

Drafting against a background of differing legal systems: Canadian bijuralism

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Introduction

Canada's colonial heritage has produced a unique legal landscape of mixed common law and civil law in Quebec and a coexistence of civil and common law at the federal level.¹ Indeed, in Canada, federal legislation must adapt to and reflect the private law of 12 provincial common law jurisdictions and the private law of the province of Quebec, a civil law jurisdiction. This interaction defines Canadian federal law and produces a duality of sources known as Canadian bijuralism.²

Different as they may be, the common law and the civil law systems are not the only sources of diversity in federal legislation, since legal rules and concepts, particularly in relation to the law of property, the law of obligations, family law or the law of persons and even commercial law, may also vary significantly from province to province in Canada. Such differences are merely the reflection of the different legal choices and policies that provincial legislatures may pursue in a federal democracy.

The mixed legal background of civil and common law in our legal system is, like bilingualism, the direct result of political compromises following the British conquest and the cohabitation of English and French Canadians in history, but more recently as a result of the reform of the *Civil Code of Québec*.³ Flowing from national unity considerations, the federal Government has undertaken to revise the Canadian statute book and regulations as well as its policies and administrative practices to ensure that they are compatible with the private laws of the province of Quebec and more generally with provincial private laws. This initiative has been associated with the development of language rights in the federal Government and has proceeded in parallel with the development and fostering by the federal Government of French common law terminology⁴ and related minority language rights.

The process whereby federal legislation is revised gradually and systematically to ensure its compatibility with provincial private laws and in particular with Quebec civil laws has been referred to as the *harmonization* of federal legislation and this harmonization mandate has been assigned to the Department of Justice of Canada.

The harmonization initiative has produced new interpretation rules that clarify the interaction between federal legislation and provincial private laws. This article will examine these rules and discuss their impact but first, it would be useful to examine the definition of Canadian bijuralism and to outline important differences between the common law and the civil law systems. Some background will be provided on the development of bijuralism in Canada, before we examine the interaction between federal legislation and provincial private law in Canada. After a discussion of the new rules used to interpret bijural enactments, their impact will be illustrated with an example using the concept of ownership and with drafting techniques used to implement bijuralism.

¹ For more details on the mixed character of Quebec law see John E.C. Brierley & Roderick A. Macdonald (eds.), *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) p. 5-73.

² Bijuralism is a term used to recognize the coexistence in federal legislation of Quebec civil law and common law with respect to matters of private law (property and civil rights). Bijuralism also refers to the mixed or hybrid system of civil law and common law (in public law matters) prevailing in the Province of Quebec as a result of the British conquest. Bijuralism does not deny the influence of native laws in Canadian law but for the purposes of this article we shall only consider the role of common law and civil law as complete systems of reference for federal legislation.

³ S.Q. 1991, c. 64 (C.C.Q.).

⁴ See the dictionary developed under the Project for the integration of both Official Languages in the Administration of Justice (POLAJ) at <http://www.pajlo.org/en/dictionary.php>.

I will not attempt to refer to all the articles which have been written on this subject;⁵ my purpose is simply to raise awareness and perhaps to alert readers of federal legislation to the emergence of new bijural terminology as well as to new drafting techniques and interpretation rules for bijural enactments in federal legislation. The Canadian experience may also provide useful examples of how legislation of a state may integrate and harmonize different norms that are founded on different legal systems while respecting the character and uniqueness of the concepts and principles of each legal system.

Canadian bijuralism: What is it?

Canada is a federation of 10 provinces and 3 territories. The population in Canada reached 32.5 million in 2006 and some 7.6 million are from Quebec.⁶ The inter-provincial trade flow between Quebec and the rest of Canada amounted to over \$51 billion [Canadian] in exports of goods and services and over \$53 billion in imports of goods and services in 2004.⁷ Quebec exported over another \$89 billion outside of Canada and imported almost \$88 billion from outside of Canada in 2004. This compares to Canadian goods and services exported abroad (\$443.1 billion) and those sold inter-provincially (\$232.5 billion).⁸ Quebec, like the rest of the Canadian provinces, has an open economy that exports more than half of its gross domestic product (\$52.7 billion) and that imports similar proportions of total goods and services used. In addition, more than 80% of those exports find their way to the U.S.⁹ (this is also the case of the other Canadian provinces where the U.S. is by far our principal business partner). Therefore the Quebec economy as well as its legal system is directly situated in the sea of North American common law.

The federal relationship in Canada is developing as a political, economic and social union between provinces and territories. Canada has a federal Government, a federal Crown and a federal Parliament with legislative powers and sovereignty that follow a model of a federal state. Canada also has 13 provincial or territorial governments, 13 provincial Crown representatives and 13 legislatures with their own set of powers and sovereignty that follow a model of federated provinces. The division of powers in our Constitution¹⁰ sets out the template for a dynamic federal relationship in pursuit of national unity and coherence in federal laws and programs while at the same time incorporating an equally strong desire to respect the autonomy and diversity of the constituent members.¹¹ For example, the federal Government handles national and international matters including “trade and commerce”,¹² bankruptcy, defence, banking, criminal law and maritime law. Provinces look after more local/social matters, such as hospitals, education, administration of justice and “property and civil rights”.¹³ Some powers, like immigration, agriculture, natural resources and taxation, are shared powers and the federal Parliament has power over a few private law matters (bankruptcy, marriage, divorce and letters of exchange). Thus, as a general rule, criminal law and matters of national

⁵ For a more complete bibliography see <http://www.bijurillex.gc.ca>.

⁶ Statistics Canada <http://www.statcan.ca/Daily/English/060927/d060927a.htm>.

⁷ Statistics Canada <http://www.statcan.ca/english/research/11-621-MIE/11-621-MIE2004011.htm>.

⁸ Statistics Canada <http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=13-016-XIE2006001>.

⁹ Quebec external trade, Facts and Figures, May 2005 Edition, http://www.mdeie.gouv.qc.ca/mdercontent/000021780000/upload/publications/pdf/Exportation/calepin_anglais_mai05.pdf.

¹⁰ For more information on the division of powers in Canada see Peter W. Hogg, *Constitutional Law of Canada* (Scarborough, Carswell, 1997), part II.

¹¹ For more information on the federal relationship in Canada see: C. Lloyd Brown-John, and Howard Pawley, “When Legal Systems Meet: Bijuralism in the Canadian Federal System”.

www.recercat.net/bitstream/2072/1225/1/ICPS234.pdf#search=%22lloyd%20brown%20bijuralism%22

¹² However encompassing “trade and commerce” may be in relation to private law matters, it has been interpreted rather narrowly as a result of early rulings by the British Judicial Committee of the Privy Council; see Hogg, *supra* note 10 at 20.1-20.3.

¹³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5, sections 91 and 92. See also Hogg, *supra* note 10 at 21.1. Note also that the federal Government has power to legislate on all matters of private law incidentally to dealing with a federal head of jurisdiction.

importance are within federal jurisdiction and most private law matters (law of obligations, contracts, civil liability, estates and trusts, business and commercial law etc) are the provinces' responsibility.

It should be noted that the exclusive power of provinces to deal with "matters of property and civil rights" is the foundation of bijuralism in Canada. As a result of the *Quebec Act 1774*,¹⁴ the civil law tradition of French Canadians has benefited from constitutional protection. A similar concession had been made in the Treaty of Union between England and Scotland in 1707 which guaranteed the continuance of Scots private law.

Canadian federal bijuralism refers to the co-existence of two private law traditions in Canada, the British common law tradition of common law jurisdictions and the French civil law tradition of Quebec. The federal statute book is thus bijural in the sense that federal legislation applies in all provinces and frequently relies on underlying provincial law. For example, a reference to contracts in a federal law is a reference to contracts as understood in a provincial context. As a result, federal legislation must dovetail with both the civil and the common law traditions.

It is important to distinguish between the requirement that federal laws be printed and published in both official languages (bilingualism) and the requirement that federal laws be in keeping with both the civil law of the province of Quebec and the common law of the other provincial jurisdictions in Canada, when touching upon matters of property and civil rights (bijuralism). In addition, bijuralism protects the legal rights of an important Anglophone civil law community in Quebec and the Francophone common law community outside Quebec. Bijuralism, like bilingualism, provides increased access to justice but also crosses over the language barrier in Canada and reflects the different legal traditions that are now embraced by French and English-speaking citizens alike. Since legal traditions are territorial in nature, in Canada, federal legislation based on property and civil rights concepts draws upon civil law when it applies in Quebec and upon common law when it applies elsewhere in Canada.

[f]ederal legislation in Canada is not only bilingual, but also bijural in the sense that it is applicable to persons, places and relations that are subject to the civil law in Quebec and to the common law in the rest of Canada. This wealth of possibility creates a difficult challenge for federal drafters, and for interpreters of federal legislation. Although Quebec is the only province with a civil law system, the French version of federal legislation is meant to operate in all the provinces. This makes it impossible simply to reserve the English version of legislation for application in the common law provinces and the French version for application in Quebec.¹⁵

There is little doubt however that common law is strongly embedded in the English language in the same way that civil law is close to the French language. To translate some words, concepts or rules from one language to the other is often a daunting task. It is equally challenging to transpose these words, concepts or rules from one legal system to the other.

There are significant differences between our provincial private laws, mostly between common law provinces and Quebec, but also among common law provinces themselves. Different legislative policies in individual provinces may result in significant differences in the private law of common law provinces due to varying judicial decisions and numerous provincial statutory incursions into the common law. For example, although they all originate in the House of Lords definition of charity in the *Pensel* case, important differences exist in the statutory definitions of charity for provincial law purposes; sports, culture and recreation are included in some jurisdictions and not in others.¹⁶

¹⁴ (U.K.) 14 George III, c. 83, reprinted in R.S.C. 1985, App. II. No. 2.

¹⁵ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Vancouver, Butterworths, 2002) (Sullivan, *Driedger*), at pp. 94-95. On the relationship of language and law see also Mr. Justice Michel Bastarache, "Bijuralism in Canada" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd publication, booklet 1, p. 24; also available online at www.bijuralex.gc.ca.

¹⁶ A variety of cases are cited in David G. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation and Canadian Bijuralism", (2003) 51 *Canadian Tax Journal* at pp. 23-26 in particular his note 145 citing diverse provincial statutes; available online at: www.ctf.ca/pdf/ctjpdf/2003ctj1_duff-e.pdf.

Canadian private law is diverse and this diversity is an important constitutional value in our federation.

The development of bijuralism in Canada¹⁷

The battle for Quebec in 1759 and the Royal Proclamation¹⁸ of 1763 marked the end of the French rule and the passage to the English rule in Canada. The Treaty of Paris¹⁹ of 1763 established a global peace accord between France, England and Spain putting an end to the 7 years war and providing for the exchange of conquered territory. The treaty provided, among many other exchanges, for the transfer of Canadian colonies to England (including the freedom of its French population to retain its Roman Catholic religion). France regained its lucrative territories in the Caribbean (and its sugar trade) and England got most of continental North America with its natural resources and fur trade. While the objective of the *Royal Proclamation* had been assimilation, the growing population of French Canadians (over 75,000 at the Conquest and around 150,000 in 1774) combined with the limited number of British citizens (a few hundred mostly British troops) and the aspirations of independence in the 13 American colonies to the south (with a population of 1.5 million) resulted in the failure of the policy of assimilation. After little more than 10 years of British rule, the administration of justice in Canada was already moving towards bilingualism and bijuralism.

The formal recognition of Quebec civil laws began with the *Quebec Act* of 1774,²⁰ a Westminster Statute passed after more than 10 years of military government. The *Quebec Act* restored civil law “in matters of property and civil rights”.²¹ This critical political development officially introduced bijuralism in Canada and informs to this day the interpretation of federal legislation. Conversely the Quebec Act provided that common law would govern in all but private law matters; this is the basis for the mixed civil and common law nature of Quebec law where common law and civil law apply respectively in public law matters such as administrative law, criminal law and other non-private law matters, and in private law matters.²²

The recognition of Quebec civil law (made up, at that time, of the *Coutume de Paris* but later codified in the *Civil Code of Lower Canada 1866*) was later enshrined in the *British North America Act of 1867*. As a result, all the Provinces in Canada now have exclusive legislative authority over “matters of property and civil rights”, in essence, *private law*.²³ Again this means that when federal legislation touches on questions of private law it must take account of the specificity of provincial Quebec private law, if it applies in Quebec. As the development of bijuralism in Canada is historically tied to bilingualism, equal recognition of the common law and civil law systems in federal legislation is accompanied by a requirement that federal legislation be printed and published in our two official languages²⁴ (English and French).

Federally established courts have played a leading role in the development of Canadian bijuralism and in harmonizing federal legislation with provincial private law. In dealing with the interaction of federal and provincial laws and potential conflicts between them, the courts have gradually

¹⁷ For a more complete review of the historical context of Canadian bijuralism see Aline Grenon, “The Interpretation of Bijural or Harmonized Federal Legislation: *Schreiber v. Canada (A.G.)*” (2004) 83 Canadian Bar Review 131.

¹⁸ Royal Proclamation, October 7, 1763, reprinted in R.S.C. 1985, App. II, No. 1.

¹⁹ See <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006083>.

²⁰ *Supra* note 14; it should be observed also that the Royal Proclamation and the Treaty of Paris, in not providing for the temporary continuance of the laws of a conquered territory, were inconsistent with common law, see A. Shortt, and A.G. Doughty, *Documents relating to the Constitutional History of Canada 1759-91*, vol. 1 (Ottawa 1907) p. 526.

²¹ The *Treaty of Union* between England and Scotland had similarly recognized and guaranteed the continuance of Scots private laws in 1707.

²² *St Hilaire v. Canada (Attorney General)*, (2001) F.C.A. no 444, [2001] 4 F.C. 289 per J. Decary at para 26-28 (*St Hilaire*): <http://recueil.cmf.gc.ca/en/2001/2001fca63/2001fca63.html>; see also Brierley & MacDonald, *supra* note 1.

²³ *Constitution Act*, *supra* note 13, subsection 92(13).

²⁴ *Ibid* section 133.

recognized the bijural stream that runs through federal law.²⁵ In the seminal decision of *Quebec North Shore Paper Co. v. Canadian Pacific*,²⁶ the Supreme Court of Canada rejected the notion of a general “federal judicially-created common law” applicable throughout the country for all matters falling within the jurisdiction of the Federal Court. This decision and others that followed clearly set the stage for the recognition of the complementarity relationship between federal law and provincial law. Gradually also the autonomy and the specificity of the civil law came to be recognized and it is now accepted that the private law of Quebec supplements the application of federal laws in Quebec, much in the same way as the common law is called upon to supplement federal legislation in common law provinces.²⁷ The courts held that federal legislation often depended on provincial private law, either civil or common law, as the case may be, for much of its content and meaning; moreover, they are moving to accept that civil law and common law are separate and independent legal systems and that common law could not force its way into the Province of Quebec through the application of case law from other provinces²⁸ even though differences or asymmetry might result from the application of the federal provision.²⁹

It must be acknowledged, however, that courts have also carved out several pockets of autonomous federal law like maritime law, native law or Crown law that do not depend on private law to the same extent and that may be dissociated from it. These pockets of federal common law are treated as independent from provincial private law. As well, it is accepted that the federal legislator may set out its own private law rules in any federal enactment as a complete federal code, should it be rationally connected with a federal head of jurisdiction and necessary to have a uniform federal norm that applies across the board over and above the divergent provincial private law.³⁰

Similarly the development of bijuralism in drafting has been incremental. First implemented by translating legislation from English to French, it was subsequently carried out in the co-drafting method where Anglophone and Francophone drafters worked side by side to produce a French version for civil law and an English version for common law. Now the policy on legislative bijuralism³¹ mandates that federal legislation must speak to the 4 legal audiences: English and French common law community and English and French civil law community. As a result of this policy and in response to the reform of the *Quebec Civil Code* of 1994, the *Program for the Harmonization of*

²⁵ See the analysis of: Justice Louis Lebel and Pierre-Louis Le Saunier, “L’interaction du droit civil et de la common law à la Cour suprême du Canada” (2006) 47 *Les Cahiers de Droit* 179; see also Bastarache, *supra* note 15, pp. 23-26; France Allard, “The Supreme Court of Canada and its Impact on the Expression of Bijuralism”, *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd publication, booklet 3, pp. 1-26 and Louise Lavallée, “Bijuralism in Supreme Court of Canada judgments since the Enactment of the Civil Code of Quebec” *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd, booklet 3 pp. 1-30. These papers are available online at the Canadian Legislative Bijuralism Site: www.bijurilex.gc.ca.

²⁶ [1977] 2 S.C.R. 1085. See discussion in Allard, *ibid.*, pp 22-26.

²⁷ *Peoples Department Stores Inc. (trustee of) v. Wise* [2004] 3 S.C.R. 461 (*Peoples*); *St Hilaire*, *supra* note 22; 9041-6868 *Quebec Inc v. M.N.R.*, 2005 F.C.A. 334 (9041-6868 *Quebec Inc.*); *D.I.M.S. Construction Inc. (Trustee of)* [2005] 2 S.C.R. 564 (*D.I.M.S. Construction Inc.*); see also David Duff, *supra* note 16 at pp. 6-20 for tax cases where complementarity was recognized; and case comment by Philippe Denault, « D.I.M.S. Construction Inc. (Syndic de) c. Québec (Procureur général): La fin d'une controverse—Mise en oeuvre du principe de complémentarité par la Cour suprême du Canada », (2006) 27 *Revue de planification fiscale et successorale* 235.

²⁸ Pierre Archambault, “Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism—Second Collection of Studies in Tax Law* (2005) Association de planification fiscale et financière, Department of Justice Canada at 2:1 also available online at: http://www.apff.org/_site/DOCUMENTS/PDF/HARMONISATION_RECUEIL-2005/ANGLAIS/t-2_pierre_archambault_eng.pdf. See also the cases discussed by France Allard, *supra* note 25 pp. 15-18.

²⁹ *D.I.M.S. Construction Inc.*, *supra* note 27. Also Décary J.A. in *St Hilaire*, *supra* note 22[, para] 10.

³⁰ Hogg, *supra* note 10 at 15.9.

³¹ See the Policy on Legislative Bijuralism available at: http://jusnet.justice.gc.ca/lbs_e/Direction/politique.htm.

*Federal Legislation with the Civil Law of the Province of Quebec*³² was implemented to revise systematically all new federal legislation and to revise gradually our 600+ federal Statutes and 3000+ federal regulations and new rules of interpretation were adopted to interpret bijural enactments.

Some major differences between common law and civil law

There are numerous differences between the civil and the common law systems; similarly, there are also many differences between common law jurisdictions and civil law jurisdictions as between themselves. For the purpose of our discussion we will look at the most important differences that form the general characteristics belonging to the family of common law and of civil law systems.

The civil law tradition, it has been said, can be distinguished from the common law tradition essentially by its method, that is, its rules of interpretation, the different hierarchy of its sources and its inductive reasoning.³³

The primary source of civil law is not case law but legislation. Case law is only a secondary source of law although it enjoys a growing importance, as does legislation in common law systems. The civil law system is organized in the form of a single corpus of legislated rules, a code that purports to unify, systemize and prioritize these rules, thereby providing a global approach to, and vision of, the law. Civil law strives to present law as a complete and logical suite of rules set out in clearly defined categories and expressed as general rules that show a distinct taste for structure and normative synthesis.³⁴ Common law by contrast is less preoccupied by structure and organization and focuses on the case at hand and how it relates to previous cases.

The difference in the primacy of legislated law as a source of law is another fundamental characteristic of civil law. It explains differences in how the silence of the law or how uncertainties in the law are addressed. The code is the starting point of all legal enquiries as it contains the “common law” or *jus commune*, the general law or the law of general application that governs all matters in the absence of special legislation.³⁵ In other words it contains rules of general application that act as a default system or that apply *a priori* in all matters. In the common law system, statute law or legislated law does not supplement the common law. It will usually be the opposite. Codifications, however extensive, are never really independent from the common law. The common law, as discovered, expressed and reformulated by the judges, provides the fundamental normative basis that supplements the uncertainties and silences of statute law. Thus the attitude towards legislated law and the approach to the interpretation of legislation is markedly different in civil and common law. The civil law system’s view of the legislated law as the primary source of law and as the *jus commune* requires considerable sympathy for the intention of the legislator, whereas the common law system’s vision of the primacy of judge-made law and the often purely derogatory role of statute law has encouraged, historically, a narrower interpretation of the legislated rules.³⁶ Although this suspicious attitude, leading to narrow interpretation of legislated law, has tended to fade off with the proliferation of modern legislation, statute law or legislated law is still often regarded as a secondary source of law, not as the law of general application.

A final aspect of the differences in method between common and civil law is the inductive reasoning typical of the common law and the deductive reasoning that characterizes civil law. Common law is created (or discovered) incrementally from the bottom up through the process of generalizing common points with previous cases. A general rule is inferred from the *ratio decidendi* of previous

³² See Louise Maguire Wellington, “Bijuralism in Canada: Harmonization Methodology and Terminology” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd publication, booklet 4, pp. 4, 5, 6; available online: Canadian Legislative Bijuralism Site: www.bijurillex.gc.ca.

³³ Bastarache, *supra* note 15 at 19.

³⁴ Brierley & MacDonald, *supra* note 1 at p. 99, and Alain François Bisson in his contribution “Caractéristiques et méthodes du droit civil” to Louise Bélanger-Hardy and Aline Grenon, (ed.) *Éléments de common law*, (Toronto: Carswell 1997), at pp. 155-156.

³⁵ Bisson, *ibid.*

³⁶ Pierre-André Coté, *The Interpretation of Legislation in Canada*, (Scabourough, Carswell, 2000).

instances. This process is pragmatic and provides the flexibility and durability characteristic of common law rules. Civil law, on the other hand, follows the opposite route in the application of the norm: from the top down. A general rule is interpreted and, from that general rule, the law applicable to the particular instance is inferred. The civilian process requires that the legislated rules be broad and abstract enough to be adaptable through time and social changes as the legislated rules cannot be reopened as often and do not provide the same flexibility; the redeeming feature, however, is that judges may nonetheless interpret the legislation very generously so as to adapt the broad norms to social changes.³⁷

Differences in the methodology and in the related structure and classification of rights and obligations between civil and common law are reminiscent of the differences that exist between the English garden and “le jardin français”. While they have different structures, and different internal organization, and while they represent different ways of thinking about law (or gardening), both are as autonomous, specific and beautiful. Like beautiful gardens, our different legal systems are organically bound in federal legislation as a result of our legal and constitutional history.

The interaction of federal legislation with provincial private law

As part of the harmonization initiative, two key concepts have been developed to describe the interaction between federal legislation and provincial private law: “complementarity” and “dissociation”. These terms address two very different relationships.³⁸ Federal legislation is either completed or complemented by provincial private law (complementarity) or it is separated or dissociated from provincial private law (dissociation).

Federal legislation in Canada is rarely autonomous; it does not often stand alone, complete and independent from the influence of provincial private law. In fact federal legislation is usually made up of a combination of public and private law rules, principles and concepts that govern matters over which the federal Parliament has jurisdiction. The private law component of the federal norm usually involves rules, principles and concepts drawn from provincial private law (the law that regulates relationships between persons as opposed to public law that regulates relationships with the State). This provincial private law component usually refers to or acknowledges the private law of general application (the private *jus commune* or common law). For example, the *Income Tax Act*,³⁹ in setting out the rules of taxation (public law), refers to numerous private law concepts such as trusts, partnerships or contracts (private law concepts) in the substantive tax rules without defining these private law concepts. This leads to inclusion of private law concepts, rules or principles into the federal norm such that federal legislation depends on these private law concepts, rules and principles for meaning and context. Federal law is not an island unto itself.⁴⁰ This reference to private law rules or concepts is not problematic when they are the same or similar across the country, but when they are not, incoherence may arise.

Inasmuch as most private law in Canada is under the legislative authority of the provinces, federal legislation is therefore inextricably linked with provincial private laws and prone to connecting to varying private law standards. When federal legislation is silent or incomplete, for example, provincial private law rules and concepts will kick in with supplemental rules drawn from the private law of the province where the federal legislation is being applied. This type of interaction is referred to as complementarity in our jargon because provincial private laws complete federal laws. In a

³⁷ Bisson, *supra* note 34 at p. 157.

³⁸ See Jean Maurice Brisson and André Morel, “Federal Law and Civil Law: Complementarity, Dissociation” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Collection of Studies* (Ottawa: Department of Justice, 1999) 217 and Louise Maguire Wellington, *supra* note 32; both available online at the Canadian Legislative Bijuralism Site: www.bijurilex.gc.ca.

³⁹ R.S.C. 1985 (5th supp.) c. 1.

⁴⁰ Henry L. Molot, “Clause 8 of Bill S-4 (which became the *First Harmonization Act*): Amending the *Interpretation Act*” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, 2nd publication*, booklet 6 at p. 15 in fine, available online at the Canadian Legislative Bijuralism Site: http://www.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6b.html.

complementarity relationship, federal legislation *depends on provincial private law for meaning and content*. The private law of each province serves as a backdrop, a legal infrastructure for federal law.⁴¹

As we have seen above, the provincial private law rules and concepts that complete federal laws are drawn from the common law in common law jurisdictions and from civil law in Quebec. Not only are they bijural, but they may also vary from a common law province to another. Federal norms must accordingly be articulated around two legal systems with potentially different streams of meaning, and leading to separate pools of private law rules and concepts, the civil law of Quebec and the common law(s) of the 12 other jurisdictions.

Differences in the application of federal legislation are better understood given this intricate interaction and architecture of the federal norm. It is also important to note, however, that not all differences in provincial private laws will lead to material differences in the impact of federal legislation. Not surprisingly, the federal legislator may take exception to, or derogate from, some or all of this provincial private law and may set out its own separate and independent private law rules or concepts for its own federal purposes where the coherent application of federal policies is at risk, and policy gaps or discrepancies are looming.⁴² When federal legislation is dissociated from provincial private laws it may be dissociated from one legal system or the other (partial dissociation) or from both (complete dissociation). This second type of interaction is called “dissociation” in our jargon.

Examples of both complementarity and dissociation may be found in subsection 136(1) of the *Bankruptcy and Insolvency Act* which on the one hand sets out an elaborate rule of priority for the whole of Canada.

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

[10 paragraphs follow setting out an extensive list of creditors]

This rule was found to be a separate and independent federal rule dissociated from individual provincial private law priority schemes. On the other hand, the reference in this subsection to “secured creditors” is only defined very generally in the Federal Act and has been interpreted as referring back to provincially developed private law rules and definitions of secured creditors and therefore provides complementarity with the private laws of each province.⁴³ This example illustrates how the rules and concepts of federal legislation may be linked to and influenced by its various provincial private laws.

The metaphor of an iceberg comes to mind where the tip of the iceberg is the concepts or rules in the federal enactment and the underside is a mixed infrastructure made up of the private laws and concepts of each province that are necessary to give meaning and effect to the federal rule or concept.

Many more compelling examples of the tricky interaction that may exist between federal legislation touching upon private law rules and concepts can be found throughout the federal statute book but for the sake of simplicity we will examine 2 basic scenarios where the relationship of complementarity may pose distinct challenges to a drafter of bijural legislation. First, there is the situation where the federal provision uses a concept that has a different meaning or that is associated with different rules in civil law and in common law such as, for example, the concepts of ownership, contract, trust, servitude and gift. Secondly, the federal legislation may refer to common law rules or concepts that have no meaning in civil law such as an “estate” or “an interest in land” (fee simple, life estate, remainder or leasehold interests), “real and personal property”, or “equity and equitable or beneficial ownership”, etc. Similarly, harmonization problems arise where the legislation refers to civil law concepts that have no meaning in common law such as “dismemberments of ownership” (usufruct, emphyteusis, substitution, or right of use), “patrimony”, “movable or immovable property”, etc.

⁴¹ Brisson et Morel, *supra* note 38. See also Roderick A. Macdonald, “Harmonizing The Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies*, (Ottawa: Department of Justice, 1999), p. 29.

⁴² See Hogg, *supra* note 10. An example is the concept of common law spouse defined in federal legislation in order to avoid incoherent tax treatment and discussed *infra* at pp. 32 and 33.

⁴³ *Re Giffen* [1998] 1 S.C.R. 91 and *D.I.M.S. Construction Inc.* *supra* note 27 at paras 11 and 12.

Moreover, complementarity between federal legislation and the provincial private laws of 13 different jurisdictions raises the thorny policy issue of uniformity (equality under and before the law) versus diversity. In a federal system that recognizes two legal traditions and 13 provincial or territorial jurisdictions, uniformity is constantly in competition with the value of legal diversity. The policy for the harmonization of federal legislation with provincial private law in Canada is influenced by our legal and constitutional framework and must pay tribute to fundamental principles like the recognition of the equality of our legal traditions and equal access to justice and to the law for the citizens of each legal tradition and of each official language. The federal legislator may promote the uniformity of private laws among common law provinces.⁴⁴ In addition, the Uniform Law Conference of Canada has been steering the development of proposals in a legislative form (models and uniform statutes) for the uniformity of provincial legislation particularly in the field of commercial law.⁴⁵ Other important proponents in the development of a harmonization policy for federal legislation are the federally established courts. The Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada are all required to apply the principles of both legal systems in the interpretation of federal legislation. As we have seen earlier, the policies of the federal legislator and of the judiciary in relation to the interaction of federal legislation with civil and common law, have gradually evolved. Courts first interpreted federal laws as requiring a uniform application; later, the specificity of civil law and the equality and autonomy of each legal system was gradually recognized in applying federal legislation in Quebec; now, bijuralism is viewed as a dialogue between legal cultures.⁴⁶

Convergence or divergence

In most cases the use of the civil law norm alongside the common law norm will suffice to give full effect to federal legislation and policies but where substantial differences exist between these two norms, significant conflicts arise, with possible discrepancies and gaps in federal laws or programs. How should these conflicts be resolved? The harmonization of federal legislation has spurred a debate in academic circles on how to resolve such conflicts. Should any legal system prevail over the other? Should there be convergence towards common rules, towards a common system? There is evidence in the Supreme Court of Canada decisions that the development of the common law and of the civil law is not oblivious to the solutions adopted by the other legal system in Canada and that there is a considerable degree of cross-pollination or influence, exercised by legal systems on each other in our legal environment. It would be an overreaction to consider that the harmonization of federal legislation with provincial private law aims at ultimately merging civil and common law into a unique federal norm. Whether there will or should be greater convergence between Canadian common law and Quebec civil law and whether divergences in the application of federal legislation should be eliminated by borrowing rules and concepts from one system to the other is often beyond the immediate purposes of harmonization of federal legislation. Harmonization may well be achieved by simply bridging gaps between the legal systems using rules and concepts that are specific to each legal system without necessarily borrowing rules and concepts foreign to a particular legal tradition or forging new hybrid substantive law. But harmonization may also be achieved by the creation of a new federal norm dissociated from existing provincial private law concepts or rules, so long as the new federal norm is complete, and accessible to and understandable by the users of each legal tradition.

In a recent article analyzing the jurisprudence of the Supreme Court of Canada on the question of convergence and divergence, Justice Louis Lebel of the Supreme Court of Canada states that the recognition of civil law has encouraged the emergence of a dialogue between the two legal systems. This dialogue has influenced the parallel evolution of both common law and civil law by promoting limited exchanges of solutions between legal systems and the use of comparative law arguments.

⁴⁴ *Constitution Act* s. 94, *supra* note 13.

⁴⁵ The Uniform Law Conference of Canada was formed in 1918-19 under the auspices of the Canadian Bar Association. more information is available on its website at: <http://www.ulcc.ca/en/home/index.cfm?sec=1>.

⁴⁶ Lebel and Le Saunier, *supra* note 25. See also France Allard, *supra* note 25 p. 202 and Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, (2004) 29 Brooklyn Journal of International Law 985 (Sullivan, *Challenge*) at p. 1043.

Justice Lebel adds that convergence is very limited and focused primarily on aligning solutions or seeking equivalent legal effects to common problems (developing comparative law arguments). In the end, he suggests, the autonomy, the sources and legal methods of each system are preserved and respected rather than merged into a new mixed system or norm. He concludes that systematic and true convergence of the civil and common law is not prevalent in Supreme Court decisions and happens only in respect to limited legal issues (the law of damages is cited as an example). This analysis suggests that while there are significant cross-influences between common law and Quebec civil law, harmonization in the sense of convergence and fusion of the two systems by way of judge-made law in the Supreme Court is so limited because of the important structural and historic differences and because the decision to develop a new harmonized norm belongs primarily to the legislator. True harmonization, it is said, is the one that will result from the will of the legislator.⁴⁷

Since the responsibility for substantive private law in our constitution lies with provincial legislatures, the federal legislator is not as well positioned as the provincial legislator to legislate substantively in private law matters. However, the Supreme Court of Canada, in its appellate capacity over provincial private law matters, does play a leading role in the development of substantive provincial private law policies. The federal Government's involvement in substantive private law has been limited to a few heads of jurisdiction (divorce, marriage, bankruptcy and letters of exchange). The federal Government has also been active in supporting the work of the Uniform Law Conference of Canada and in negotiating and adopting international treaties (private international law).⁴⁸ Despite its authority to do so in section 94 of the *Constitution Act 1867*, there has been no direct and substantive intervention in the development of provincial private law by the federal legislator. Harmonization of private law and the decision to promote convergence or divergence between our two private law systems is a complex and unpopular subject that requires the concerted efforts of legislatures, the judiciary, the profession and academia, not to mention the involvement of several interest groups, such as business associations and bankers.

The federal lawmaker's intervention in private law making is incidental to the development of federal legislative policies. It does not much focus on convergence or divergence of legal systems; rather it aims at closing gaps and eliminating disparities that could interfere in federal legislation and programs. For example, the extension of the common law concept of "disclaimer" to include a civil law "renunciation" in subsections 248(9) and (10) of the *Income Tax Act*, or the definition "common law partner" in that Act and in federal pension legislation, were introduced to level the playing field (establish a common denominator among divergent concepts) for the limited purposes of federal tax and pension policies. Where federal policies and legislation are at risk of incoherent application due to divergent provincial private laws, the harmonization approach is functional and it adapts federal policy and legislation to ensure that it works in both the civil and the common law environment, without forming any value judgment. Federal harmonization is "legal system neutral", and focuses on achieving effective and equitable federal legislative policy results. This will usually be done by using equivalent (as opposed to identical) civil and common law rules, concepts and principles. In the unlikely event that equivalent rules, concepts and principles may not be found or created, harmonization efforts might turn to the reformulation of the rule or policy, moving away from narrow legal terms and concepts to avoid incoherence. Economic rules and concepts are very flexible and potent harmonization tools. At the limit, if all else fails, borrowing a unijural rule or concept from common law or civil law and spelling it out in a complete code as a uniform private law rule for specific federal purposes is also a possibility. An important difficulty with the latter solution is that one legal community is bound to be unable to fully understand the unijural rule or concept as it would be foreign to their private law system. Such an approach, needless to say, might not achieve equal access to justice and could be at odds with the constitutional division of powers.

In summary, the motivation and methodology of harmonization of federal legislation is unbiased or neutral in terms of which legal system should provide the better mode of expression of the federal

⁴⁷ Lebel and Le Saunier, *supra* note 25.

⁴⁸ See Valerie Hughes, "Harmonization of Private Rules Between Civil and Common Law Jurisdictions: A Canadian Perspective" in *Contemporary Law / Droit Contemporain* (Cowansville, Éditions Yvon Blais, 1992), p. 83 at p. 90.

norm. A strong case is made that the federal norm must adapt to each legal system, and that it must be compatible with both. Some degree of convergence of legal systems may or may not occur in the process as a by-product of harmonization.

Interpreting bijural legislation

In response to the intricacies of interpreting and drafting bijural enactments in a mixed system of civil and common law, new rules of interpretation addressing specifically the challenges of bijural enactments were adopted in 2001. With a view to clarifying the interaction of federal legislation with provincial private law and particularly Quebec civil law, the following two important rules for the interpretation of bijural enactments were enacted as amendments to the *Interpretation Act*:⁴⁹

- 8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
- 8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.⁵⁰

The rule in section 8.1 first declares that common law and civil law are equally authoritative in federal legislation and that they both represent a recognized source of the law of property and civil rights (private law). This declaration confirms and codifies the principle that federal legislation must be interpreted as referring to both the common law and the civil law systems and that both are equally authoritative and necessary components of the federal norm.

This statement and rule reaffirm the principle of equality of our two legal traditions and it unequivocally recognizes the duality inherent in our federal legislation when it deals with matters of property and civil rights. Noticeably, it refers back to the constitutional division of powers between the provinces and the federal Government and ties in with, and has the weight of, a constitutional rule.⁵¹

A second element of the rule in section 8.1 is to *require* (it says "reference must be made to") that federal legislation be completed or supplemented by the rules, principles and concepts of the law of property and civil rights (provincial private law).⁵² The supplemental or complementary character of provincial private laws in relation to federal law is not only confirmed but it is also set out as a requirement. This *statutory duty* to refer to provincial private law⁵³ is subject to two conditions: 1 that it be necessary to so refer to the province's private law, and 2 that the law not provide otherwise. Examples of situations where the statutory duty of reference to the requisite private law rules and concepts is not necessary would include federal enactments that do not touch upon provincial private law (pure criminal law or public law provisions) or enactments providing their own separate and independent private law rules as a more or less complete code that is dissociated from provincial private law rules.⁵⁴ Other exceptions would include federal enactments where dissociation from one or

⁴⁹ R.S.C. (1985), c. I-21.

⁵⁰ *Federal Law-Civil Law Harmonization Act, No 1*, S.C.2001, c.4 (*First Harmonization Act*).

⁵¹ *St-Hilaire*, *supra* note 22 at para 49: "It is the Constitution of Canada itself which provides that some federal laws have differing effects according to whether they are applied in Quebec or in the other provinces... To associate systematically all federal legislation with common law is to ignore the Constitution".

⁵² See *Peoples*, *supra* note 27; *9041-6868 Quebec Inc.* *supra* note 27, and *St-Hilaire*, *supra* note 27.

⁵³ Henry L. Molot, *supra* note 40 p.15 describes the requirement as a "statutory duty of reference".

⁵⁴ *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24: the concept of detention was interpreted as providing a separate federal remedy in a complete federal code, over and above any existing provincial remedies; *Canada (Minister of National Revenue – M.N.R.) v. National Bank of Canada*, 2004 F.C.A. 92: deemed trust provisions in federal tax law were complete and explicit as to their effect such that provincial

other provincial private law is implicitly or expressly provided by law. This might include federal provisions dealing with matters of aboriginal law, matters of Crown prerogative, maritime law, and even matters of international law that supersede the duty to refer to private laws and require uniform country-wide application. Such matters do not require a reference to provincial private law as they are interpreted as autonomous branches of federal law that depend on external sources separate and independent from provincial private laws.⁵⁵

A third aspect of the rule in section 8.1 is its ambulatory effect. Where reference is made to a provincial private law rule, principle or concept in a federal enactment, such reference will encompass the provincial private law in effect at the time of application of the federal enactment.⁵⁶ This rule provides automatic updating of federal references to provincial laws as these laws are amended from time to time. Thus, where a federal provision refers to a provincial private law concept or rule that has been amended (eg the new civil law concept of extra-contractual liability that replaces the concept of delictual liability) and where that provision is not adapted to reflect the change in provincial law, new section 8.1 would require that the provision be read as referring to the new concept or rule. While this aspect of section 8.1 might provide a good back up system for upgrading references to provincial law pending the revision of all federal legislation, legislative interventions in individual federal provisions will still be necessary to effect more intricate adaptations where the interaction with provincial private law is more complex.

Be that as it may, the introduction of these rules calls for a new attitude of the federal legislator vis à vis the interaction of its legislation with provincial private law. This is why a wholesale administrative revision of the federal statute book and regulations was mandated and will soon lead to a third harmonization bill in a series that will go on until all existing federal statutes and regulations are revised. As well, all new federal legislation is now systematically revised at the drafting stage to adapt it to Quebec civil law.⁵⁷

The Program for the Harmonization of Federal Legislation with the Private Law of the Province of Quebec has considerably different objects and purposes from harmonization in the European Economic Union and from other international and inter-jurisdictional unification exercises in relation to private law (Unidroit, UNCITRAL, US Uniform Code of Commerce, even Canadian Uniform Law Conference endeavours). The harmonization of federal legislation seeks to provide better access to justice in the Canadian federation and is also linked to linguistic rights and national unity considerations.⁵⁸ It is not a comparative law exercise motivated by legislative reform of the law with a

law did not apply; in *Théberge v. Galerie d'Art du Petit Champlain inc.* [2002] 2 S.C.R. 336, the historical common law definition of copyright was only concerned with economic rights and did not address moral aspects of the transaction as the civil law concept did; *A.Y.S.A. v. Canada Revenue Agency* [2006] F.C.A.136: not necessary to have recourse to the common law of Ontario as the federal tax law already defined charity in a manner that precluded the application of provincial law.

⁵⁵ See *ITO-International Terminal Operators Ltd.v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 771 (“[T]he term ‘Canadian maritime law’ includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date.”).

⁵⁶ Henry L. Molot, *supra* note 40 at p.16.

⁵⁷ All federal legislation is revised to ensure bijural application, since 2002. This includes tax legislation of the Department of Finance where Technical Bills and Budget Bills are revised in cooperation with Finance drafters. Research and development for a number of more thorny issues continues and will require further adjustments in future Bills.

⁵⁸ The Preamble to the *First Harmonization Act* reads:

“WHEREAS all Canadians are entitled to *access* to federal legislation *in keeping with the common law and civil law traditions*;

“WHEREAS the civil law tradition of the Province of Quebec, which finds its principal expression in the *Civil Code of Québec*, reflects the *unique character of Québec society*;

“WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal *legislation that is compatible with the common law or civil law traditions*, as the case may be;

view to developing uniform standards and stamping out diversity, rather it purports to acknowledge and reflect diversity as much as possible while pursuing national interests.⁵⁹

The issue also arises whether common law judicial precedents fall within the meaning of the phrase “unless otherwise provided by law” for the purposes of the exception to the duty to refer to private law in sections 8.1 and 8.2. It would appear that case law does not provide a valid justification for the application of the exception to the duty to refer to provincial law.⁶⁰ Case law predating the introduction of section 8.1 and ignoring provincial private law needs to be revisited and reassessed in light of the statutory duty to refer to provincial private law in section 8.1. It was ruled recently that cases decided in relation to common law jurisdictions and setting out a “comprehensive judicial test” to determine whether a taxpayer was an employee or a self employed person, for the purposes of contributions under the federal *Employment Insurance Act*, did not apply in Quebec where the *Civil Code of Quebec* now specifically provides the “sole legal criteria” of subordination as the test for the status of employee. Although pre-existing case law that disregards provincial private law is no exception to section 8.1, courts may well decide that some case law is founded on an express or implicit intention to dissociate federal legislation from one or other provincial private law system and apply it uniformly across Canada. Uniform application that is contrary to provincial private law is only warranted under section 8.1 where reference to provincial law is not necessary or where a clear intention to derogate from provincial private law is expressly or implicitly provided in the federal legislation.⁶¹

A question that often arises in dealing with the rule in section 8.1 is whether it applies retroactively to a time before its introduction in the *First Harmonization Act*, in June of 2001? The rule in section 8.1 is declaratory in nature as it merely restates the law that has always existed and as such applies to fact situations arising before 2001. This is borne out by the ambulatory nature of the rule. However, while section 8.1 is intended to apply in the interpretation of statutory provisions that involve a transaction or event in progress, it is not intended to reopen transactions or events that are over and the legal effect of which is already spent. Therefore one must consider carefully the particular operation of the federal provision in order to give full effect to the scheme and intent of the federal provision without

“WHEREAS the full development of our two major legal traditions gives Canadians enhanced opportunities worldwide and facilitates exchanges with the vast majority of other countries;

“WHEREAS the provincial law, in relation to property and civil rights, is the *law that completes federal legislation when applied in a province, unless otherwise provided by law*;

“WHEREAS the objective of the Government of Canada is to *facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions*;

“AND WHEREAS the Government of Canada has established a harmonization program of federal legislation with the civil law of the Province of Quebec to *ensure that each language version takes into account the common law and civil law traditions*;

“NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:”

⁵⁹ Martin Boodman, “The Myth of Harmonization of Laws” in *Contemporary Law / Droit Contemporain* (Cowansville, Éditions Yvon Blais, 1992), p. 126 at p. 149 & (1991) *American Journal of Comparative Law*, 669 concludes that all systems of law are by definition harmonized and that harmonization is vague and meaningless without clear relationships, purposes and objects with elements to be harmonized in a particular project. See also Marie Claude Gervais, “Harmonization and Dissonance: Language and Law in Canada and Europe, Program to Harmonize Federal Legislation with the Civil Law of the Province of Quebec, Assumption of Complementary and Methodological Issues”, in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, 2nd publication*, Booklet 1: pp. 10-18. which is also available at www.bijurilex.gc.ca.

⁶⁰ See *9041-6868 Québec Inc. v. M.N.R.*, *supra* note 27 paras 5, 6 and 7, and Henry L. Molot, *supra* note 40 p. 19.

⁶¹ The argument that judicial precedents should not be regarded as “law” for purposes of the exclusion in section 8.1, intimates that such precedents, to displace provincial law, need to be based on explicit provisions of federal law or *absolutely necessary implications* (emphasis in original) thereof – see Roderick A. Macdonald, *Provincial Law and Federal Commercial Law* (1992) 7 *Banking and Finance Law Review* 437-51 at 447; Aline Grenon *supra* note 17 at pp. 16-17; Pierre Archambault *supra* note 28 at para. 30, and David Duff *supra* note 16 at 49; see also *9041-6868 Québec Inc.*, *supra* note 27.

reopening past transactions or events that have already attained their legal effects under the scheme of the federal legislation.⁶²

The rule in section 8.2 states that the terminology of bijural enactments must be read and interpreted in a manner that is consonant with the legal system of the province of application. Accordingly, for purposes of applying a provision that contains both common law and civil law terminology (for example when the expression “real property or immovable” is used) the reader is reminded to interpret the provision using civil law terminology in Quebec (“immovable”) and common law terminology elsewhere (“real property”). By the same token, when the meaning of a term used in a bijural provision is different under both systems, the reader must ensure that the civil law meaning is applied in Quebec and the common law meaning is applied elsewhere. This rule, like the rule in section 8.1, sets out as a statutory presumption of complementarity that may similarly be reversed when the law provides otherwise.

The presumption that civil law terminology applies in Quebec and that common law terminology applies elsewhere in Canada is particularly reassuring for readers of federal enactments who are not familiar with both of our private law systems as it enables anyone to understand and apply federal enactments in the private law system of the province with which that person is familiar. Conversely, for anyone who works on private law issues with cross-border application, familiarity with both legal systems becomes an important asset in the practice of federal law. Drafters are undoubtedly in the latter group.

Further assistance in the interpretation of bijural federal enactments is also provided through various interpretative tools. The Department of Justice of Canada publishes a record of bijural terminology⁶³ that succinctly explains the bijural problems encountered in a provision and describes the solutions adopted to resolve them in each language version of the bijural provision. The Department of Finance of Canada also describes in its technical notes for tax bills the adaptations made in the application of bijural tax provisions to Quebec.

In summary, the interpretation rules in sections 8.1 and 8.2 are predicated on the recognition that federal laws in Canada have a composite structure calling on diverse provincial private law. Federal law must take account of provincial private law as it provides supplemental rules that form part of, and complete, federal law. Bijuralism flows from this composite architecture and, as we have seen, may lead to variations in the application of federal legislation based on differences in the provincial private law component of federal laws. Asymmetries or differences in the application of federal legislation are normal in the federal bijural context of sections 8.1 and 8.2 and when federal policies and legislation cannot be applied consistently and coherently, adaptations become necessary to avoid disparities or gaps and to achieve similar federal policies for Quebec and the other provincial jurisdictions. In this manner, harmonization maintains the right balance between the competing needs of coherence in national policy objectives (through greater uniformity) and provincial autonomy as expressed in private law diversity.

Bridging bijural gaps in federal legislation is routinely done as part of the ordinary drafting process where Bills are co-drafted by an Anglophone common law lawyer and a Francophone civil law lawyer with the help of comparative law experts who ensure the best trans-systemic fit. Increasingly, however, harmonization has to be implemented upstream at the policy development level, before the drafting process, to avoid couching federal policies in a policy structure or design that is too tightly wrapped up in legal concepts at odds with bijuralism. A good example is the use of the concepts of “legal” and “beneficial ownership” throughout federal legislation where these concepts have no equivalent in the civil law system.⁶⁴ Such legal traps could be avoided by more sensitivity to bijuralism at the policy development stage.

⁶² See in this respect Sullivan, Driedger, *supra* note 15 at p. 548; and Coté, *supra* note 36 at pp. 115-137.

⁶³ See <http://canada.justice.gc.ca/en/ps/bj/harm/Index.html>.

⁶⁴ A similar problem exists in international tax Conventions for the avoidance of double taxation that refer to the concept of beneficial ownership where that concept is foreign to the legal system of certain contracting civil law States like the Netherlands. In *Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A.*, [2006]

These new interpretation rules have significant implications for the drafting of federal legislation. The interpreter must now assume the complementarity of federal legislation and provincial private law; similarly lawmakers⁶⁵ and drafters should anticipate and adapt their legislation in light of their combined effect with provincial private laws. Only where this is not possible or necessary would federal legislation be dissociated from provincial private laws, and such dissociation would nonetheless set out clearly how the federal rule should apply in the provincial private law environment from which it is dissociated.

Lawmakers and drafters must now design and draft federal legislation so as to either adequately embrace, or derogate from, the private law rules, concepts and principles of each of the 13 provincial or territorial private law jurisdictions. Fortunately this process involves mostly fine tuning federal laws so that they better reflect civil law rules, concepts and institutions. Typically, changes in terminology are made to ensure that federal provisions work in a civil law environment and that the federal policies are achieved for Quebec. For example, references to “movable” and “immovable” property are added alongside “personal” and “real” property, to “hypothec” alongside “mortgage”, to “extra-contractual civil liability” alongside “liability in torts”, or to “solidarily” alongside “jointly and severally”, all with the view to adequately addressing similar civil law rules and concepts.⁶⁶

Some adaptations are more complex⁶⁷ and require the invention of an equivalent rule or concept where the rule or concept used in the federal provision does not have any equivalent in the other legal system. For example, federal rules for the taxation of usufructs in Quebec have been adapted using as a model the rules for the taxation of trusts even though civil law usufructs are not trusts legally and resemble more life interests. The tax concept of a “partial gift” (contribution to a charity where a part of the contribution is used to purchase tickets or a meal offered by the charity to raise funds) has been invented for common law jurisdictions to allow the deduction of charitable contributions that would be valid under Quebec civil law but not at common law.⁶⁸ In the *Federal Real Property and Federal Immovables Act*,⁶⁹ “immovable” is defined as including the rights of a lessee over such property in the Province of Quebec. This ensures that Quebec leases are treated in the same manner as leasehold interests at common law even though such leases do not amount to a real right (interest in land) and the lessee does not hold an immovable (real property) but rather only has a personal right in relation to that property.

To sum up, the new rules of construction of bijural enactments buttress the complementarity of federal legislation with provincial private law by setting complementarity as the default system where it is necessary to refer to private law. This forces lawmakers and drafters to unequivocally embrace or derogate from provincial private laws. It is now up to federal lawmakers to anticipate differences in the application of federal legislation caused by incompatible provincial private laws and to bridge, as required, gaps and disparities by derogating from the apprehended effect of inconsistent provincial private laws.

EWCA Civ 158 (England and Wales Court of Appeal (Civil Division)) the Court of Appeal found that this concept had acquired an “international” meaning based on the commentaries of the OECD model convention that included certain intermediaries and conduits.

⁶⁵ See “Cabinet Directive on Law Making” on the website of the Privy Council of Canada: www.pco.gc.ca (publications).

⁶⁶ See Bijural Terminology Records, *supra* note 63.

⁶⁷ Beware of those who say that harmonization is just a symbolic exercise and that it suffices to throw in a few Quebec buzz words and the problem will disappear.

⁶⁸ At common law there is no gift if any consideration is received; proposed subsections 248(30)-(33) create a regime similar in its effects to the civil law partial donation with a view to allowing that portion of the transaction that is a “true gift”, notwithstanding the consideration given for the “non-gift” portion of the transaction.

⁶⁹ S.C. 1991, c. 50, harmonized in S.C. 2001, c.4, section 11.

Practical impact on federal legislation

To illustrate further the practical impact of bijuralism in the context of federal legislation in Canada, let us imagine a hypothetical provision that could be part of Canadian public law and that would read:

- X. (1) The officer may seize any thing by means of or in relation to which the officer believes on reasonable grounds that an offence under this Act is being or has been committed.
- (2) The *owner* of the seized thing may apply to the court...

Having regard to the differences in the law of ownership between the Province of Quebec and the other Canadian jurisdictions, one might ask whether in Quebec a trustee or a beneficiary of trust property might be able to exercise the recourse in subsection (2). One might also enquire whether a mortgagee of a chattel and the mortgagor, including their equivalents in the civil law of Quebec, the hypothecary creditor and hypothecary debtor, could be regarded as owners for this purpose.

In a civil law trust neither the trustee nor the beneficiary owns the trust property. Under Quebec civil law, trust property is held in a separate patrimony distinct from the property of the trustee and of the beneficiary. The trustee is a mere manager of the trust property and has no “real right” or legal title to the property. There is no such thing as equity or equitable ownership and the beneficiary merely has a claim (a personal right not a right *in rem*) against the trustee for failure to enforce the trust. Thus, neither the trustee nor the beneficiary owns the trust property.⁷⁰

More generally, since ownership in civil law is absolute, perpetual, exclusive and unitary, ownership cannot be fragmented into a bundle of rights and there is no such thing as concurrent ownership interests over the same land, exercised by different persons. Ownership is not flexible. Only one form exists in civil law: absolute ownership. If there is more than one owner of property, all the co-owners share the absolute ownership (an indivisible portion of the title to property). The meaning of owner is fixed and invariable. Unlike common law, ownership is not an economic network in relation to property but rather a symbol and an attribute of liberty.⁷¹

Under Quebec civil law, security interests do not involve actual ownership of property as is the case in a common law mortgage but rather, *in rem* rights as a creditor. Thus, the civilian equivalent of a mortgagor, the Quebec hypothecary creditor, never owns the property.⁷²

By contrast, the common law definition of owner is wide and varies according to context; it includes mortgagors and mortgagees alike, trustees and beneficiaries.

The solution to the differences between the common law meaning of owner and the civil law meaning for the province of Quebec might be to extend the meaning of owner to hypothecary creditors and debtors, and to trustees and beneficiaries, for the purposes of this provision. It would be easy to do if one could use as a common denominator the concept of an interest in land but unfortunately this concept does not exist in civil law and resort must be had to more convoluted formulae.

⁷⁰ See article 1260 - 1298 C.C.Q. *supra* note 3.

⁷¹ For more information on the differences in ownership at civil law and common law see Aline Grenon, “Reflections on the Civil Law and Common Law Concepts of Ownership, in the Context of Harmonization and of Integrated Economies” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Second Collection of Studies in Tax Law (2005), A.P.F.F. / Department of Justice Canada, 2005, doc. 1; France Allard, «Entre le droit civil et la common law: la propriété en quête de sens», dans J. C. Gémar and N. Kasirer (ed.), *Jurilinguistics: Between Law and Language*, Montréal, Editions Thémis, 2005, p. 193 available at: www.bijurillex.gc.ca.

⁷² See articles 2660-2802 C.C.Q. *supra* note 3.

Drafting techniques of bijuralism⁷³

We note above that bijuralism is deeply rooted in the Canadian constitution and that harmonization of federal legislation is now guided by a clear statutory duty of reference to provincial private law⁷⁴ in the *Interpretation Act*. The new rules for the interpretation of federal bijural enactments have direct implications for the drafting of federal legislation. Federal legislation must be drafted harmoniously with the provincial private law of the provincial jurisdictions where it will apply. Federal legislation must “speak” to Canadians not only in English and French but also in legal terms that are relevant to the jurisdiction to which they belong and with which they are familiar. This is the best way of ensuring access to justice and equality before and under the law, to the end user.

Accordingly, drafting techniques used to implement bijuralism in federal legislation aim at 4 legal audiences in Canada: the Anglophone common law community, the Anglophone civil law community, the Francophone civil law community and the Francophone common law community.

A most natural technique used to harmonize federal legislation with provincial private law is neutral terminology. Following this approach, neutral or generic terms that apply both in common law and in civil law are used to express a private law concept or rule that is different in the provinces. An example of the technique of the neutral term might be the use of the single common term “loan/prêt” as a substitute for a reference to the phrase “mortgages and hypothecs/hypothèques”. Neutral or generic terminology may avoid some of the traps of specific legal terminology and may provide useful trans-systemic tools. Tax legislation often substitutes economic tests, generic, ordinary or non-legal terms to narrow legal terminology in order to enhance the scope of anti-avoidance rules.

Sometimes the underlying legal rules and principles are so different that even generic terms may not adequately capture the intended scope of a provision as is the case, for example, with the terms “lease/bail”. Such terms are neutral yet not adequate when a provision is intended to refer to an interest in land and its civil law equivalent real right/*droit réel* as the civil law lease does not encompass a leasehold interest but merely involves a purely personal right (not real property) that does not amount to an interest in land. The underlying law of property is so different between common law and civil law that the common denominator of an interest in land may not be used without adaptations to include civil law leases.⁷⁵

The technique of the definition is also used to bridge gaps in the meaning of private law concepts that result from differences in provincial private law. A textbook example of the definition technique in Canada is the following definition of “common law partner/conjoint de fait” in the *Income Tax Act*:

- 248.** (1) “common law partner”
- “common-law partner”, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and
- (a) has so cohabited with the taxpayer for a continuous period of at least one year, or
 - (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),
- ...

The *Income Tax Act* provides various benefits and obligations in relation to a taxpayer’s spouse or common law partner. In the late 1980s and early 1990s, the status of common law partner was

⁷³ For more information and examples see Maguire Wellington, *supra* note 32 and Marie Claude Gaudreault, *Canadian Legislative Bijuralism: An expression of legal duality, 2006* (to be published) will become available at www.bijurillex.gc.ca.

⁷⁴ Not to mention: the *Policy on Legislative Bijuralism*, *supra* note 31; the Preamble to the *First Harmonization Act*, *supra* note 58; and the Cabinet Directive on Law Making, *supra* note 65.

⁷⁵ *Supra* note 69 in reference to changes made to the definition of immovable in the *Federal Real Property and Federal Immovables Act* to include Quebec leases in the concept of immovable and to treat immovable in the same way as real property for the purposes of that Act.

considerably different from one province to the other. For example, in the Province of Quebec persons that were not married to each other did not enjoy any special rights or obligations for the support of each other nor over each other's property, while in most common law jurisdictions, unmarried persons having cohabited for variable periods of 1 to 5 years or having a common child were treated as spouses (more particularly common law spouses) both for support and division of property obligations. One province had recognized same-sex partners living in a conjugal relationship and was treating them as spouses as well for civil obligations. The federal *Income Tax Act* introduced a definition of "common law partner" for tax purposes. This definition attempted to create a common denominator for what constituted a common law partner for federal tax purposes and bypassed the "balkanized" provincial definitions. Thus the definition technique is a useful tool for merging different provincial norms into a broader and more workable definition intended to apply to both the common law and the civil law audiences while respecting the specificity and autonomy of each legal system.

The scope of the definition technique for the resolution of systemic legal issues is very broad as it may address both differences in terminology as well as in the substantive private law rules themselves. Some definitions however can be problematic, for example in some federal provisions a short cut was attempted by defining real property as including an immovable in civil law. Such definition although it may technically bridge the bijural gap is inadequate in that it does not treat both legal systems as being equal; it could give the impression that common law is the dominant source of federal legislation and deny the equal status provided in section 8.1 of the *Interpretation Act*.

An innovative technique that seems particularly promising to resolve differences in terminology between the civil law and the common law is the technique called the double. By setting up the common law term and the civil law term side by side in the federal provision, the character and uniqueness of the concepts and principles of each legal system are respected and the bijural nature of federal legislation is emphasized and better reflected in keeping with the objectives of accessibility and equality.

Popular examples of the double technique might include the pairs "real property and immovable", "personal property and movable", as well as "mortgage or hypothec". The mixing and matching of civil and common law terminology in a given provision should not pose any special problem as the new rule in section 8.2 of the *Interpretation Act* specifically requires that civil law terms and meanings apply in Quebec and common law terms and meanings apply in the other provinces.

The technique of the double is inspired by a similar approach used in Westminster to harmonize UK legislation that extends to Scotland and take into account Scots law by including Scottish provisions in a Westminster Bill to address Scots civil law and reflect the bijural nature of UK legislation.

Another form of the double involves setting up side by side the substantive private law rule (as opposed to the terminology only) for Quebec on the one hand and the rule for the other provinces on the other hand. Such division based on territorial lines or on legal systems is unambiguous and clearly sets out the scope or the effect of the federal provision at common law and under civil law. The drawbacks of the double technique are longer provisions and potentially poorer readability.

Conclusion

When federal legislation is being applied in any one of the 13 Canadian jurisdictions, provincial private law rules and concepts will be called upon to complete or supplement its application. When there are differences in the private laws of the provinces, whether they are systemic or merely due to differences in provincial legislative policies, federal legislation will apply differently in different provinces unless it is dissociated from divergent provincial private laws. Bijuralism challenges the assumption that all federal legislation is intended to apply uniformly across Canada. Material differences in the application of federal legislation in any province may sometimes result in unacceptable gaps and disparities in federal practices, policies and programs. While unacceptable

gaps and disparities need to be fixed, understandably, some degree of asymmetry is inevitable, having regard to the legal diversity inherent in Canadian federalism.⁷⁶

Coherence in the application of policies and programs is, of course, an important objective but so is respect for diversity (fostering other important values of equality and access to justice) in our federal democracy. The goals of legal diversity and uniformity compete to create the right democratic balance between local and national interests. Bijuralism carries with it the need for a dynamic rebalancing of legal values.

While civil law and common law complement the private law provisions of federal legislation, at the same time, federal legislation should not be applied uniformly throughout the country in every respect. Our objective is legal duality, not necessarily to achieve one rule to be applied uniformly across Canada; this requires respect for the character and uniqueness of the concepts and principles of each legal system. The fact that provincial legislatures may pursue distinctive legal policies which might each be different as well as different from those of Parliament, is a principal justification for federalism.⁷⁷

Unlike harmonization of laws in the European context, harmonization of federal legislation in Canada does not aim at a uniform and independent set of supra-national norms. Neither does it purport to iron out legal diversity. Harmonization of federal laws often serves the opposite purpose of acknowledging diversity of our legal traditions⁷⁸ so that federal legislation may “speak” to both the civilian and the common law community in French and in English. The objective of harmonization in Canada is very different and yields a very different product: law that recognizes the unique character of the concepts and rules of each system. The Canadian experience is nonetheless relevant to those involved in unification of the law. In dealing with concepts and rules that are unique to each system such as the rules of equity or the concepts of interests in land or of beneficial ownership, for example, policy gaps and discrepancies need to be avoided. Where trans-systemic bridges are required between legal traditions or legal substitutes and equivalent rules or concepts must be created in the other legal system, Canada’s know-how in the field of building legal bridges, avoiding policy gaps, finding suitable substitutes and drafting against backgrounds of differing legal systems may be of assistance and I invite you to visit our website www.bijurillex.gc.ca for more information.

The debate will continue regarding the finality of harmonization as to whether harmonization should lead simply to the equal recognition of each legal system or whether it should lead to greater convergence and even the fusion of our common law and civil law systems.⁷⁹ There are at least three proponents of the harmonization of laws in Canada: the federal Government, the judiciary, in particular the Supreme Court of Canada, and the provincial and territorial jurisdictions (acting with the Uniform Law Conference of Canada). Each group has different perspectives and purposes. The federal Government pursues national interests and unity and therefore is more focused on the dilemma of equality versus legal diversity. The Supreme Court of Canada in its final appellate role over private law matters has legal authority to promote the convergence of legal solutions; and, finally, legislatures hold the pen in private law matters and work with the Uniform Law Conference to reform and unify private law in Canada.

The idea that Canada offers prime testing ground for a dialogue between two different ways of thinking about law (through a civil and common law prism) is making headway. It feeds the ideal of convergence or “rapprochement” that occurs inevitably when legal cultures cohabit.

⁷⁶ Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf ed., (Toronto: Carswell 1997), at 2.4 (notes 38, 39) and at 17.3(b): “There is no constitutional requirement that federal laws be uniform across the country”. See also *Perron-Malenfant v. Malenfant (trustee of)*, [1999] 2 R.C.S. 375, para. 56 where the court stated: “This Court cannot undo the Quebec legislature’s express choices and adopt the policy of the common law provinces, only because it is convenient to do so in a particular case. This is something to be left for the consideration of the legislature itself.”

⁷⁷ Bastarache, *supra* note 15 at p. 24.

⁷⁸ “Our legal system must now incorporate the shared values of society as a whole, without excluding or discriminating against anyone”: Bastarache, *supra* note 15 at p. 25.

⁷⁹ Lebel and Le Saunier, *supra* note 25 at p. 202; Sullivan, *supra* note 46, at p. 1043; Allard, *supra* note 71, at pp. 21 and 22.

There is evidence of convergence and cross-fertilization even in the UK. In the seminal case of *Donoghue v. Stevenson*, the House of Lords under the pen of Lord Atkin, a Scot,⁸⁰ produced the idea of a general tort of negligence similar to what existed in the private laws of Scotland as a species of “culpa”.⁸¹ Convergence or harmonization of legal systems does not require that the specificity and autonomy of a legal system be lost; it may well suffice that similar solutions be sought within the rules and methods that are unique to each legal system. Legal traditions like languages can be opened to foreign influence without losing their originality and specificity.

In modern times, knowledge of different legal traditions, like knowledge of different languages, is an asset both nationally and internationally (dialogue of legal diversity). Canada and the UK have experienced the co-existence in their domestic laws of civil and common law as several other jurisdictions have and increasingly will. The ability to synthesise legal knowledge and conjugate it in another legal system is critical to the integration of the new pluralist legal culture that is emerging in the global village.

⁸⁰ [According to *the Dictionary of National Biography* (1941-1950), Lord Atkin was in fact born in Australia and later moved to Wales to be with his mother’s family.]

⁸¹ [1932] A.C. 562, All E.R. 1 (H. of L.). Lord Atkin reconciled the civil law concept of fault with the common law tort of negligence by using the common idea of moral wrongdoing and extending the duty of care. He stated: “The liability for negligence, whether you style it such or treat it *as in other systems as a species of ‘culpa’*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The *rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.*”