirement that a parent had received his or her elementary education in English in Canada; the more restrictive rule of the *Charter of the French language*[157] (according to which this education should have been received in Quebec) has been struck down by the Supreme Court. However, parents who have been educated abroad do not enjoy similar rights. Overall, Quebec still retains a substantial control over linguistic and educational issues.

IV. FUNDAMENTAL RIGHTS AND THE CONTROVERSIAL ROLE OF COURTS

In Quebec, the role played by courts in the enforcement of fundamental rights has become controversial over time. In the seventies, there was a strong commitment to these rights. As explained in subpart A, this is exemplified by the adoption of specific human rights legislation in Quebec. In subpart B, we shall see that the Supreme Court of Canada resorted to this law to strike down provisions on the use of French in commercial advertising, initiating a debate on the supremacy of the *Canadian Constitution*. Following a series of unpopular decisions on religious issues, the Quebec legislature has recently

---

153 *Charter of the French Language*, *supra* note 137; but see, Frédéric Bérard, *Charte canadienne et droits linguistiques: pour en finir avec les mythes* (Montréal: Presses de l'Université de Montréal, 2017).
154 *Official Languages Act*, *supra* note 132.
155 *Charter of the French Language*, *supra* note 137.
156 *Ibid*.
157 *Ibid*.

decided to overhaul the principle of laicity and insulate it from constitutional challenges. This will be discussed in subpart C. Finally, subpart D will review the new constitutional rights of Aboriginal Peoples, which have not escaped criticism either.

a) THE QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS (1975)

The Charter of Human Rights and Freedoms (best known as the *Quebec Charter*) was adopted in 1975.[158] Following this, the Quebec Government ratified the *International Covenant on Civil and Political Rights* (*ICCPR*).[159] *The Quebec Charter* prohibits discrimination on the basis of

> race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap

in the context of private dealings (i.e. for contracts, wills, labour relations, tenancies, and goods or services ordinarily offered to the public).[160] This prohibition also applies to the Quebec government and to Quebec legislation, unless the National Assembly expressly declares that a given law will apply despite the *Charter*.[161] Therefore, in general, if it is challenged, a statute that infringes a fundamental right guaranteed by the *Quebec Charter* will be declared invalid by a court of law, as if it was unconstitutional, even though the *Quebec Charter* can be amended like ordinary legislation. Exceptionally, however, a statute can be immunized against the *Quebec Charter*, if a government so chooses. Furthermore, the *Quebec Charter* is not part of the *Canadian Constitution*, and it could theoretically be repealed tomorrow by a simple majority vote of the National Assembly.

All provinces have an analogous statute that prohibits discrimination in private dealings. Quebec generally took the lead in this field. For example, in 1977, an amendment added sexual orientation to the prohibited grounds of discrimination.[162] This was a first in Canada and the U.S.A. (except at the municipal level) and it was not controversial. The next province to follow suit was Ontario, in 1986, but there was considerable opposition to this measure at the time.[163] *The Pay Equity Act* (1996), whose purpose "is to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes", is another example of Quebec's innovative approaches.[164] Correspondingly, Quebec heavily subsidizes childcare services, which is not the case in other provinces.[165]

---

[158] *Quebec Charter*, *supra* note 9.
[159] Executive Council Chamber, *Arrêté-en-conseil*, 1438-76 (21 April 1976) at 4.
[160] *Quebec Charter*, *supra* note 9, arts 10, 13, 16-20.
[161] *Ibid*, art 52; Pierre Bosset & Michel Coutu, "Acte fondateur ou loi ordinaire? Le statut de la Charte des droits et libertés de la personne dans l'ordre juridique québécois" (2015) Hors-série RQDI 37.
[162] *Act to amend the Charter of human rights and freedoms*, SQ 1977, c 6, art 1.
[163] *Equality Rights Statute Law Amendment Act*, SO 1986, c 64.
[164] *Pay Equity Act*, CQLR c E-12.001, art 1.
[165] *Educational Childcare Act*, CQLR c S-411, arts 89ff.

b) EXCEPTIONS TO THE SUPREMACY OF THE CONSTITUTION

The Canadian Charter provides two important exceptions to the principle of constitutional supremacy. First, courts may decide that even though a given law is inconsistent with a provision of the *Canadian Charter*, this legislation represents a reasonable limit prescribed by law as can demonstrably be justified in a free and democratic society.[166] In other words, the court will decide, first, that there has been an infringement to the *Charter*, and second, that this was done in a limited way that is justifiable in a free and democratic society. One striking example is the lack of protection in Quebec for unmarried spouses, who, unlike those that live in other provinces, have no right to financial support or to a share of the family assets after the breakdown of their relationship (although their rights as parents do not vary on account of marriage). In 2013, the Supreme Court of Canada held that this lack of protection violated women's right to equality, but that it was a reasonable limit, designed to promote choice and autonomy in Quebec with respect to property division and support, in the context of rapidly changing attitudes with respect to marriage.[167]

The second exception is the notwithstanding clause. As mentioned above, this was a political compromise made in 1981. It applies only to Articles 2 (freedom of religion, conscience, expression, assembly, association), 7 to 14 (pertaining to the criminal law) and 15 (equality rights).[168] The Canadian Parliament or a provincial legislature may shield one of its statutes from a constitutional challenge, by stating clearly that this legislation (or a part of it) will apply notwithstanding the constitutional provisions just mentioned. In such a case, the court is powerless to decide if the law infringes these provisions. The notwithstanding clause lapses five years after it comes into force (or at the end of a lesser period specified in the clause), but it can be reenacted as often as is deemed necessary.[169]

In 1982, the National Assembly added the notwithstanding clause to every single law in force in Quebec and to all those that were adopted subsequently, until the Parti Québécois lost power in 1985.[170] These clauses were allowed to lapse, but this across-the-board approach had already been challenged in court. In 1988, the Supreme Court held that the clause was complete and unambiguous and should be given effect. In that case, it was faced with a constitutional challenge to the provisions of the *Charter of the French Language* imposing the use of the French language in commercial advertising and public signs.[171] Because of the notwithstanding clause, the Court declined to examine the potential conflict between the challenged legislation and the right to freedom of expression guaranteed by the *Canadian Charter*.[172] However, the "notwithstanding clause" of the *Quebec Charter* had not been resorted to. Therefore, the Court found the statute to be in violation of the right to freedom of expression

166 *Canadian Charter*, *supra* note 7, art 1.
167 *Quebec (AG) v A*, [2013] 1 SCR 61.
168 *Canadian Charter*, *supra* note 7, s 33(1).
169 *Ibid*, s 33(3)(4).
170 *An Act respecting the Constitution Act*, SQ 1982, c 21.
171 *Charter of the French Language*, *supra* note 137.
172 *Ford v Quebec (AG)*, [1988] 2 SCR 712.

protected by the latter *Charter*. It also held that the exclusive use of French had not been adequately justified as a reasonable limit on freedom of expression, because it could coexist with any other language, or it could be required to have greater visibility, even a "marked predominance",[173] instead of being entirely prohibited.

In 1988, the Liberal government of Quebec decided that exterior commercial advertising and public signs should be written exclusively in French; indoors, French should be markedly predominant.[174] This legislation included a notwithstanding clause applying to both the Canadian and the Quebec charters that shielded it from constitutional challenges. This caused an outcry that was a major factor in the failure of the *Meech Lake Accord*. Following this, some Anglophone merchants brought this matter to the Human Rights Committee of the United Nations. In 1993, the Committee held that the right to freedom of expression guaranteed by the *International Covenant on Civil and Political Rights* had been infringed.[175] As a result, the *Charter of the French language*[176] was amended to allow the use of more than one language in outdoor and indoor advertising or public signs, with a marked predominance of French.

Compared to other provinces, Quebec has felt comfortable using the notwithstanding clause to prevent judicial review of its legislation.[177] But this is not to say that *Charter* rulings of the Supreme Court of Canada were uncontroversial in other provinces, far from it. Restrictions on, or the outright prohibition of, abortion,[178] same-sex marriage,[179] medically supervised death for terminally ill patients,[180] and strikes in the public sectors,[181] have all been found to conflict with the *Charter*. Stay of proceedings have been regularly granted to enforce the right of accused persons to be tried within a reasonable time.[182] In a word, the social policies and values of Canadian society are shaped to a large extent by the judgments of the Supreme Court of Canada.

c) LAICITY

Starting in 2004, the Supreme Court of Canada has handed down judgments affirming the right to practise a religious activity or to wear a religious sign in a public context.[183] This started a period of intense debate on the appropriateness of regulating

---

[173] *Ibid* at para 73.

[174] *An Act to amend the Charter of the French language*, SQ 1988, c 54.

[175] *Ballantyne, Davidson, McIntyre v Canada*, Communications Nos 359/1989 and 385/1989, UNHRC, 47th sess, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev 1 (1993).

[176] *An Act amending the Charter of the French language*, SQ 1993, c 40.

[177] Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47:2 RGD 343.

[178] *R v Morgentaler*, [1988] 1 SCR 30.

[179] *Reference re Same-sex marriage*, 2004 SCC 79; technically, the Court did not overrule the lower court judgments granting the right to marry same-sex couples.

[180] *Carter v Canada (AG)*, 2015 SCC 5.

[181] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

[182] *R v Jordan*, 2016 SCC 27; *R v Cody*, 2017 SCC 31.

[183] *Syndicat Northcrest v Amselem*, 2004 SCC 47; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *Bruker v Marcovitz*, 2007 SCC 54.

or prohibiting the wearing of a visible religious sign (notably, but not only, the Islamic veil, whether or not it covers the face of the woman wearing it). In 2019, the government of the Coalition Avenir Québec, which had been elected the previous year, adopted *An Act respecting the laicity of the State* (also known as *Bill 21*).[184]

This legislation assumes that "a stricter duty of restraint regarding religious matters should be established for persons exercising certain functions, resulting in their being prohibited from wearing religious symbols in the exercise of their functions", except if they already held specific positions at the time the bill was introduced.[185] The list of persons subject to this prohibition may be summarized in the following way:[186]

the President and Vice-Presidents of the National Assembly;

court officials;

members of administrative agencies or tribunals;

arbitrator for labour disputes;

legal professionals working for the Government, such as public prosecutors;

peace officers;

principals, vice principals and teachers of public educational institutions (as opposed to private ones).

Next, the legislation provides that members of designated bodies must exercise their functions with their face uncovered. These bodies include:

government departments and agencies;

bodies funded by the Quebec Government, or whose personnel is appointed in accordance with the Public Service Act;

municipalities, municipal bodies, and public transit authorities;

public educational institutions, and private educational institutions subsidized by the Government, including universities;

public institutions providing health services and social services, and similar private institutions subsidized by the government;

bodies the majority of whose members are appointed by the National

---

184 *An Act respecting the laicity of the State*, SQ 2019, c 12; *Act respecting the laicity*, *supra* note 11; Michel Seymour & Jérôme Gosselin-Tapp, "Entre philosophie politique et droit: le cas de la Loi sur la Laicité de l'État au Québec" (2020) 61:3 C de D 741; Louis-Philippe Lampron, "La Loi sur la Laïcité de L'État et les Conditions de la Fondation Juridique D'Un Modèle Interculturel au Québec" (2021) 36:2 RCDS 323; Frédéric Mégret, "Lost in Translation? Bill 21, International Human Rights, and the Margin of Appreciation" (2020) 66:1 McGill LJ 213.

185 *An Act respecting the laicity of the State*, *supra* note 184, preamble and art 31.

186 *An Act respecting the laicity of the State*, *supra* note 184, art. 6 and Schedule 2.

Assembly;

commissions of inquiry appointed by the Government;

childcare centers.

Finally, persons who present themselves to receive a service from such a personnel member must have their face uncovered when doing so is necessary to allow their identity to be verified or for security reasons. Persons who fail to comply with that obligation may not receive the service, except if their face is covered for reasons of health or a handicap, or because of professional or safety requirements.[187]

The rule against the wearing of religious signs has the following consequence: a recent university graduate who wears a (Jewish) kippa, an Islamic veil, a (Sikh) kirpan or a (Christian) cross, cannot become a teacher in a public school (but he or she could be hired by a private school), nor can he or she become a police officer, a lawyer or a notary employed by the Quebec Government, etc. On the other hand, these persons could work for government departments, boards and agencies, municipalities, institutions providing health or social services and childcare centers, except if they insisted on having their face covered. Quebec is the only province that has adopted rules on wearing religious signs in the public sector (there are no rules applicable to private activities, of course).

The new rules on laicity have been enshrined in the *Quebec Charter*.[188] This legislation also prevails over any subsequent act, unless the new law expressly excludes this possibility.[189] Conversely, because of a specific notwithstanding clause, the *Quebec Charter* cannot prevail over its provisions.[190] The *Act respecting the laicity of the State* and the *Quebec Charter of Human Rights and Freedoms*[191] are therefore put on the same footing, while constitutional challenges based on the *Canadian Charter of Human Rights and Freedoms*[192] are barred for a period of five years by the inclusion of a second notwithstanding clause.[193] This last provision has been challenged unsuccessfully; however, other provisions of the same law were held to infringe the constitutional rights of Anglophone educational institutions.[194]

d) ABORIGINAL PEOPLES' RIGHTS

Until the seventies, the rights of Indigenous Peoples were derived only from British and Canadian law or historical treaties. As mentioned above, they were gradually confined in reserves and totally lost control of the natural resources located on their ancestral lands. Indeed, they could be fined and jailed for fishing or hunting

[187] *An Act respecting the laicity of the State*, *supra* note 184, art. 7-10.
[188] *Quebec Charter*, *supra* note 9, preamble and art 9.1.
[189] *Act respecting the laicity*, *supra* note 184, art 11.
[190] *Ibid*, art 33.
[191] *Quebec Charter*, *supra* note 9.
[192] *Canadian Charter*, *supra* note 7.
[193] *Act respecting the laicity*, *supra* note 184, art 34.
[194] *Hak v Quebec (AG)*, 2021 QCCS 1466; the judgment has been appealed.

without licenses. New membership rules and procedures for selecting chiefs were also imposed.[195] In the 20th century, children were sent to residential schools, where they were forced to abandon their language and culture and suffered numerous forms of sexual, physical and emotional abuses.[196] The former Chief Justice of Canada, Beverly McLachlin, has labelled this dark episode of Canadian history a cultural genocide.[197] Indigenous Peoples were granted the right to vote in Canadian elections only in 1960, and they had to wait another nine years to gain the same right in Quebec.[198] Nonetheless, in Quebec, as in Canada, systemic discrimination has recently been found to be rampant in the police and in other institutions, such as health and youth protection services.[199]

The Constitution Act, *1982* recognizes and protects the "existing aboriginal and treaty rights" of the Aboriginal Peoples of Canada.[200] This means that legislation or regulation that infringes these rights in an unjustifiable manner will be found unconstitutional. Furthermore, if an asserted aboriginal or treaty right appears credible and is threatened by a project, the government in charge has a duty to consult with the Aboriginal People whose rights will be affected, in order to obtain their consent or to accommodate their concerns as the court sees fit.[201] If this is not done, a project may be suspended or even annulled by the courts. This can limit in important ways the development of natural resources. As a result, in northern parts of Quebec and Canada, self-government agreements have been entered into by the Canadian and provincial governments, on the one hand, and some Indigenous Peoples, on the other. The blueprint for these first modern-day agreements was the *James Bay Convention*, entered into in 1975 by the Canadian Government, the Quebec Government, the Cree and the Inuit (formerly called "Eskimos").[202]

Furthermore, Indigenous legal traditions (which are totally distinct from Canadian law, including constitutional rights defined by the courts) are now being reclaimed and revitalized, as well as being applied to specific issues in some communities. They are also being taught in universities. Indeed, in British Columbia, the University of Victoria has created a "Joint Degree Program in Canadian Common

---

[195] See *supra,* text corresponding to fn 25.

[196] Truth and Reconciliation Commission of Canada, "Honouring the truth, reconciling for the future : summary of the final report of the Truth and Reconciliation Commission of Canada", (2015), online: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>..

[197] Sean Fine, "Chief Justice says Canada attempted 'cultural genocide' on aboriginals", *The Globe and Mail* (28 May 2015), online: <www.theglobeandmail.com>.

[198] *An Act to amend the Canada Elections Act*, SC 1960, c 39, art 14; *An Act to Amend the Election Act*, SQ 1969, c 13, art 1.

[199] *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Final Report* (Québec: Gouvernement du Québec, 2019).

[200] *Constitution Act, 1982*, *supra* note 5, s 35(1).

[201] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; Ghislain Otis, "Les droits ancestraux des peuples autochtones au carrefour du droit public et du droit privé: le cas de l'industrie extractive" (2019) 60:2 C de D 451; Geneviève Motard, "Regards Croisés Entre le Droit Innu et le Droit Québécois: Territorialités en Conflit" (2020) 65:3 McGill LJ 421.

[202] *James Bay and Northern Quebec Native Claims Settlement Act*, SC 1976-1977, c 32.

Law and Indigenous Legal Orders".[203] In Quebec, since 2017, the *Civil Code of Quebec* recognizes Aboriginal customs for the purpose of adoption[204] and for the designation of a "suppletive tutor" that will take care of a child.[205] In 2019, federal legislation has recognized the "legislative authority" of Aboriginal Peoples in relation to child and family services and the power to "administer and enforce laws made under that legislative authority".[206] Under certain conditions, these enactments may prevail over provincial laws.[207] In this area of the law, the legal landscape is changing fast.

In this part, we have seen that the role of courts in the protection of fundamental rights and freedoms has become controversial over time. In 1975, Quebec expressed its commitment to the protection of fundamental rights and freedoms by enacting the *Charter of Human Rights and Freedoms*, which prohibited discrimination in private dealings and prevailed over contradictory Quebec legislation that did not contain a notwithstanding clause.[208] As a result, in 1988, the obligation to use only the French language in public signs and commercial advertising was declared invalid, because it was an unjustifiable infringement of freedom of expression. The only safety valve in such cases is the notwithstanding clause, which can shield specific legislation from a constitutional challenge based on specific provisions of the *Canadian Charter*, for a period of five years. The *Quebec Charter* contains a similar provision that shields legislation from judicial challenge indefinitely.[209]

The *Act respecting laicity* prohibits the wearing of religious signs by newly hired persons holding important positions in governmental institutions, including school teachers. However, many other public institutions are not targeted by this rule, except if a person covers her face for religious reasons. This very substantial restriction to freedom of religion is viable because two notwithstanding bar a challenge based on the *Canadian Charter* or the *Quebec Charter*.

In 1982, aboriginal and treaty rights were also given constitutional protection. The right to practise traditional activities and to control to some extent the development of ancestral lands has been recognized, but governments still have the upper hand for the exploitation of natural resources, although they must pay close attention to these constitutional rights. This has aroused criticism, both from provincial government and from Indigenous leaders, for different reasons, of course. Similarly, a federal law provides for the implementation of the *United Nations*

---

203 "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)" (last visited 17 August 2022), online: *University of Victoria Law* <www.uvic.ca/law/>.

204 *CcQ*, *supra* note 50, art 543.1.

205 *Ibid*, art 199.10; Sébastien Grammond & Christiane Guay, "Comprendre et reconnaître le droit innu du ne kupaniem/ne kupanishkuem" (2021) 62:2 C de D 467.

206 *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 18(1).

207 The relevant provisions have been found unconstitutional, but the case has been appealed to the Supreme Court of Canada: *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis (Décret no 1288-2019)*, 2022 QCCA 185.

208 *Quebec Charter*, *supra* note 9.

209 *Ibid*, art 52.

Declaration on the Rights of Indigenous Peoples, but the Quebec government refuses to follow this example for issues that fall under its jurisdiction.[210]

***

Quebec's legal system reflects the historical trajectory and the specific values of the various peoples who live and interact in this jurisdiction (Indigenous Peoples, Francophones, Anglophones and people originally from non-Francophone or non-Anglophone countries). The *Canadian Constitution* confers upon Quebec a sovereign authority to address many extremely important social issues (private law, education, health and social services, natural resources, municipal organizations, etc.). Although permissible, attempts to obtain a mandate to secede or increased powers for Quebec have failed. These events spurred the adoption of a new *Canadian Constitution* providing an amending formula and a robust protection for fundamental rights and freedoms.

The legal system of Quebec has unique characteristics. *The Civil Code of Quebec*, with its short articles, general propositions and logical structure, stands out. The most important provisions of the *Charter of the French language*[211] remain in force. They include the obligation of francization imposed on enterprises employing at least 100 persons, which has not been discussed here.[212] As well, it is still the case that parents who have received their elementary education in French, whether in Quebec or in a foreign country, and in English, but outside of Canada, cannot send their children to a publicly funded English school. However, the financial resources of publicly funded English schools are comparable to those of French schools and they are numerous in the areas where an important Anglophone community lives. Many Anglophone universities also thrive in Quebec.

The Charter of Human Rights and Freedoms[213] provides a broad protection in the realm of private relations, as well as against Quebec governmental institutions. In general, for moral issues such as abortion, same-sex couples and medical assistance in dying, Quebecers have been and remain more liberal than the population of other provinces (although nowadays, the difference between large provinces, such as Ontario or British Columbia and Quebec, may be negligible). This reflects the declining influence of Christianity in a society that was for a long time under the sway of the Catholic church. It now embraces laicity: people wearing religious signs can no longer be appointed to important public positions, such as being a teacher in a public school, nor can they hold many public positions if they want to work with their face covered. This law is insulated from constitutional challenges by two "notwithstanding" clauses

---

[210] *UN Declaration on the Rights of Indigenous Peoples Act*, *supra* note 5; "Legault says he doesn't want to give Indigenous Peoples a veto over economy", *Montreal Gazette* (14 August 2020), online: <montrealgazette.com>.

[211] *Charter of the French Language*, *supra* note 137.

[212] *Ibid*, art 136.

[213] *Quebec Charter*, *supra* note 9.

that, until then, had been infrequently resorted to[214]. It has no equivalent in other provinces, but it enjoys strong support in opinion surveys conducted in Quebec. Aboriginal and treaty rights, and the treatment reserved for Indigenous Peoples, are a source of complaints and animosity, but, in this regard, Quebec does not seem to be very different from other provinces.

Finally, it should be said that a majority of Quebecers have a more positive opinion of economic regulation and publicly funded services, as opposed to a *laissez-faire* attitude, or the glorification of individual achievement.[215] To give but one example, Quebec residents that are Canadian citizens or permanent residents, enjoy the lowest university tuition fees in North America (and law school education is a real bargain!).[216] This positive view of government intervention is perhaps a trait of the French culture which, rightly or wrongly, is highly valued by a large part of the population, no matter their country of origin nor the language that they speak.

---

214 *Act respecting the laicity*, *supra* note 184.

215 Louis Côté, Benoît Lévesque & Guy Morneau, "L'évolution du modèle québécois de gouvernance: le point de vue des acteurs" (2007) 26:1 Politiques et Sociétés 3–26.

216 Bernise Carolino, "Canadian law schools 2021/22: Resources if you're considering whether, and where, to become a lawyer", (2 September 2021), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/resources/legal-education/canadian-law-schools-202122-resources-if-youre-considering-whether-and-where-to-become-a-lawyer/359445>