



A Word from the Minister

The launch in 1997 of the first collection of studies, *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, aroused keen interest in the legal community across Canada and even beyond our borders. That first publication, written by university professors and other experts in civil law, laid the groundwork for an in-depth reflection on the special nature of Canadian bijuralism and the relationship between civil law and federal legislation.

Since then, within the Department of Justice, some excellent studies have resulted from the harmonization of federal legislation with Quebec civil law. The purpose of this publication is to share some of these studies. It is divided into nine booklets dealing with the background of the harmonization initiative and various aspects of the harmonization initiative. Also included is a text that presents a portrait of a legal harmonizer. Other publications will be added as the harmonization program progresses in order to ensure that knowledge related to legal harmonization is continually shared.

I would like to thank my officials at the Department of Justice who strive to ensure each day that all Canadians have access to legislation that respects the traditions of common law and civil law. In January 2001, the Department of Justice launched its five-year Strategic Plan (2001-2005), which identifies the extension of the Harmonization program to the drafting of all federal legislation as a key part of our commitment to serving Canadians by making the justice system relevant and accessible. The Government of Canada's commitment is reflected in Bill S-4, *A First Act to harmonize federal law with the civil law of the Province of Quebec*.

Bill S-4 is a totally unique effort and concretely acknowledges the existence of the two great legal systems of our nation in a way that has not been done before in Canada or indeed anywhere in the world. It also supports Canada's leading role in an increasingly globalized world.

I sincerely hope that this work will be welcomed enthusiastically and that it will serve to highlight what we are: a bijural nation that is proud of the harmonious coexistence of common law and civil law.

A. Anne McLellan
Minister of Justice Canada

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Mario Dion
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PREFACE

**Mario Dion, Associate Deputy Minister,
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As Associate Deputy Minister responsible for civil law, I am pleased to be associated with the publication of this collection and to have the privilege of writing its preface. In describing the background to this compilation, I propose to outline the history of the federal government's harmonization effort and the present harmonization program as well as summarize this second publication intended to share our knowledge, its purpose and content.

First of all, I should note that Canada is the only G-8 nation where bijuralism is being achieved through a formal program organized by the national government. According to available sources, it would also appear to be the only country where national legislation is genuinely based on two separate systems of law. The division of powers provided for in the *Constitution Act, 1867* grants jurisdiction over "property and civil rights" to the provinces, except where such matters are placed under federal jurisdiction, e.g. banking, marriage and divorce, bankruptcy and insolvency. Provincial jurisdiction over "property and civil rights" is the reason for the coexistence of two private law systems in Canada: civil law in Quebec and common law in the other Canadian provinces and territories.

It must be borne in mind, however, that this process of bijuralism in federal legislation did not begin formally until the *Civil Code* reform, which was started in 1955 by the Government of Quebec and led to the coming into force of the *Civil Code of Quebec* on January 1, 1994. The substantive changes provided for in this reform led to the amendment of nearly 80% of the provisions of the *Civil Code of Lower Canada*. In response to this reform which affected one quarter of Canada's population, the federal government introduced a program to coordinate federal legislation with the terms and concepts of the new *Civil Code of Quebec*. In 1993, it put in place a small team that was responsible for harmonizing federal legislation with the new concepts, notions and institutions of the Province of Quebec's civil law system.

Although a joint drafting policy has been in place since 1978, federal legislation and regulations remained incomplete since they did not reflect all four of Canada's legal audiences: Francophone and Anglophone civil law jurists and Anglophone and Francophone common lawyers. The Civil Code Section was created in 1993 to, inter alia, harmonize federal laws with the new *Civil Code of Quebec*. The Section was shortly thereafter given the additional task of ensuring that federal legislation reflected Canada's four legal audiences and was thereby fully bijural. This change came about in spite of the major budgetary cutmakes to the federal administration at that time.

In 1999, the Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec was given permanent resources and at this time has a staff of 50 persons, including a number of jurists for whom the program represents an alternative to the traditional practice of law. The Program is being implemented by the Civil Code Section whose work consists mainly of legal research and the drafting of proposed legislative amendments to make federal legislation fully bijural.

To date, two bills have been tabled in Parliament. The first, Bill C-50, was introduced in the House of Commons on June 11, 1998 and did not receive royal assent before Parliament was prorogued in fall 1999. The bill was reintroduced on May 11, 2000, this time in the Senate (S-22), but met with the same fate when the federal election was called in October of that year. Bill S-4, which contains essentially the same content as the previous bills, was tabled in the Senate on January 31, 2001.

We would like to thank the *ministère de la Justice du Québec*, the *Barreau du Québec* and the *Chambre des notaires du Québec* for their invaluable cooperation during the consultations that preceded the tabling of these bills. Without their support, the work done under the Harmonization Program would have been considerably more difficult.

It should be recalled that, since harmonization was, up until then, an unexplored field, the Civil Code Section had to develop new work methodology that would enable it to identify and correct bijuralism problems and ensure that the two legal systems were visibly and genuinely respected. It was thus through experiment and an original approach that the methodological procedures necessary to the harmonization work described in this collection were established.

To increase awareness of Canadian bijuralism, the Department of Justice has adopted a promotional strategy that deals specifically with it. The strategy has five components, most notably coordinating bijuralism initiatives, training and integrating Canadian bijuralism into the Department, into the Public Service, and into the broader Canadian legal community. Through a range of activities and initiatives, a number of players are carrying out the strategy and contributing to the promotion of Canadian bijuralism as a competitive advantage for Canadian jurists in the context of globalization and the growth of supranational structures such as the European Union and the Organization of American States.

Against this background, the Civil Code Section has established a program of research contracts for graduate law students and is publishing papers in legal journals. A number of these papers are included in this collection.

The first collection published by the Civil Code Section consisted solely of studies on the harmonization of federal legislation and other aspects of Canadian bijuralism written by law professors and other legal experts for the Civil Code Section. That first collection was very well received by practising lawyers as well as judicial, academic and legal authorities. Since its publication, interest in Canadian bijuralism and the Harmonization Program of the federal Department of Justice has clearly been on the rise. Many presentations relating to bijuralism have been given on different occasions and in different circumstances including the Faculty of Law of the University of Ottawa which recently devoted a significant portion of an international conference to the issue.

I am therefore very pleased to introduce the publication of this second collection, which, contains articles written primarily by both jurists of the Civil Code Section, some of whom were hired when the Program was introduced, and contributors from other sections within the Department. These contributions reflect the decompartmentalizing of our understanding of bijuralism and its extension beyond the sole task of representing the concepts and notions of the two legal systems in federal legislation and regulations.

The publication of this collection on the occasion of the Conference of the *Barreau du Québec* in May 2001 will raise awareness of the Harmonization Program and of the characteristics of

Canadian bijuralism throughout the legal community in Quebec and elsewhere. This is also the perfect opportunity for Canadians to enjoy a partial return on the major investment they have made in this project.

Since this collection is published in both official languages and available in an electronic version it is readily available to the Canadian and international legal community. Although the bijuralism issue has thus far been of interest primarily to civil law jurists, our common law colleagues are now increasingly aware of and interested in the interaction of different private law systems occurring around the world.

The collection's format allows for updates and additions which confirms that work relating to Canadian bijuralism is ongoing and that the Department of Justice Canada firmly intends to share its knowledge of the subject as it develops. The law arising from this work is learned law and those involved as well as the Department deserve due recognition. This work should also benefit Canadians with an interest in this question.

To provide a clearer idea of the collection's value, I would like to say a few words about its content. As mentioned previously, we have developed a harmonization methodology that is outlined in detail in the first article. This is followed by a number of more technical texts essentially concerning specific concepts in the fields of bankruptcy law, tax law and security law, which have formed the subject of proposed legislative amendments in recent years.

Some of the articles refer directly to the progress through Parliament of the most recent harmonization bill tabled. This gives readers a better understanding of the culmination of the research conducted by jurists in the Civil Code Section and, in some instances, elsewhere. It is useful to point out that, since this bill is still the first harmonization bill being considered by Parliament, its preamble and initial clauses contain statements of principle concerning Canadian bijuralism. The impact of these statements in the *Interpretation Act* is discussed by Mr. Henry Molot in this volume.

As it is our objective to demonstrate the importance of the federal government's harmonization exercise, we have included a booklet on the contribution of the Supreme Court of Canada relating to bijuralism. Since enthusiasm for harmonization extends beyond our borders, we also provide an overview of bijuralism in the world, and discuss the nature of the diverse relations between the two legal traditions in Canada.

The collection also includes a number of speeches delivered by the Minister and departmental employees on Canadian bijuralism and the Harmonization Program. As the reader will note, the message has been delivered in many fora, which will help to promote Canada's unique legal status and the important contribution the Department's jurists can make to similar efforts being undertaken elsewhere in the world.

The last article in the collection is a short humorous piece contributed by one of the Civil Code Section's young lawyers who joined the Department when the Section was created. In it he explains how the Harmonization Program has enabled several young jurists to find interesting and original work despite a lack of legal experience. The article is an attempt to increase awareness of this new field amongst young lawyers and law students seeking an alternative to the traditional opportunities available for lawyers and notaries.

Lastly, I would like to thank all the authors of the articles published in this collection for their rigorous and energetic efforts, particularly in view of the imposing workload and schedules of their regular jobs at the Department of Justice Canada.

In conjunction with the preparation of this collection, we are also very pleased to be involved in organizing the 2001 Conference of the *Barreau du Québec* where the theme of bijuralism will be in view. The productive association between our Department and the *Barreau du Québec* in this field dates back to the early 1990s and it is our hope it will continue well into the future.

For readers of this volume, I hope you will find in it legal concepts that stimulate your research and assist you in your work, or at the very least satisfy the curiosity that characterizes jurists in general.

SYMPOSIUM ON THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW

**Notes for an Address by
The Honourable Stéphane Dion,
President of the Queen's Privy Council
for Canada and Minister of Intergovernmental Affairs**

Montreal, Quebec

November 24, 1997

Introduction

I am happy to open this Conference on the Harmonization of Federal Legislation with Quebec Civil Law. Your deliberations will provide us with food for thought on a topic that is of close interest to the legal community in Quebec and in Canada as a whole. I intend to devote my opening address to the concept of bijuralism and the advantages it brings to Canada.

Canada: a bijural country

Without a doubt, Canada has one of the most respected legal systems in the world. That well-earned reputation is clearly due to the excellence of our law faculties, the exceptional quality of our judges and the wisdom of their decisions. But it is also due to the coexistence of two great legal traditions of the Western world, civil law and common law.

For Canada can in fact be proud to be one of the rare bijural countries in the world. As early as 1774, the *Quebec Act* maintained in force French laws and customs with respect to property and civil rights in the province. The *Constitutional Act*, 1791 and the *Union Act*, 1840 did not modify the rights recognized in 1774. And when the Canadian federal union was created, this legal duality was confidently entrenched. Indeed, the *Constitution Act*, 1867 provides that private law is an exclusive provincial jurisdiction, which has allowed to Quebec to make the *Civil Code of Lower Canada* the framework of its civil law, while the other provinces could continue to be governed by common law. That duality is also reflected in the requirement that superior court judges in Quebec are selected from members of the bar of that province. The same is true for the Supreme Court of Canada, for under the *Supreme Court Act*, three of its nine judges must be from the *Barreau du Québec*. The bijural character of our legal system is thus entrenched in the very heart of our basic law. In that and many other respects, Quebec enjoys a degree of autonomy that is uncommonly high, and much higher than that of many other federated states.

The civil law tradition is not only an essential characteristic of Quebec society, as the premiers of nine provinces recognized once again in the Calgary Declaration, but it is also an asset for Canada as a whole.

Bijuralism certainly poses some particular challenges, which you will be studying in the course of your deliberations. But it is an undeniable richness for those who know how to use it and benefit from it. In the words of Mr. Philip Simpson, a British lawyer who works with the Court of Justice of the European Communities, [Translation] "... the existence of two independent legal systems within

a single nation-state does not inevitably lead to conflict; on the contrary, such coexistence can be advantageous for all.”

Absolutely: Canada has every reason to be proud of its two great legal traditions, and it has a duty to do everything in its power to ensure that they flourish and complement each other. Civil law cannot but benefit from its interactions with common law, and the reverse is also true. In that respect, it is wonderful that more and more Canadian jurists are mastering our two legal systems, a development which promotes the teaching of common law in French and the learning harmonization project. The scope of this project, which seeks to bring Quebec civil law and existing federal legislation more into step, is without precedent in Canada's legal history. This initiative, which has now been underway for more than four years, is based on close cooperation between the departments of Justice of Canada and Quebec and has benefited from the vital contribution of the academic community.

The objective is ambitious. It is not only to bring about terminological changes, but in particular genuinely to take into account the bilingual and bijural nature of Canada. While the harmonization project is designed first and foremost to allow Quebecers to recognize themselves better in federal legislation, it will also be an opportunity to ensure that there is not too much discrepancy between the common law in various provinces and the concepts imparted in federal legislation. All Canadians will benefit, because the end result will be clarification of the federal status and a legal corpus that is more respectful of their own institutions.

My colleague, the Minister of Justice, the Honourable Anne McLellan, will give you an initial overview in a few moments of what has been done so far. I would simply like to underscore the scope of the task. Of some 700 federal laws that have been examined by jurists in the Department of Justice, just over 300 have been earmarked for a more in-depth review. In the bill to be tabled by June 1998, laws with the clearest links to civil law and having a greater effect on citizens will be harmonized.

Once that phase of the project is completed, the Department will proceed to harmonize more complex legislation in the fields of securities, property, family and civil liability. More extensive studies will also have to be conducted with respect to laws that present more specific difficulties, such as the *Divorce Act* and the *Interpretation Act*. There is thus much work to be done. This is obviously an undertaking that will be spread out over several years.

I am therefore proud to announce today, in Montreal, that the Government of Canada has decided to provide, for the harmonization of federal legislation with Quebec civil law, initial funding of over \$7,418,839 for this large-scale project: \$3,931,193 for the 1997-1998 fiscal year and \$3,487,646 for the 1998-1999 fiscal year. The Department's needs will have to be reassessed in two years, to enable it to proceed with and complete its project.

Respecting the civil law tradition

As Professor Morel of the faculty of law of the Université de Montréal has noted, [Translation] “The complementarity of federal law and civil law, however natural it may be [...] must be constantly maintained and reaffirmed, if not reinvented, to remain alive.” More than ever, then, we must do all we can to develop this important aspect of Canadian diversity. Prime Minister Jean Chrétien believes deeply in the advantages of that diversity, which is why he moved the resolution adopted in 1995 by both Houses of Parliament recognizing that Quebec society is distinguished in particular by

its civil law tradition and calling on “all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly.”

Turning words into action, his government developed the means to capitalize on this richness. First, the Department of Justice adopted in June 1995 a policy on legislative bijuralism, which reflects its desire to make laws clearer and for an interpretation that is more accessible to all Canadians. The Department of Justice also made a commitment at that time to draft both versions of all bills or regulations relating to private law, also taking account of the terminology, concepts, notions and institutions specific to Canada's two private law systems.

The coming into force of the *Civil Code of Quebec* in 1994 was the catalyst of the Civil Code: “It thus appears that as a fundamental building block of the Quebec identity, the Civil Code also constitutes an original and characteristic component of the Canadian identity (...) This Code is more than a mere legal instrument. It is truly a social statement.”

The project to harmonize federal legislation with Quebec civil law is an inevitable necessity. It will be a considerable task, and the Department of Justice of Canada has the good fortune of being able to count on one of the most skilled legal communities in the world to bring this enterprise to fruition. Common law and civil law will both be enriched by it, and all our citizens will reap the fruits of this labour. I wish you productive deliberations and stimulating exchanges.

Conclusion

We have long known that the unity of the state does not necessarily go hand in hand with uniformity of legislation. In *The Spirit of Laws*, Montesquieu wrote, 250 years ago: [Translation] “If citizens follow laws, what matter if they follow the same.” Montesquieu could have been Canadian. If there is one country that knows that equality is not synonymous with uniformity, it is certainly ours.

Quebec is governed by a legal system that is specific to it and whose existence is protected by the Constitution. Its private law tradition is an essential component of its specificity and also an element of Canada's diversity. The Honourable Charles Gonthier, Justice of the Supreme Court of Canada, has given this eloquent description of the importance of the Civil of civil law in English. In so doing, not only are our jurists expanding their horizons and honing their skills; the entire legal community is forging closer ties, and all Canadians are the winners.

Our bijuralism is not only advantageous in our mutual relations among Canadians. It also facilitates access to other countries. We thus gain a better understanding of the laws in force in the countries with which we are intensifying our relations, the vast majority of which are governed by legal systems stemming from common law or civil law. As points of contact between very diverse legal cultures multiply, that is an appreciable competitive edge. Indeed, in this era of economic and market globalization, mastering the two most widespread legal systems in the world is more than ever a substantial asset. For example, the fact that most South American countries are governed by legislation inspired by civil law gives us in our relations with them an advantage over our neighbours in the United States.

Our bijuralism obliges us to develop expertise in solving problems relating to the juxtaposition of rules of law stemming from different traditions. We can other help countries to benefit from that experience we have acquired. The Government intends to make Canada a leader in that field.

Bilingualism allows Canada to be a member of both the Francophonie and the Commonwealth. The varied cultural origins of the Canadian population also give us many footholds in the world. Our opening to the Pacific and the Atlantic bolsters our cultural and commercial exchanges. In the same way, our bijuralism gives us a window on the world, and the Government of Canada wants to work actively to promote that fundamental characteristic of Quebec society, which is shared by all of Canada.

HARMONIZATION AND DISSONANCE: LANGUAGE AND LAW IN CANADA AND EUROPE

THE COHABITATION OF BILINGUALISM AND BIJURALISM IN FEDERAL LEGISLATION IN CANADA: MYTH OR REALITY?

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1. Constitutional framework

1.1 Bilingualism

The Parliament of Canada is required by the Constitution to use both English and French in its proceedings and publications. This constitutional requirement, which dates back to Confederation (s. 133 of the *Constitution Act, 1867*), was later strengthened and defined, notably in the *Canadian Charter of Rights and Freedoms (Constitution Act, 1982)*, section 18 of which provides that both versions of the statutes “are equally authoritative”.

1.2 Bijuralism

In the case of bijuralism, Parliament’s obligations are not as clear. Since the *Quebec Act* of 1774, two systems of law have coexisted in Canada: French civil law in Quebec and the common law of England in the rest of the country. In fact, shortly after the victory of the English a few years earlier, the *Quebec Act* allowed Quebec to base its private law on the civil law of France, although its public law continued to be based on the common law of England.

This situation was indirectly embodied in the *Constitution Act, 1867*, which gives the provinces exclusive legislative jurisdiction over property and civil rights. This Quebec is subject to both the civil law in the case of its private law and the common law in the case of its public law. Everywhere else in the country the common law holds sway in both private and public law.

This does not mean that Parliament has to express itself bijurally. However, given the coexistence of the common law and the civil law in Canadian private law, Parliament feels that it has at least a moral duty to take the two systems of law into account in its legislation when it enacts rules of private law, which happens very rarely, or when it sets out standards the application of which intersects with provincial private law, which is much more often the case.

2. Legislative bilingualism and bijuralism

2.1 Legislative bilingualism

Until the 1970s, all acts were drafted in English and then translated into French by translators who were not recognized as having any particular skills in law and who were usually forced as a result to convey the message of the English version very slavishly.

Since they did not have any current resources concerning the common law in French or the civil law in English, the expression of the interaction between federal law and private law was based on makeshift equivalents that they devised on the basis of the available resources and without concern for the problems of interpretation that could result in some parts of the country. The requirements of bilingualism were met, at least formally, but legislative bijuralism was, so to speak, non-existent.

2.1.1 Legislative co-drafting

Consequently, in 1978, the federal Department of Justice made a major change of direction when it put in place a method of legislative drafting that was unique of its kind: codrafting.

Since that time, in fact, all bills for which the Legislative Services Branch of the federal Department of Justice is responsible are prepared by a team of two drafters: one Francophone, who has usually been trained in civil law, and one Anglophone, who has usually been trained in the common law. As a rule, the same is true of regulations. Some aspects of bijuralism are already present in codrafting.

2.1.2 The Jurilinguistic Service

The drafters of statutes and regulations are supported in their work by specialists in the language of the law called “jurilinguists”. They are responsible for ensuring not only that the meaning of both versions of a piece of legislation is the same but also they are perfectly equivalent from a cultural point of view. They also advise the drafters concerning the choice of wording to be used, especially when the drafters are dealing with an interaction between federal law and the private law applicable to a particular person or part of the country.

Exactly one year ago, the Legislative Services Branch created a new unit, the Jurilinguistic Service, to bring together all the jurilinguists who had hitherto reported to the Legislation and Regulations Section of the Branch. The purpose of this was first to pool rare and valuable resources to ensure better management during the peak periods. It was also an expression of the desire to consolidate the linguistic support on which drafters of statutes and regulations, especially Francophones, need to have at their disposal in order to prepare legislation that meets the requirements of the Department of Justice in language of a very high standard. The jurilinguists are there to ensure that the solutions adopted are linguistically correct.

2.2 Legislative bijuralism

2.2.1 The four audiences for the law

Because of the official bilingualism within the federal jurisdiction and the coexistence of two legal systems in the country, there are four audiences for the law in Canada (at least in terms of private law): Anglophones and Francophones subject to the civil law, on the one hand, and Anglophones and Francophones subject to the common law, on the other hand. Until recently, the

English version of the federal statutes tended to reproduce the terminology and concepts of the common law while the French version derived its terminology from civil law sources. Unfortunately, this approach meant that two of the four audiences mentioned above were ignored, namely Francophones living outside Quebec who are subject to the common law and Quebec Anglophones who are subject to the civil law.

2.2.2 The Policy on Legislative Bijuralism

The federal Department of Justice accordingly adopted a policy on legislative bijuralism in 1995, the basis for which was respect by Parliament for the four audiences for the law in this country and recognition that all Canadians have a right to understand the meaning of the federal legislation applying to them. This presupposes that Canadians are able to read federal legislation in the official language of their choice and that the language version they choose to read is harmonized with the legal system that applies to the province or territory in which they live.

In adopting its policy on legislative bijuralism, the federal Department of Justice formally acknowledged the existence in Canada of four “legal” audiences and their right to read federal legislation in the official language of their choice and to find in that legislation terminology and wording that are consistent with the system of private law in effect in their province or territory. Furthermore, whenever a federal bill or regulations interacts with the private law of a province or territory, the Department also undertakes to draft each version of the legislation using the proper terminology, concepts, notions and institutions of the two systems of private law in Canada.

This policy is a response to one of the objectives that the Department of Justice has made a priority, namely access to justice. In fact, the Department’s commitment to a more accessible system of justice for all Canadians is reflected in the production of legislation that respects the two systems of private law that apply in this country. Moreover, this policy is clearly part of a series of measures to support the official language minority communities.

2.2.3 Techniques of bijural legislative drafting

In order to ensure that both official versions of legislation reflect both the civil law and the common law in their references to provincial or territorial private law, Parliament makes use of a wide range of drafting techniques. The most frequently used techniques are the so-called “neutrality” technique and the doublet.

2.2.3.1 Neutrality

Whenever possible, Parliament prefers to use “neutral” terms or phrases, that is those that have no particular connection to either of the two legal systems in Canada. If necessary, it is possible to use neologisms in this situation.

Whenever necessary, the neutrality technique can take the form of definitions in which Parliament defines civil law or common law concepts and notions to which it wishes to refer by using the neutral terms in question.

This technique has the enormous advantage that it avoids lists or repetitions of a host of terms that belong to the civil law and the common law. It also makes it possible to limit the number of amendments that need to be made to federal legislation as a result of changes made to provincial or territorial law.

2.2.3.2 The doublet

However, it is not always possible to use the technique of neutrality if there is no neutral term capable of encompassing the various civil law and common law concepts to which Parliament wishes to refer. In those cases, therefore, a doublet will be used.

The doublet is a drafting technique that involves stating the as it exists in each of Canada's two legal systems. In the case of the doublet with paragraphs, the technique is used to make up for the lack of a single expression expressing both the civil law and common law concepts and to ensure that both versions of the legislation retain their separate identities. It is then a question of setting out in separate paragraphs the different forms that a rule of law may take as it is applied in different regions of the country.

As for the simple doublet, it involves expressing a given legal concept through the terminology of each separate legal system. Both expressions (the civil law terms and the common law term) will then appear one after the other in each language version.

2.2.4 The *Interpretation Act*

The provisions that make use of a simple doublet can sometimes cause problems of interpretation since civil law terms are juxtaposed with common law expressions in those provisions. Thus, Parliament is currently considering a Bill (Bill C-50, *A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law*), section 8 of which amends the federal *Interpretation Act* to include a provision that will serve as a guide to the interpretation of such provisions.

The proposed provision states that legislation that used both terms belonging to the civil law of Quebec and terms belonging to the common law of the other provinces or that uses expressions that have a different meaning in each of the two systems, must be interpreted in a way that is consistent with the legal system of the province in which the provision is being applied. This is an attempt to avoid the situation, for example, where courts interpreting legislation that uses simple doublets might be tempted to apply the common law terms used in this legislation to Quebec, since Parliament is deemed not to speak to no purpose.

2.2.5 Basic tools

The Department of Justice of Canada could not have made this major change in the area of legislative bijuralism without the remarkable work that has been done in Canada in the field of common law terminology in French and civil law terminology in English and the pioneering work done by the Universities of Ottawa and Moncton in teaching the common law in French.

The bilingual and bijural tools now available to drafters of statutes and regulations and jurilinguists are the product of work done by POLAJ—the Program for the Integration of Both Official Languages in the Administration of Justice, the objectives of which are essentially to improve access to justice in both official languages by promoting, among other things, the creation of tools for the people who draft legislation in this country.

This network involves most of the organizations involved in the administration of justice in both of Canada's official languages. It brings together the centres for jurilinguistics, the associations of French-speaking lawyers and their national organization, government institutions and the

universities active in training lawyers either in the common law in French or in the civil law in English.

3. Conclusion

Perhaps I might be allowed, by way of conclusion, to note that the Legislative Services Branch, which is responsible for implementing the Department's policy on legislative bijuralism, must increasingly make room for the discipline of comparative law. How would it be possible otherwise to make the necessary distinctions and comparisons between the two systems of law in this country that must cohabit in both language versions of federal legislation?

Thus, the Legislative Services Branch has recently decided to hire a specialist in comparative law (common law/civil law, of course). This person will guide and advise drafters on the subject of legislative bijuralism and will also be responsible for ensuring close communication with the Department's Civil Code Section, which has the task of steering the federal government along the path toward harmonization of federal legislation with the new *Civil Code of Quebec* and which is accordingly an important partner of the Legislative Services Branch with respect to legislative bijuralism.

However, the principles of bijural legislative drafting must not be implemented at the expense of the clarity and readability of the legislation in question. Parliament will not wish, on the pretext of clearly reflecting this country's legal duality, to enact legislation that is difficult to read on account of the presence in this country's acts and regulations of lists or terminological repetitions that are unusually cumbersome. Ensuring that federal legislation is readable remains a major goal of the federal Department of Justice. Achieving a reasonable balance between the requirements of bijuralism and those of readability is still the order of the day.

In conclusion, I should like to point out that the expertise and know-how developed in Canada in the fields of bilingualism and bijuralism make a valuable contribution to improving access to justice in both official languages. Moreover, it is against this background that future lawyers in this country will be able to receive training in the legal system and the official language of their choice. As a result of the efforts made by the Universities of Ottawa and Moncton and of McGill University in Montreal, languages and law are a unique and integrated concept that makes it possible to train lawyers to serve the people of Canada in both official languages and in both of this country's legal systems.

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 COMPLEMENTARITY AND METHODOLOGICAL ISSUES**

**Introductory Notes by
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Moncton, N.B.

May 7, 1999

Introduction

In its broadest meaning, bijuralism refers to a state of facts, i.e., the co-existence of two contemporaneous legal systems. In Canada, current federal legislation contains no express mention of the coexistence of both common law and civil law.

Historical references and the study of the complementary relationship between federal law and Quebec civil law form the background for the mandate conferred on the Civil Code Section.

An examination of bijuralism and a review of its definition are helpful in providing a general understanding of the historical context and current status of the relationship between federal and civil law; it is equally necessary to conceptualize and operationalize bijuralism in order to understand the theoretical and methodological requirements associated with characterizing the mandate of harmonizing federal legislation with civil law.

It would not be sufficient simply to describe the phenomenon of bijuralism and the purpose of the harmonization mandate conferred on the Civil Code Section by the Department of Justice; we must also identify the problems associated with the issues, however general the latter may be, conceptualize and structure their resolution and, at the same time, describe some of the successive stages of the method.

In a historical and legal perspective, this means,

- understanding the historical basis for the coexistence of common and civil law;
- grasping the nature of the relationship between federal and civil law;
- finally, becoming aware of the requirements for interpreting and harmonizing laws.

It is also my intention, further to the background paper and the presentation by Mr. Lionel Levert, to discuss departmental policy statements in the context of which the process of harmonizing federal laws and regulations is taking place, as well as the issues raised by the harmonization process, of which the following pages are only a partial treatment:

- What is the harmonizer's role? Can it serve as a model?
- What are the special attributes vested in him?
- Does he change the substance or force of the law?

The study initiated by us in the Symposium, entitled *Harmonization and Dissonance: Language and Law in Canada and Europe*, may provide a model for such practices and, in exchange, lead us to a reconsideration of bijuralism and the interpretation that it evokes.

HARMONIZATION OF FEDERAL LAWS AND REGULATIONS WITH QUEBEC CIVIL LAW, AND ITS ORIGINS: HISTORICAL CONTEXT

The Department of Justice Canada created the Civil Code Section in April 1993; on June 7 of that year, it adopted a policy on the application of the *Civil Code of Quebec*, which entered into force on January 1, 1994 in the federal government.

In June 1995, the Department of Justice also adopted a policy on legislative bijuralism, in which it undertook, in drafting both versions of every bill and proposed regulation that touches on provincial or territorial private law, to take care to reflect the terminology, concepts and institutions of both of Canada's private law systems.

Furthermore, a resolution recognizing Quebec as a distinct society within Canada, and recommending that all elements comprising the legislative and executive authority of the Government of Canada give effect to, and that their conduct attest to, this recognition was adopted by the House of Commons on December 11, 1995. A similar motion was adopted by the Senate on December 14, 1995.

Finally, in the 1996 Speech from the Throne, the Government of Canada undertook to renew and update Canadian federalism, and ensure that it meets the needs of Canadians in the 21st century.

Working from the results of studies conducted up until 1997, the Civil Code Section began work on Bill C-50, entitled A First Act to harmonize federal law with the civil law of the province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law, 1st sess., 36th Legislature, Elizabeth II, 1997-98, (1st reading), tabled in the House of Commons on June 12, 1998. Bill C-50 was the first of a series of harmonization bills and represented the first milestone along the road to harmonization.

HARMONIZATION OF FEDERAL LAWS AND REGULATIONS WITH CIVIL LAW: LEGAL CONTEXT

A. Statement of Objectives and Origin of Initial Studies

The harmonization of federal laws with Quebec civil law has the following objectives:

1. to adapt federal laws and regulations that deal with private law or use its concepts to the new concepts, new institutions and new terminology of the *Civil Code of Quebec*;
2. to allow Anglophone and Francophone common law jurists, as well as Francophone and

Anglophone civil law jurists, to recognize their respective legal traditions;

3. to guarantee better implementation of federal legislative policies in Quebec and, at the same time, minimize problems with the application and interpretation of federal laws that could arise from the coming into force of the *Civil Code of Quebec*.

Harmonization of federal laws and regulations also ensures that all citizens are treated equally before the federal law. Of course, harmonizing the laws and regulations is not equivalent to standardizing or amending the law. Rather, the harmonization procedure is concerned with ending any discrepancies in the application of federal laws.

The Department believes that these objectives may be achieved through systemic harmonization of the laws and regulations that interact with Quebec civil law; for example, it is estimated that approximately 60 new laws are passed each year by the House of Commons and that, of this number, roughly half are suitable for harmonization with Quebec civil law. As well, of the roughly 700 existing laws, over 300, including 120 that are extremely complex, are also suitable for harmonization with Quebec civil law.

The task of reviewing the federal laws, assigned to the Civil Code Section, has thus far focused on three major areas:

I. Relationship between Federal Law and Quebec Civil Law

The first job was to establish how and under what authority civil law interacts with federal law. Two studies were conducted: the first applied a constitutional perspective in dealing with the former and the new *Civil Code* as an expression of federal suppletive law¹; the second analysed the basis of the complementarity between federal and the civil law².

II. Amendment of Federal Legislation on the Basis of the Quebec Civil Code Reform

In considering the various aspects of the issue of revising federal laws so as to take into account the nature and scope of the changes enshrined in the new *Civil Code*, the consultation committee developed a methodology and work plan³. Pilot studies were developed to establish the nature, variety and scope of the problems arising from the interaction between the federal law and the new *Civil Code*⁴; the studies, which focused on three federal laws chosen for their obvious connection to civil law, were then carried out; the laws in question were the *Federal Real Property Act*⁵, the *Crown Liability and Proceedings Act*⁶ and the *Bankruptcy and Insolvency Act*⁷.

¹ Roderick A. MACDONALD, "The Constitutional Position of the *Civil Code of Lower Canada* and the *Civil Code of Quebec* as an Expression of Federal Suppletive Law", March 1996. Professor Macdonald also prepared a study entitled "Constitutional Implications of the *Civil Code of Quebec*", March 1995, which was revised and became "The *Civil Code of Quebec* and Section 129 of the *Constitution Act, 1867*", March 1996. A synopsis of this work appeared under the title "Encoding Canadian Civil Law", in *Mélanges Paul-André Crépeau*, Cowansville, Éditions Yvon Blais, 1997, p. 579.

² Jean-Maurice BRISSON and André MOREL, « Droit fédéral et droit civil: complémentarité, dissociation », March 1995; subsequently published under the same title in (1996) 75 *R. du B. can.* 197.

³ André MOREL, « La révision de la législation fédérale à la lumière du *Code civil du Québec*, Méthodologie et plan de travail », March 1995.

⁴ A pilot study was also conducted of the interpretation by Quebec courts of legislative provisions that are expressed exclusively in common law terms: Jean-Maurice BRISSON and André MOREL, « Les langues de la *Loi sur les lettres de change* et la common law au Québec, à travers le contentieux judiciaire », March 1996.

⁵ S.C. 1991, c. 50. John E.C. BRIERLEY and Nicholas KASIRER, "Preliminary Report, Review of the *Federal Real Property Act/Loi sur les immeubles fédéraux* in light of the coming into force of the *Civil Code of Quebec*", April 1995.

By examining amendments that could be made to those laws in order to harmonize them with civil law, these studies made it possible to conduct a critical analysis of the most appropriate means of making federal legislation relating to private law fully bijural in both language versions⁸.

III. Survival of Provisions of the *Civil Code of Lower Canada* Relating to Matters under the Exclusive Jurisdiction of the Parliament of Canada since 1867

A third area that could not be ignored was the surviving provisions of the 1866 Civil Code that have related to matters under the exclusive jurisdiction of the Parliament of Canada since 1867 and that the provincial legislature could not repeal when the *Civil Code of Quebec* came into force. From this point of view, a series of special studies⁹ were undertaken according to area of federal jurisdiction. These studies resulted in a summary report outlining the practical problems posed by the survival of pre-Confederation law and recommending ways of resolving them¹⁰. These studies made it possible not only to prepare the work plan, but also to make subtle distinctions in the statement of the harmonization mandate conferred on the Section.

B. Current Statement of Harmonization Mandate and Methodological Imperatives

The sole purpose of the initial work plan was to harmonize the existing laws. Currently, the Department is including in this process not only existing legislation, but also laws and regulations in the process of being adopted.

The mandate of the Civil Code Section is based on the principle that harmonious interaction between federal and provincial legislation is necessary and that it may be achieved by interpreting federal laws in a manner compatible with the legal system of the civil or common law, as appropriate, that is in force in the province of application. This mandate is composed of four elements:

1. Harmonization of Federal Laws and Regulations

- to implement the process of harmonizing federal laws and regulations, both those already in existence and those in the process of being adopted, with Quebec civil law, while respecting both its Anglophone and its Francophone legal audiences, by making recommendations for amendments to the laws and regulations:
- to ensure, when making such recommendations, that the French-language common law

⁶ R.S.C. (1985), c. C-50. Gaspard CÔTÉ, « Révision de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* eu égard aux dispositions du *Code civil du Québec* », March 1995.

⁷ S.C. 1992, c. 27. Jacques DESLAURIERS, « Les points de contact entre la loi sur la faillite, les lois connexes et le *Code civil du Québec* », March 1995.

⁸ This analysis was conducted in light of the work on bijuralism conducted within the Department of Justice, in particular the "Report of the Committee on Legislative Bijuralism", April 1996, of the Legislative Services Branch.

⁹ Jacques AUGER, « Les créances de la Couronne », March 1996; Albert BOHÉMIER, « La faillite et l'insolvabilité, La réforme du *Code civil du Québec* et les dispositions préconfédérales », March 1996; André BRAËN, « Les dispositions maritimes du *Code civil du Bas-Canada* », March 1996; Gaspard CÔTÉ, « Étude portant sur les dispositions du *Code civil du Bas-Canada* d'origine préconfédérale concernant la Couronne et sur l'abrogation éventuelle de celles-ci dans la mesure où elles ont trait à des matières relevant de la compétence législative du Parlement du Canada », March 1996; Pierre-André CÔTÉ, « La survie du droit préconfédéral : le cas des dispositions relatives à l'interprétation et à l'application des lois du *Code civil du Bas Canada* », March 1996; Jean LECLAIR, « Étude de la légalité constitutionnelle de l'abrogation, par la Législature du Québec, des dispositions préconfédérales du *Code civil du Bas Canada* relatives aux lettres de change et à l'intérêt de l'argent », April 1996; André MOREL, « Les dispositions préconfédérales du *Code civil du Bas Canada* sur le mariage », March 1996.

¹⁰ André MOREL, « Le droit civil préconfédéral et le rôle du Parlement après le nouveau Code civil », revised version, April 1997.

provisions are improved;

- to provide, on an *ad hoc* basis, specialized services relating to the harmonization of laws and regulations.

2. Information Management

- to create, operationalize, maintain and circulate a specialized computerized database on civil and comparative law;
- to set up and manage a specialized documentation centre on civil and comparative law.

3. Development of Expertise

- as a corollary activity, to provide specialized services in the form of legal opinions on civil and comparative law;
- as a corollary activity, to offer consulting, policy development and functional co-ordination services, having regard to the civil law and to the activities of the federal government in Quebec.

4. Activities to Spread and Promote Bijuralism

- to publish studies on civil law, comparative law and harmonization;
- to participate in, support and ensure through action the spread and promotion of Canadian bijuralism.

The methodological imperatives relating to the uniqueness of the required interpretative work are subsumed in the mandate briefly described herein. In order to be consistent, legislative drafters are expected to respect the principle of uniformity of expression: each term should have only one meaning; each concept should have only one expression.

In this case, the principle of interpretation means that throughout the law, and beyond it in the corpus of laws, the same term has the same meaning. Yet our experience in bilingual legislative drafting has taught us that compliance with this principle is difficult to achieve, so that the drafter must make a number of assumptions of intention in cases of ambiguity. He may also resort to this when his efforts to establish a common meaning, in order to confirm the general purpose of the law that is being interpreted, is unsuccessful.

However, when faced with the even thornier problem both reconciling the two language versions and establishing the conceptual field of the terms of the law, the jurist's work becomes even more complicated. Of course, there is an assumption that, among the many laws passed by a single authority, there reigns the same harmony as that found among the various components of an individual law: as Professor Côté states, *all legislation of one Parliament is deemed to make up a coherent system*¹¹ [TR].

¹¹ Pierre André Côté, *The Interpretation of legislation in Canada*, 2nd ed. Cowansville, Editions Yvon Blais, 1990, p. 288.

The interpreter in us then sets out to promote the harmonization of laws among themselves, rather than the reverse, because, interpretations favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislator¹² [TR]. What, then, is the situation when harmonizing laws under different legislative jurisdictions?

To put it more concretely, and given the statement of mandate referred to *supra*, the issue of coherence between laws will arise even more clearly when the aforesaid laws relate to different concepts.

Where a federal law and the civil law turn out to be antinomial, this antinomy may be eliminated by applying an interpretive procedure to reconcile them. The contradiction or discrepancy may be eliminated even more effectively with the aid of a legislative drafting procedure, which, at a later date, will facilitate the application of federal law to Quebec. Is this a simple matter? There are a number of methodological implications arising from the achievement of harmonization.

An initial methodological implication arises from the analysis of the interaction between federal laws and civil law. The uniqueness of the harmonization process is a function of the nature of the relationship between federal law and Quebec civil law. One problem confronting the legal harmonizer is that of dissociation. In some cases, the concept of dissociation overrides the assumption of complementarity.

In a study published in 1996, professors Brisson and Morel describe the complementarity that, in Quebec, relates federal law to civil law, despite the tendency of some courts to attempt to supplement federal laws with rules from the common law tradition¹³. According to the authors, this complementarity originates in the distribution of legislative powers under the *Constitution Act, 1867*¹⁴: exclusive jurisdiction over property and civil rights having been vested in the provinces (subsection 92(13)), any standards subsequently adopted by the provinces would accordingly be the only ones capable of supplementing federal laws that are silent on an essential aspect of their application.

Thus, where parliamentary legislation relating to property and civil rights¹⁵ remains silent and where recourse to secondary standards is necessary in order to ensure its application to Quebec, the civil law in effect in that province constitutes the suppletive law to which the interpreter must turn, unless otherwise indicated by the federal Parliament. As a result, civil law is applicable when the federal legislative mechanism fails to bring to bear all the necessary elements for its implementation, or when the concepts of private law used by the federal Parliament are not otherwise defined.

The rule of complementarity of federal and civil law is, however, subject to exceptions that professors Morel and Brisson refer to as dissociations. In such cases, a standard foreign to the private law of the province of application makes up for the incompleteness of the federal legislative standard, thereby ruling out any application, as a suppletive measure, of that province's law. Such standards will be said to have no complementarity with the provincial law. Consequently, an area of

¹² Ibid.

¹³ J.-M. Brisson and A. Morel, « Droit fédéral et droit civil: complémentarité, dissociation » (1996) 75 R. du B. can. 297.

¹⁴ *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3 [hereinafter referred to as the *Constitution Act, 1867*].

¹⁵ Although jurisdiction over property and civil rights rests principally with the provinces, Parliament retains certain special, limited powers in the matter (bills of exchange, marriage and divorce, bankruptcy and insolvency, for example).

activity will be said to be subject to "independent" federal law where, taken as a whole, the legislative standards governing it support this dissociation.

We will therefore question sources of dissociation where, in choosing a law other than that of Quebec in order to make up for silences in its legislation, the federal Parliament rules out any application. Moreover, the degree of dissociation between federal and civil law varies. The dissociation may be absolute or relative.

A second methodological implication arises from the need to actualize the existence of bijuralism and lay down the rules of conduct with respect to legislative drafting, which are aimed at integrating Quebec civil law into federal legislation. Accordingly, we offer the following paragraphs as a guide to future legislative drafting and interpretation.

These methodological implications therefore cover a multitude of questions. At the very heart of the dynamic in which we would like to see Canadian bijuralism operate, are a number of issues in need the attention of an experienced hand. Harmonization of federal laws with Quebec civil law is not a simple undertaking. Because jurists in the Civil Code Section are concerned with harmonizing the law, both conceptually and formally, in both the English and French versions of the legislation and in both systems, a thorough study of the legislation is required. We must therefore ask ourselves a number of questions, including the following:

1. What was the intention of the Parliament that presided over the introduction of the federal standard?
2. How is this intention conveyed linguistically and conceptually?
3. Which tradition—civil or common law—does it support, and to which of four audiences—Francophone civil law, Anglophone civil law, Francophone common law, or Anglophone common law—does it respond?
4. Which process is capable of achieving bijuralism in the standard?
5. Does the process chosen result in a change of language and/or concept?
6. Which drafting procedure is most effective in achieving the objectives?
7. Finally, what is the impact of the proposed changes?

We are aware that almost every time a federal law uses both a civil law and a common law concept together, the two concepts may be said to be incompatible since, generally, their meanings are slightly different. For example, consider the words "*contra*" and "contract", "*meubles*" and "personal property", "*hypothèque*" and "mortgage".

Although both versions of the law carry equal authority, it is important to ensure that both the civil and common law concepts used or eventually proposed be given their own distinctive meaning in accordance with the legal system from which they are derived and which is in force in the province when the law is applied. While this goal is indeed laudable, it is never easy to recommend and draft amendments to the provisions in question when the issues are complex; the federal legislation must address four audiences simultaneously and, in so doing, be not only bilingual but also bijural. A number of concrete actions, to which we referred *supra*, have lent legitimacy and expediency to the harmonization process. But beyond the matter of the role of the State, the equally distinctive matter of the method remains to be settled.

Much has been made of neutrality, as may be seen from the work of Unidroit. Our job, of course, is to hope that it becomes a reality, but also to be suspicious when it reaches a dead end. It is not true that we have accepted a shift in meaning and the incompatibility of the legal systems, because one cardinal value endures, through the multiple manifestations of the harmonization process: unity and the henceforth declared right to achieve it.

The harmonizer's job, when faced with what he perceives to be incompleteness, and notwithstanding his inability to *fully* explain legal interpretive conduct, is to demonstrate how the production of laws is still governed by the rigid peculiarities of the two legal traditions, in which the balances may have become blurred. But is the search for neutrality more convergence-oriented? Frequently, it is the emergence of a new term that silences -perhaps not easily—the relations of power that presided over its creation. Rather, the harmonizer's job is to ensure harmonious cohabitation—of different conceptual worlds or in the wording of a single provision.

The additions to the *Interpretation Act* expressed in clause 8 of Bill C-50, *A First Act to harmonize federal law with the civil law*, spell out the concerns related to such cohabitation. A specific aim of the harmonization process is to prevent problems in applying federal legislation, whether an Act or a regulation, to Quebec and end a legal practice that sometimes goes against the complementarity of federal and civil law in principle.

From this point of view, the Civil Code Section deemed it advisable to recommend that the bijural nature of Canada be expressly acknowledge in the federal *Interpretation Act*. Furthermore, the Section considered it necessary to put in writing the complementary natures of federal law and Quebec civil law. For this reason, the Bill has included in the *Interpretation Act* a provision explicitly recognizing this relationship so as to avoid, whenever a federal law is applied to Quebec, the substitution of common law for suppletive law of the civil variety.

Because a rewriting of a number of federal laws was one harmonization method chosen by the Civil Code Section, a number of drafting techniques were proposed. In order to prevent any ambiguity as to the purpose of this undertaking, the Civil Code Section also decided that it would be advisable to include in the *Interpretation Act* guidelines on reading laws of this nature, for both civil law interpreters and common law jurists.

One such technique, the doublet, is an effective tool of cohabitation; it involves including in legislation relating to private law both a civil law term and a common law term. In this context, the interpreter of a federal law that contains a doublet will consider, for the purposes of its application, only the term or meaning that is compatible with the legal tradition of the province to which it applies.

The proposed clause is thus dependent on the implementation of legislative bijuralism via the terminological doublet and the use of terms common to civil and common law. Since it will only have a *raison d'être* after the new legislative drafting policy passed by the federal Parliament is applied, this clause is not expected to cause any substantive changes in the interpretation of federal law, other than to the extent required to fulfill the mandate to harmonize federal with the reformed Quebec civil law.

The amendments to the *Interpretation Act* constitute the cornerstone for the interpretation of Canadian bijuralism. The proposed clauses are a declaration directed at all those who will have to apply federal laws. After all, who are our interpreters? All those who must observe, apply, or study the laws; they are the individuals to whom we direct the rules of interpretation. As for the rules, Professor Côté notes the following:

Whether designed as guides or arguments, the rules of interpretation play an extremely important role in the world of law; their complex mechanisms are only now beginning to be explored by legal authorities (...)

When used as arguments, they promote judicial peace, acceptance of a decision that was made taking into account the claims of the parties and that appears reasonable and consistent with the law. When used as guides, they reduce the number of interpretation problems that may arise and encourage the parties in question to resolve them without the involvement of the courts¹⁶. [TR]

The uniqueness of the harmonization process lies in its changing nature and in the breadth and complexity of the procedures whose implementation it requires. This is borne out by the description of the issues related to the concepts of dissociation and complementarity.

Of course, a number of obvious difficulties stand in the way of achieving the goals of the harmonization process. These difficulties are the result of the independence of the legal systems concerned, the complexity of their concepts, the existence within a single system of a number of terms to convey the same meaning, the need to update the legislation and, last but not least, the need to assess the advisability and appropriateness of certain conceptual changes. They are the road to harmonization. Do they lead to more questions and more concepts, or to the meaning of and respect for bijuralism? This is an urgent question for the harmonizer. Bijuralism is forged from federal law to provincial law, law by law, concept by concept, wherever complementarity allows it.

¹⁶ Pierre-André Côté, « Les règles d'interprétation des lois : des guides et des arguments », (1978) 13 *R.J.T.* no. 2-3, p. 302.

BIJURALISM IN CANADA

DEPARTMENT OF JUSTICE, LUNCH AND LEARN WORKSHOP ON BIJURALISM AND THE JUDICIAL FUNCTION

The Honourable Mr. Justice Michel Bastarache,
Supreme Court of Canada

Ottawa, Ontario

February 4, 2000

There are relatively few countries in the world in which fundamentally different legal regimes co-exist. Canada represents such a country. Bijuralism or “*bijuridisme*” in Canada signifies the co-existence of the English common law and the French civil law traditions, within a country organized along federal lines.

While we find the coexistence of these two legal systems and traditions in Canada, I must profess that I do not consider it correct to speak of a “common law” or a “civil law” *per se*. Rather, in my opinion, there is one legal family in Canada which contains the common law systems and another legal family which contains the civil law systems.

(i) Common Law Tradition

The common law tradition can be distinguished from the civil law tradition essentially by its method, that is, its rules of interpretation, the hierarchy of its sources and its inductive reasoning. The principal characteristic of the common law is this inductive process, which consists of generalizing from common points between distinct cases and then establishing legal categories with vague foundations and flexible limits. The *ratio decidendi* of a previous decision is ascertained, after which we proceed by way of analogy. To practitioners, the common law means that they have access to a fragmented law that they will discover incrementally as needed. This leads to the legal fiction that a judge does not make the law but discovers it, as a legal vacuum is impossible. Thus, there is also intellectual uncertainty, as the law is in constant evolution. Of course, this evolution is not anarchical. On the contrary, each development must be justified by linking it to a principle drawn from the preceding cases. According to Oliver Wendell Holmes, the law is only what the judges say it is. Everyone is familiar with his famous assertion that: “The life of the law has not been logic: it has been experience”.

(ii) Civil Law Tradition

Perhaps the most important feature of the civil law tradition differentiating it from the common law tradition, is its emphasis on the primacy of written laws. Rather than proceeding from the *ratio decidendi* of previous judicial decisions, the emphasis in the civil law tradition is on the written, or codified law, which is the primary source of law. The civil law is therefore not “judge-made law” but codified law.

Another defining characteristic of the civilian tradition is its conceptualism as the civil law tradition is characterized by its emphasis on abstract concepts. Flowing from this is the civil law deductive approach to legal reasoning, proceeding from the general to the specific. The theory in

civil law drafting is therefore to enunciate general principles. Judges therefore proceed from the general to the specific, deriving conclusions through interpreting the rules set out.

The second source of law in the civilian tradition is legal scholarship "*la doctrine*" and the third source of law in the civil tradition are prior judicial decisions. While prior decisions are sometimes a source of law in the civil tradition, they are therefore never the source of legal rules as in the common law tradition.

Language

One integral issue relating to Canada's bijuralism is that of "language". It is very important for me to stress that I consider language to play a crucial role in the evolution of law. Linguistic duality has been a constant concern in our country. Both the English and French languages are solidly embedded in our history. I cannot stress enough the judiciary's responsibility to protect language rights enshrined in the *Canadian Charter of Rights and Freedoms* and to promote efforts toward true bilingualism. This would help continue our path in Canada towards increasing access to justice.

The sources of the common law were established in the English language. Translation often results in some very significant problems for the practice of the common law in French. The same holds true for the practice of civil law in English. Some concepts are quite hard to translate. It is hard to avoid confusion when civil law terminology must be relied on. It is also hard for lawyers to present their arguments in French in courts where the judges are not fluent in that language. Fortunately, this situation has improved significantly, especially in the Supreme Court of Canada, the Federal Court and the courts of New Brunswick. Nonetheless, to attain a high level of interaction between Canada's two legal systems, a high degree of individual bilingualism must be attained within the legal profession. Indeed, the history of Canadian bijuralism supposes an ability to function in the two languages. At present, there is still reason to fear that we are less than well equipped to meet this challenge.

The suitability of judges educated in the common law tradition hearing cases involving civil law issues has been the subject of some debate in Quebec and has even led to some opinion favouring a distinct Supreme Court for Quebec or a separate civil law division within the existing Supreme Court. There is also a perception that while Ontario courts often serve as persuasive authority in other Canadian provinces, decisions of Quebec courts that are rendered in French are not fully heeded in other jurisdictions, undoubtedly due to the language barrier. Indeed, much of Quebec civil law and Quebec French unilingual commentary or decisions, even on non-civil law matters, "remains a closed book to those outside Quebec". I do not think that any of you would contest that the rest of Canada would only gain insight from their knowledge of Quebec jurisprudence and doctrine.

One question that often arises is whether the common law system is intimately linked to the Anglo-Saxon mentality and language? Is the system of values of Francophones inconsistent with the common law tradition? And if Francophones integrate French into the practice of the common law, will they change the course of development of the common law as a result of their French influence? Likewise, the same questions can be asked of the civil law tradition and whether it is intricately linked to the French language?

In this regard, I cannot emphasize enough that my experience has taught me that French is not the exclusive linguistic vehicle for the expression of the civil law tradition nor is English the exclusive vehicle for the expression of the common law. I highly doubt that there is any mystical connection

between the French language and the civil law tradition and the English language and the common law tradition.

Today, several law faculties have successfully undertaken multi-traditional or multi-lingual legal training. In particular, the faculties of Ottawa University and McGill University offer both civil and common law degrees. The faculties of Moncton and Ottawa offer common law programmes in French and McGill University offers the civil law programme in English. A number of faculties have instituted student exchange programmes and the Federal Government has sponsored an annual summer programme in which students from both legal traditions undertake comparative legal studies.

Bilingual Legislation

It is perhaps trite to state that federal legislation in Canada is intended to apply consistently across the provinces and territories—that the same federal law must apply in both Quebec and in Ontario. While this may be the ultimate goal of federal legislation, in practice this goal is not easily attained, since federal legislation must be drafted in the English and French languages and in a manner which is compatible with two legal systems. Canada is blessed with four different legal languages and federal legislation must not only be bilingual but bijural. Indeed, federal legislation must simultaneously address four different groups of persons:

1. anglophone common law lawyers;
2. francophone common law lawyers;
3. anglophone Quebec civilian lawyers; and
4. francophone Quebec civilian lawyers.

It is crucial that these four legal audiences in Canada be able to both read federal statutes and regulations in the official language of their choice and also be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal tradition of their particular province or territory. This task is easier said than done and the courts should play a role in fostering this task.

One distinctive and often difficult feature of Canadian bijuralism is the task of rendering the common law in French and the civil law in English. More specifically, how legislative statutes and judicial decisions of either legal tradition can be “transposed” into the language of the other. With respect to the process of drafting federal legislation, it is now readily recognized that this process should not rely upon the technique of simply transposing the concepts of one legal tradition into the corresponding functional equivalents of the other legal tradition. In many areas, a new vocabulary must be forged.

Certain problems arise where federal legislation is drafted on the basis of the common law system alone, or based on rules or institutions that exist only in the common law. This problem has now been addressed directly through a project of which you have been informed.

Interpreting Bilingual Legislation

In their interpretation of bilingual legislation, Canadian courts should and do play a role in fostering Canada's bijural legal system and in avoiding the perpetuation of the inequalities referred to above.

The requirement in Canada that legislation be enacted in both English and French has important implications. It means that both language versions of a bilingual statute are original, official and authoritative expressions of the law. Neither version has the status of a copy or translation—and neither has paramountcy over the other. Notwithstanding the repeal of section 8 of the *Official Languages Act* in 1988, Canadian courts have consistently affirmed that the English and French versions of a statute are equally authentic and authoritative. This is known as the “equal authenticity rule”, which must be applied by courts in interpreting federal bilingual legislation. This rule was first formulated in 1891 by the Supreme Court in *C.P.R. v. Robinson* wherein the Court stated:

I take it that whether the article was first written in French or in English is immaterial . . . In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law. It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is.

By virtue of the equal authenticity rule, therefore, the English and French versions of statutes and regulations of Canada are equally authoritative. Indeed, as professed by the Quebec Superior Court and confirmed by the Court of Appeal in *Mekies v. Directeur du Centre de détention Parthenais*, “le Tribunal canadien a non seulement le droit mais aussi l'obligation de prendre connaissance des deux textes officiels et de les interpréter l'un par l'autre.” This means that to properly interpret bilingual legislation of Canada, the English and French versions must be read in light of each other, taking into account the context of such legislation, including the intent of the legislature that each provision of the act be read consistently with the others and that the act as a whole be read in light of the legal family or system of law applicable in the particular jurisdiction.

The Policy on Legislative Bijuralism, adopted by the Department of Justice in June of 1995, formally recognizes that when reading federal statutes and regulations, the reader, regardless of his or her language or legal system, must be able to find the terminology and wording that are respectful of the concepts and institutions proper to the legal system in effect in the relevant jurisdiction. This policy and approach is also followed by judges in their interpretation of bilingual legislation.

A case in point where one can see the importance of reconciling the French and English versions of a provision within the specific context of the applicable legal system is that of *Gulf Oil Canada Ltd. v. Canadien Pacifique Ltée*. At issue in this case was a provision of the *Federal National Transportation Act* wherein the English version provided that carriers were not liable for loss caused by “acts of God” while the French version provided non-liability for “*cas fortuit*” or “*force majeure*”. The Quebec Superior Court took into consideration the civil law system in interpreting this provision, concluding that, while the acts of third parties do not meet the definition of “acts of God” in the common law system, they nevertheless may constitute “*cas fortuit*” or “*force majeure*” in Quebec law. The Court in this case recognized that, in its English and French versions of this provision, the legislature sought to take into account the two legal systems in Canada.

The rule of equal authenticity also requires the courts, in interpreting bilingual legislation, to extract the “highest common meaning” from the two versions that is consistent with the context of the provision. Where there is a blatant conflict between the English and French versions, courts must examine the legislative history of the two linguistic versions of the provision, looking also to the

purpose and object of the statute. One must therefore go further than mere verbal comparisons, looking to the highest common meaning of the two versions. This approach can be seen in the Ontario Court of Appeal decision *in Reference re Education Act of Ontario and Minority Language Education Rights*, wherein the Court of Appeal dealt with the interpretation of subsection 23(3) of the Canadian Charter on minority language rights. Specifically, the English version of the section referred to “minority language educational facilities” while the French version spoke of “établissements d’enseignement de la minorité linguistique”. While a common meaning of these terms reduced to their lowest common meaning was equivalent to a guarantee of classrooms, the Court of Appeal opted for the highest common meaning, reading the two versions together, and accorded a guarantee of schools managed by francophones—the linguistic minority, rather than mere physical facilities within the language facilities of the majority.

In a recent decision of the Supreme Court in *Doré v. Verdun*, Justice Gonthier maintained that a court is free to reject a shared meaning between the two versions of a statute if it appears contrary to the intention of the legislature. Courts are therefore required to interpret bilingual legislation in a manner that accords with the true spirit, intent and meaning of an enactment and that best ensures the attainment of its objectives.

Harmonization

The interaction of law emanating from the federal and provincial levels and the potential conflicts between them and possible harmonization is a complex issue.

Over the years, pursuant to the division of powers under the *Constitution Act, 1867*, Parliament has enacted a considerable number of laws aimed at regulating private law issues. These matters include, *inter alia*, marriage and divorce, bankruptcy and insolvency, bills of exchange and promissory notes, maritime law, and copyrights and patents of inventions. For example, in order to have effect, legislation concerning bankruptcy, bills of exchange or bank security depend on the existence of contracts such as loans, sales and hypothecs. One can also look to divorce and the extra-contractual liability of the Crown, or the *Income Tax Act*, which determines the tax consequences of sales, assignments of claims, gifts and legacies. These examples illustrate that certain public law statutes, when applied in Quebec, require that recourse be had to the *Civil Code of Quebec* to identify the precise nature of the juridical act in question.

The *Bankruptcy and Insolvency Act* contains several provisions that demonstrate the required reference to the Civil Code for its effect. For example, s. 95 of the *Bankruptcy and Insolvency Act* allows the trustee in bankruptcy to void a preferential payment made within three months preceding the bankruptcy. However, s. 95 does not apply where “a debtor-creditor legal relationship does not exist” between the bankrupt and the third party. Thus, if no legal transaction exists pursuant to the *Civil Code of Quebec*, the payment shall not be voided. Similarly, s. 95 of the *Bankruptcy and Insolvency Act* provides that preferential payments are nevertheless enforceable against the trustee if the juridical act was agreed to prior to the three month period, again, requiring the application of the *Quebec Civil Code*. Section 136 of the *Bankruptcy and Insolvency Act* also requires looking to the Civil Code to determine the status of creditors under the *Bankruptcy Act*.

There are therefore many examples where the *Civil Code* governs private law relationships that come into contact with federal law which determines the consequences of such relationships. There are also situations where the civil law plays an active role, directly applying to private law federal statutes. As such, civil law is called upon to fill the gaps left by the federal law. Consequently, there

are several areas of law found in federal statutory enactments which require harmonization with Quebec private law, expressed primarily in the *Quebec Civil Code*.

In an effort at harmonization, the Supreme Court decided in 1977 in the case of *Quebec North Shore Paper Co. v. Canadian Pacific*, that there is no general “federal judicially-created common law” which fills the gap where Parliament has not legislated on a certain matter. In other words, the law of Quebec is called upon as the *droit commun* even with respect to some matters within the federal competence when that jurisdiction has not been exercised by the federal Parliament. In so doing, the possibility of a further duality of common laws within Quebec was avoided—namely, a judicially created one by the Federal Court in addition to that already in place in Quebec by reason of French civil law in matters of property and civil rights and English law in non-civil matters.

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. Indeed, as professed by Jean-Maurice Brisson and André Morel:

While it is true that these laws “apply to the whole of Canada”, as subsection 8(1) of the *Interpretation Act* states, it is nowhere stated that they must apply uniformly in all places and in all respects. Does not the division of powers between the federal and provincial governments indicate the contrary? As one writer has pointed out, in addressing this supposed uniformity: “If all aspects of the law should be exactly the same across the country, why have a federal system?”

This statement merits re-emphasis—If uniformity was our goal, what would be the purpose of our federal system and bijural culture? The need to recognize diversity should not, however, inhibit the need for coherence and the need to reduce conceptual and linguistic incongruence.

Convergence and Progress

There is evidence of a certain convergence between the civil law and common law traditions in Canada. While the common law and civil law families share common origins, these legal systems have been moving farther and farther from those origins. This move can be seen as the result of frequent contact with other legal systems, the growth in the number of sources of international law, the mobility of persons, the influence of the media, the production of indigenous reference works and the growing use of legislation, even in common law jurisdictions, to enable the law to adapt quickly to societal change.

This move may also result from the commercial activity of Quebec enterprises outside of Quebec coupled with the desire to attract foreign investment into Quebec. Such activity creates pressures to adopt commercial law devices from Anglo-American jurisdictions. One often-cited example of the convergence of the two legal traditions in Canada focuses on the acceptance in Quebec of specific institutions of the common law tradition—namely, the trust. In a number of celebrated decisions, the Supreme Court forged a *sui generis* conception of ownership in the trustee, nowhere envisaged in the Civil Code itself, in order to reconcile the genius of this common law institution to the Quebec legal system whose infrastructure with respect to the concept of ownership was entirely different. The new *Civil Code of Quebec* later put in place the idea of a trust upon the basis of the patrimony—a concept of civilian derivation—in order to avoid importing the concepts upon which the common law trust functions. This new formulation rejects the vision of the

Supreme Court in which the trustee was attributed a *sui generis* title. In the spirit of this comparative technique, however, the goal was to seize upon the experience gained from the common law tradition with a view to adapting it to Quebec's own "*pensée juridique*". The result can therefore be seen as the same, yet the principles adopted remain consistent with Quebec's legal tradition.

Another instance of this "*rapprochement*" of the two traditions can be discerned from the current situation where common law courts are required to apply and interpret substantive civil law. Consistent with civilian countries, statutes are at the apex of the hierarchy of sources in Quebec. However, jurisprudence is no longer so much of a secondary source in Quebec. No doubt, decisions of the Supreme Court have had a profound effect on Quebec law. One can also not deny that lawyers pleading in Quebec will invoke and abundantly cite "*la jurisprudence*" to support their arguments.

Throughout its history, the Supreme Court of Canada has been preoccupied with the reciprocal influences of the civil and common law traditions and has demonstrated its willingness to contribute to a process of "cross-fertilization". In a recent tort decision of the Supreme Court from British Columbia, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.*, the Court made extensive reference and resorted to civilian authority for resolution of a common law tort case. Chief Justice McLachlin stated that looking to how other courts in different jurisdictions deal with this issue provides perspective both on the nature of the problem and possible solutions.

Such decisions demonstrate the utility that can be derived from our bijural tradition. Constant change and evolving institution and concepts are the essence of law. Bijuralism in Canada is more than the mere "co-existence" of the two legal traditions. It involves the sharing of values and traditions.

Conclusions

It is of course too soon to draw definite conclusions, but even so, I want to mention some possible signs that things have improved as the last century has ended. The basic question relates to the legitimacy of the existing legal system. Our legal system must now incorporate the shared values of society as a whole, without excluding or discriminating against anyone. It must evolve in light of our background and needs. In the Canadian context, it seems to me that a new analysis of the situation is also needed. I feel that the inter-penetration of the two legal systems is seriously flawed. It should give way to an exercise that would determine how the concepts of the two systems can be reconciled. It is no longer enough to compare them, or even to interpret one system for the purposes of the other. In my opinion, comparative law must evolve to become a true legal discipline and contribute directly to the development of the law. Canada has the qualities to be a living model of comparative law.

It is true that things have already changed substantially. The codification of the law is increasingly extensive in both systems. There are more and more new sources of substantive law, including international law and native law. Translation, language training for judges and jurists, and exchanges between law schools are far more common. There is widespread access to criminal justice in French at the trial level throughout the country. Some universities offer a double law degree; others have organized one-year work terms for students studying the other system. POLAJ is doing important work. There is a summer exchange program for students of the two legal systems. The development of multi-jurisdictional law firms has also increased awareness of the important contributions of both legal traditions to legal issues of national and inter-provincial dimensions.

The equal authenticity of the two versions of the *Canadian Charter of Rights and Freedoms*, a “first” in Canadian Constitutional law, should encourage judges and jurists alike to draw from the best elements of both traditions. The existence of a second authoritative version of our Charter marks an important step in Canada which can only serve to enrich its bilingualism, bijuralism and multiculturalism. It can also be said that, as a result of the advent of the *Canadian Charter of Rights and Freedoms*, and of the Charter’s influence on all legal fields, we are moving farther and farther from the traditional common law method of interpretation and of application of precedents. The same is true in England, where the case law on human rights has given the House of Lords and the Privy Council much difficulty.

The negative side is that French-language books, articles and cases from Quebec continue to be inaccessible to the vast majority of practitioners and judges in the common law provinces and territories. I have also noticed that the bilingualism of many young Quebec jurists is insufficient to give them full access to English-language legal sources. On the flip-side, if French is not understood in most of English Canada, how can we be expected to make use of the insights it offers in resolving legal disputes? There are not enough points of contact between the two systems, which is an obstacle to the harmonious development of the law in Canada. I consider it to be so important to make an effort to bring the legal community of Quebec closer to the communities of the common law provinces and territories. A sense of belonging must be developed and a desire to make a positive original contribution to the development of the system must be instilled if we want to benefit fully from the extraordinary treasure of “bijuralism” in Canada.

Canada is the only country in the world where the common law and civil law systems co-exist as the two fully-fledged vibrant legal systems of a sizeable population. Internationally, Canada is already a leader in the well-balanced co-drafting of bilingual legislation. Jurisdictions such as Switzerland, Belgium and Hong Kong consider our country as a source of inspiration. Adding bijuralism to bilingualism only creates increased interest within the European community, where common law English-speaking countries, Great Britain and Ireland, are co-members with civil law countries. However, as has been pointed out by the late René David, “some are tempted to consider Canada as the promised land for comparative law, but the pilgrims are still in the desert”. Canada has not yet mined the full potential of its bijuralism. No doubt, as our legal systems continue to unfold to meet societal changes and needs, the need to harmonize into a coherent whole will be ever-present. We must all recognize the uniqueness of Canadian bijuralism. Canada’s bijuralism is an integral part of our legal heritage and identity and truly defines an important aspect of our country’s greatness.

**LEGAL PERSPECTIVES OF THE NEW MILLENNIUM
INTERNATIONAL MEETING OF
FRANCOPHONE LEGAL EXPERTS**

**HARMONIZATION OF FEDERAL LAW WITH QUEBEC CIVIL LAW:
CANADIAN BIJURALISM AND ITS ACTUALIZATION**

**Introductory Notes by
Mario Dion, Associate Deputy Minister,
Civil Law and Corporate Management Sector,
Department of Justice Canada
Montpellier University
June 29-30 and July 1, 2000**

Introduction

Many of the differences between the civil law and common law systems are more apparent than real: they arise much more from the manner and order of presentation rather than the content of the rules, and the few underlying differences are attributable mostly, the authors note, to the vicissitudes of history.

The convergences within western society largely transcend the national systems which comparative law has sometimes unduly pitted against each other. In fact, the similarities between the civil law and the common law are much more significant than the technical differences.

Quebec civil law, for example, mirrors French law which itself shares commonality of thought with British law and the historical peculiarities of 19th Century law; in other words the codification and stiffening of the rule of precedent are two stabilizing phenomena of the industrial era that run parallel.

It is these two systems that I wish to address, today, more specifically still and beyond their seeming divergence, their co-existential interrelations and closeness that we, in Canada, are energizing and vitalizing.

Bijuralism refers to a statement of fact in the Canadian context. Canada is indebted to its history and, along with it, to the development of complementarity relationships that bind the civil law to the common law, for the richness as much as the wonderful uniqueness of Canadian bijuralism. By adopting methodologies and analytical frameworks derived from various legal systems, Canadian bijuralism allows for innovative solutions that are in keeping with the requirements of a constantly evolving world.

Bijuralism, as practised in Canada generally and at the Department of Justice in particular, is first and foremost the interaction between the common law and the civil law. Eighty percent of the citizens world-wide are governed either by the common law or the civil law. Canada, for its part, shares this peculiarity as well as the benefit of being governed by these two systems.

How has Canada proceeded to translate this fact into reality? Here lies the focal point of my speech. But first, may I recall the gist of Canadian legal history.

LEGAL HISTORY OF THE CO-EXISTENCE IN CANADA OF THE COMMON LAW AND THE CIVIL LAW

Along with the royal edicts and ordinances of the Governor General, the Custom of Paris was the main source of legislation in New France until the British conquest.

However, the insistence of the inhabitants on maintaining their private law regime contributed to achieving the compromise of the *Quebec Act* adopted by the British Parliament in 1774. Section 8 restored, with a few minor exceptions, the absolute authority of pre-conquest French law, except in criminal and penal matters.

This marks the birth of the co-existence, in Canada, of British common law and French civil law.

The continuance of this legal duality arises from the sharing of legislative powers as provided under the Canadian constitution: the provinces have authority to legislate in matters of property and civil law under subsection 92(13) of the *Constitution Act, 1867*, in other words in respect of the essentials of private law. Nine of the ten Canadian provinces, and the Territories, operate a *common law* regime. Quebec, on the other hand, uses the civil law as private law.

Only the standards adopted accordingly by provincial parliaments can compliment federal enactments that are silent on any issue that comes under property and civil rights law and proves to be an essential requirement for their enforcement.

Originating from the common pool of Roman law, the two systems that are part of the Canadian heritage are thus brought to interact, which puts us under the constraint of specific congruency procedures and, beyond that, a broadening of our horizons and a new synthesis of our social values, hence of our legal regime.

HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC

Origins of the Harmonization Program

As part of its firm commitment to the revamping of its enactments, Canada desires improved harnessing of federal laws and regulations with the civil law of the province of Quebec in all areas where the two interact.

In its concern to use concepts and a terminology consistent with the new Quebec civil law following the coming into force of the *Civil Code of Quebec, 1994*, the federal legislator has made a strong commitment to harmonize federal legislation, without affecting English common law, with Quebec civil law so that civil law experts are able to identify their private law concepts and more adequately apply to Quebec the federal normative texts.

To that extent, the Program to harmonize federal law with the civil law of the Province of Quebec fits into the context of the adoption by the federal government, in 1993, of the Policy on the Application of the Civil Code of Quebec to the Federal Government.

The *Harmonization Program* also fits into the context of the adoption, in 1995, of yet another policy. The *Policy on Legislative Bijuralism* provides for the respect by the federal legislator of the four Canadian legal audiences, namely civil law Francophones and Anglophones, on the one hand, and common law Francophones and Anglophones on the other hand. Although the two language versions of the enactment are equally authoritative, it is important to ensure that the civilian concept and the common law concept are given, in each of the two languages, the meaning specific to either based on the legal system they derive from and currently in force in the province where the law is applied.

The preliminary work undertaken by the Department of Justice Canada since 1993 was instrumental in developing a comprehensive approach to the process of adjusting federal legislation to civil law and identifying the goals, including the following major ones:

- adapt federal laws and regulations dealing with or using private law concepts to the new concepts, institutions and terminology of the *Civil Code of Quebec*;
- that francophone and anglophone civilians as well as anglophone and francophone common law experts can identify with their respective legal traditions.

The early stages of the harmonization work were accomplished in co-operation with the Quebec Ministry of Justice and benefited from the vital contribution of academics. These law faculties are now being encouraged to submit, as part of the bursary awards program, applications from postgraduate university students who want to distinguish themselves in the area of comparative law and contribute to the advance of legal research, from a Canadian bijural standpoint.

Thanks to this research contract program, developed in spring, and scheduled for implementation by the Civil Code Section as early as September 2000, the Department hopes to boost the interest, in various areas of Canadian bijuralism, of university law graduates pursuing graduate studies and, ultimately, doctoral studies.

The early harmonization work culminated in Bill C-50 which was introduced in June 1998, but died on the *Order Paper* with the prorogation of Parliament. Since that time, more laws have been harmonized in the areas of property law, liability and security law. Bill S-22, tabled in the Senate on May 11 last, consolidates these new proposals for amendments and the provisions that were contained in Bill C-50.

The Bill is intended to harmonize forty-eight (48) federal laws; besides, it amends the *Interpretation Act* to incorporate into the Act provisions designed to recognize the co-existence of the two Canadian legal traditions, repeal the pre-Confederation provisions of the *Civil Code of Lower Canada*, 1866, dealing with matters within the competence of Parliament since 1867, and replace the pre-Confederation provisions of the *Civil Code of Lower Canada* in the matter of marriage.

Bill S-22 is the first of a series of bills designed to harmonize the corpus of federal laws, those currently in force as well as in the process of adoption. Regulations will also be harmonized.

Based on Department of Justice Canada estimates, among others, some 60 new laws are adopted annually by Parliament and about thirty of these are candidates for harmonization with the Quebec civil law. In addition, on a total of 700 federal laws in existence, over 300 are likely to be harmonized with Quebec civil law.

Also, this past June 5, a Notice of ways-and-means motion was tabled in Parliament for the first time with a view to amending the *Income Tax Act* and certain laws in relation to the *Income Tax Act*. This is the first time that an amendment proposal to tax legislation will be partially harmonized.

Obviously, the process of harmonization of federal enactments with the new terminology and concepts of the revised *Civil Code of Quebec*, as well as the drafting techniques of bijural and bilingual legislation are innovative and need to be refined. Expertise in this field “places us in the forefront of the international scene” declared Honourable Gerald-A Beaudoin, Senator¹, in the course of the debate on Bill S-22 entitled *A First Act to Harmonize Federal Law with the Civil Law of Quebec*, tabled in the Senate on May 11, 2000.

This expertise has naturally resulted in the creation of a number of neologisms, new concepts and the development of new research and harmonization processes.

Because of the manifold methodological implications involved in achieving harmonization, the Civil Code Section actually proceeded to rationalize its harmonization techniques.

Methodological components of the harmonization approach and work tools

The first methodological implication derives from the analysis of interactions between federal law and the civil law. The peculiarity of the harmonization approach is ingrained in the nature of the ties that bind federal law to Quebec civil law.

Where federal legislation in relation to property and civil rights is silent, and the use of complementary standards is required so as to ensure its application in Quebec, the civil law in force in that province is suppletive for the purposes of interpretation, unless otherwise provided by the federal legislator.

There are however exceptions to the principle of complementarity of federal law and the civil law which professors Morel and Brisson have characterized as “disassociations”. Where this occurs, a standard foreign to the private law of the province where the federal legislation is applied is used to make up for the incompleteness of the federal standard, thereby ruling out any application, on a suppletive basis, of the provincial law.

A review committee was set up in August 1999 responsible for developing the Guide to Harmonization Methodology for the civil law experts at the Civil Code Section. The Guide outlines the successive steps of the rationale that governs a legislative amendment and provides a preferred characterization format as a basis to identify those provisions that qualify for harmonization and to search for the most fitting harmonization solutions. Thus, each judicial situation is scrutinized in the following terms:

1. What is the intent of the legislator who presided over the introduction of the federal standard?
2. What linguistic and conceptual vehicles are used in the process?

¹ Proceedings of the Senate (Hansard) 2nd Session, 36th Legislature, Volume 138, Number 58, Thursday, May 18, 2000; <http://www.parl.gc.ca/36/2/...ribus/charnbus/senate/deb-f/58db/2000-05-18-f.htm>

3. What tradition—civilian or common law—does it support and which of the four audiences—francophone civil law, anglophone civil law, francophone common law or anglophone common law—does it address?
4. What operation is likely to actualize its bijural content?
5. Does the chosen technique generate a linguistic or conceptual adjustment, or both?
6. What is the most effective drafting technique to address these goals?
7. Finally, what is the impact of the proposed adjustments?

A judicial situation is said to be *unijural* when a legislative provision is based on a concept or terminology specific only to the common law in the English and French-language versions:

Example: “*dommages-intérêts spéciaux*”/special damages, subsection 31(3) of the *Crown Liability and Proceedings Act*.²

The term “*dommages-intérêts spéciaux*” and its English equivalent special damages are specific to the common law. In civil law, the terms “*pertes pécuniaires antérieures au procès*”/pre-trial pecuniary loss are more appropriately used.

It may happen that a given judicial situation is characterized as *semi-bijural*. This is the case when a legislative provision is based on concepts or terminology specific to civil law in the French-language version and concepts or terminology specific to the common law in the English-language version.

Example: real property/ “*immeuble*”, section 20 of the *Federal Real Property Act*.

A further methodological implication arising from the previous one is that of spelling-out legislative drafting guidelines. The following is intended as a frame of reference for the drafting and interpretation of future laws.

While both versions of a text may be equally authoritative, it is important to ensure that the civil law concept and the common law concept used or proposed are each interpreted according to their specific meaning based on the legal system they derive from, in the province where the law is applied. This is of course a praiseworthy goal. However, it is never an easy task to recommend and draft an amendment to the given provisions where the issues to be resolved are of a complex nature: federal legislation is required to simultaneously address the four audiences, not only in a bilingual but a bijural medium.

The creation of new terminology and the development of new research procedures go hand in hand, all things considered, with the new legislative drafting techniques: for example, sometimes the use of the *doublet*, the so-called *simple doublet* or *avec alinéas* (with indent) will be preferred to render, through different terms, the rule of law applicable to each system³; sometimes terminological neutrality will be desirable, that is the use of a neutral term that has no connotation in one or the other legal system.

² RSC 1985, ch. C-50.

³ LC 1991, ch. 50.

It will be clear by now that the use of the *doublet* has the benefit of sanctioning, in a given provision, a delineation of the application of the particular rule of law in Quebec and across Canada. On the other hand, the use of terminological neutrality allows efficiencies in terms of phraseology.

The Civil Code Section has set itself the task of developing other work tools such as terminological records. In the framework of the memorandum of understanding by which it is linked to the Translation Bureau, the Civil Code Section of the Department of Justice will develop a set of bijural terminological records to help share the results of its harmonization work as harmonization laws are adopted. These records are incorporated in *TERMIUM Plus*[®], the terminological database of the Translation Bureau⁴, in a special section entitled “bijuralism: civil law/common law”.

Here is an example:

Real property (English common law) *Bien réel* (French common law)

Immovable (English civil law) *Immeuble* (French civil law)

Conclusion

The Harmonization Program, a landmark in Canadian legal history by its indubitable scope, is without equal or precedent world-wide; in this era of globalization of national economies and markets, the mastery of the two legal systems that are the most widespread throughout the world, and its vealization in legislation of national application are a major asset, specially in the area of international trade.

The concept of bijuralism has gained ground in the legal environment and has all but won acclaim. In a presentation entitled *Le bijuridisme au Canada*, Justice Michel Bastarache of the Supreme Court of Canada had this to say: [Translation] “There are relatively few countries where two fundamentally different judicial regimes coexist. Canada is one of them. Bijuralism or *bijuridisme* in Canada refers to the co-existence of the traditions of English common law and French civil law in a country governed by a federal system.”

Finally, the thought that now supports the study of legal systems must go beyond the frontiers of comparison by building on awareness of their similarities and the benefits of their interactions.

I invite you to engage such thinking. Thank you.

⁴ See Translation Bureau Web site.

**EVOLUTION OF LEGAL SYSTEMS,
BIJURALISM AND INTERNATIONAL TRADE
(UNIVERSITY OF OTTAWA)**

**Morris Rosenberg,
Deputy Minister of Justice and
Deputy Attorney General of Canada
Ottawa, Ontario
October 20, 2000**

Ladies and Gentlemen,
Distinguished Guests,

It was with great pleasure that I accepted the invitation extended by Louis Perret, Dean of the Civil Law Section at the University of Ottawa, to participate in a conference that will address current and future issues. These are issues that highlight, on the one hand, law as a normative body, and, on the other, market economies, which develop their own regulatory forces. The purpose of this conference is to allow us to share what we value most in the context of globalization: our commitment to modernize our law to better serve the interests of our respective nations, while facilitating and enhancing the ties that bind us together.

In my capacity as the Deputy Minister of Justice of Canada, a bijural country, I have a keen awareness of the topics to be discussed: development of legal systems, bijuralism and international trade.

These topics are sure to provide us with an extensive program. The narrowing of the gap between American and European realities could lead to the discovery of similarities as well as differences:

- Have the legal systems we are dealing with developed in a similar fashion?
- Do influence, integration and interaction characterize the coexistence of these systems on both sides of the Atlantic?
- Finally, do the harmonization efforts undertaken by our respective countries encompass the same realities and objectives?

Furthermore, as our discussion deals with two themes, law and international trade, we cannot avoid bringing together two other rapidly growing realities: globalization and the rule of law. Many claim that these two realities are incompatible. However, bringing together these two realities could lead to unexpected, but fruitful, ideas.

Daniel Mockle recently wrote that [Translation] “globalization is generally associated with the emergence of a law without borders . . . which could diminish the sovereignty of states in various areas within their jurisdictions.” He goes on to say that “this development can be perceived . . . as a threat to the integrity of national laws . . .”¹ However, we could also say that, far from being a threat,

¹ (2000) 41 *C de D* 27, 239-240.

globalization can act, according to Mockle, as “a catalyst, [which] would favour the growth of rule of law”.²

Globalization is also motivating Canada to implement important measures to modernize and enhance its legal system using Canadian bijuralism as a development factor. We believe that bijuralism is beneficial to our Canadian legal community. We also believe that it could be beneficial to the international legal community, which could use Canada as a model in many respects.

I plan to cover the following in my remarks: starting with the definition of bijuralism, I propose to open this conference by explaining the various forms of bijuralism and describing Canadian bijuralism as unique and as a valuable tool for a promising future.

1. *Bijuralism and the concept of mixed law*

As you are aware, bijuralism refers to the coexistence within a single state of two legal traditions. Canada is said to be a bijural country because, in this country, common law and civil law coexist in both official languages.

There are many instances of bijuralism around the world. Close to a hundred countries are in fact governed by a combination of two or more systems of law. Usually, bijuralism results from the juxtaposition of a legal system—typically civil law or common law—and a pre-existing system of law—such as customary law, Islamic law or Talmudic law. The combination of *civil law/common law* is much less common; it is found in only about fifteen countries.

To understand bijuralism, one must analyze the concept of mixed law. A mixed-law state is one whose institutions are derived from different legal systems and are informed by the approaches and techniques of those legal systems.

The concepts of “bijuralism” and “mixed law” do not describe the same things. Two systems of law can, in fact, coexist within a single country without interacting with each other. In that case, the country may be described as “bijural”, but not a mixed-law state. Canada, for example, is a bijural country because civil law is the law of the province of Quebec and common law is the law of the rest of Canada. On the other hand, Canada’s federal law is a mixed law, because its drafting, interpretation and application take into account both civil and common law traditions.

The purpose of the initiative to harmonize federal legislation with the civil law in Quebec, implemented by the Department of Justice, is precisely to adapt federal statutes and regulations dealing with private law to the new concepts, institutions and vocabulary of the *Civil Code of Quebec*, which came into force in 1994. Mario Dion will be talking about the initiative this afternoon. It ensures that federal legislative policies will be more effectively implemented in Quebec while minimizing the problems of application and interpretation of federal statutes that may arise with the coming into force of the new *Civil Code of Quebec*.

One could say, therefore, that the development of systems of law that coexist is characterized by relationships involving influence, integration and interaction. Let me touch briefly on influence and integration and then deal with interactions.

² Ibid., p. 244.

Influence by means of interpretation or integration

Are civil law and common law as dissimilar as we are led to believe? Some authors go so far as to state that several of the differences between civil law and common law systems are more “apparent than real”.³ According to these authors, the differences usually result from the manner and order of presentation of rules rather than from the content of those rules. They also state that the few fundamental differences could be largely explained by “historical accidents”.⁴

The convergences in today’s western society by and large transcend the differences between national systems as perceived and perhaps exaggerated in comparative law. In fact, one could argue that the similarities between civil law and common law outweigh the technical differences.

These similarities often result from the influences they exert on one another over time. For example, Quebec civil law is certainly a faithful reflection of French law. However, French law has philosophical echoes in English law.

For example, the manner in which judgments are handed down reveals a strong relationship with the practices of common law. Jurisprudence illustrates very well the mixed nature of Quebec law: Quebec judges, as civil law practitioners, do not reformulate rules established by a court according to the facts submitted to them. Following the example of French judges, they apply an abstract rule to particular facts. However, in contrast to French judges, Quebec judges set out their reasoning, as do their common law counterparts. In general, they give a detailed analysis of the rule in question, the judgements already applied to it and the legal literature, and then set out the reasons that have led to their applying that rule to the facts before them.

The interaction between two legal traditions: the concept of complementarity

The interrelationship between legal systems includes not only the influences that they have on each other, but also the interaction between their respective rules or principles.

The division of legislative powers in Canada has created a relationship of complementarity between federal and provincial law. The ties between the civil law of Quebec and federal law are similar to those between the common law of the other provinces and federal law, with the understanding, of course, that in Quebec the system of law is different.

Since the power of the Parliament of Canada is limited in the area of private law, provincial law will apply, in principle, in order to supplement federal statutes. For example, for the purposes of determining which creditors will have preference in a case of bankruptcy, the *Bankruptcy and Insolvency Act* relies on concepts set out in the private law of the provinces. In Quebec, these concepts are contained in the Civil Code.

Parliament also relies, implicitly or explicitly, on private law when it refers in the *Income Tax Act* to the concepts of trust and mortgage.

In Canada, therefore, the coexistence of two legal traditions is characterized in two ways at the national level: sometimes they influence each other and sometimes they interact.

³ J. A. Clarence Smith and Jean Kerby, *Le droit privé au Canada*, Études comparatives, Ottawa, University of Ottawa Press, 1987, p. 12 et seq.

⁴ Ibid.

2. *Accessible and efficient justice for Canadians and bijuralism as a factor of national and international development*

Access to the law is one of the Canadian government's main priorities with respect to justice: all Canadians must be able recognize themselves in the laws enacted by the Parliament of Canada.

The complementarity between federal law, which is traditionally based on common law, and civil law constitutes the blueprint the Department of Justice uses to ensure that Canadian law develops appropriately, particularly with respect to the harmonization of federal laws with the civil law of Quebec.

In the era of globalization of economies and markets, experience in the two most widely used legal systems is a strong asset for Canada and all bijural countries.

At the national level, a practitioner working in a bijural context develops a capacity to adapt to and conceptualize some of the most complex legal challenges. The former Canadian Ambassador to Germany, Gaétan Lavertu, stated in January 1999:

[Translation] Bijuralism leads our jurists to expand their area of expertise, which helps our legal community to forge closer ties and contributes to the excellence of the law faculties, the professionalism of our lawyers and the quality of our judiciary.

At the international level, Canadian jurists trained in civil law and common law can help draft texts that can be applied uniformly in countries with different traditions.

In the field of international private law, for example, section 28⁵ of the *Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (adopted by the Special Commission of the Hague Convention), was recently drafted to specify that incompatibility with public policy of the State must be considered in relation to the recognition and enforcement and not the foreign judgment itself, since "this distinction, apparently unknown in common law countries, is essential for countries following the Romano-Germanic law tradition."⁶ Canadian jurists can make the most of their bijural abilities in this context.

Canada may consider itself a useful model by sharing the procedures for harmonization or co-existence of systems that it creates and implements in its national legislation. This would certainly be useful in bijural countries, but also in all countries dealing, through trade agreements, with partners whose legal systems differ from their own.

The development of the law, against a backdrop of increasing globalization of the marketplace, requires a harmonious coexistence among legal systems. In an article published in 1995 in *International Business Lawyer*, Robert Badinter pointed out that "globalization has led lawyers, especially those working in the international arena, to develop over the years a true *jus communis* of the international business world, an international common law for business of which jurists are not only the practitioners but also the authors".

In order to protect the valuable asset known as bijuralism, we have to find ways to promote it. We have to use technology to disseminate information about bijuralism, we need to train our law students in both legal systems, we need to encourage exchanges and other means of increasing

⁵ Section 28. Grounds for refusal of recognition or enforcement Recognition or enforcement of a judgment may be refused if . . . (f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

⁶ Preliminary Document No. 9—Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters, drawn up by Catherine Kessedjian, *Under-Secretary-General, subs.* 33.

dialogue between common law and civil law practitioners. Because bilingualism and bijuralism go hand-in-hand in Canada, there are four audiences—that is to say, practitioners of civil law in both French and English, and common law practitioners in both English and French—that communicate with one another. One measure of success could be, for example, the accessibility of the decisions of our courts and the writings of our learned authors in civil law, which are usually written and published in French, to our English-speaking colleagues.

In preparing to give this talk, I was discussing with colleagues in the department to what extent Canadian bijuralism could be characterized as a competitive advantage for Canada in a globalizing world.

We concluded that we could not answer the question, at least not now, in terms of hard quantifiable data.

That being said, we also concluded that looking at the question from an economic perspective is too narrow. That, in fact, a bijural culture can be a huge advantage for Canada, both within our country and abroad, as a concrete demonstration of respect and tolerance in both official languages, for all four legal audiences.

The practice of bijuralism in Canada places Canadian jurists in a privileged position in the world to encourage the progress of law and the harmonious coexistence of legal traditions and, therefore, to be active participants in shaping globalization.

As Dominique Turpin, Professor and President of the Université d'Auvergne, recently pointed out, globalization *is not merely economic, it is an emerging planetary consciousness*.⁷

Conclusion

Bijuralism is being built on new foundations, where the issues and strategies inherent in the modernization of the justice system are found. In an era of globalization of economies and markets, experience with the two systems of law most widely used in the world, and the concrete expression of that experience, such as in Canada through legislation that applies nation-wide, are our guarantee of the future. A guarantee of the future, but also a challenge.

Over the next two days, let us consider the concept that is a new reality: bijuralism at the global level. That is our program.

Of course, I am able to make such ambitious statements because I have the privilege of being the first speaker.

Thank you.

⁷ Expressed at the Conference, *Mondialisation et État de droit*, Montreal, Université du Québec, September 22, 2000.

**EVOLUTION OF JUDICIAL SYSTEMS,
BIJURALISM AND INTERNATIONAL TRADE
(UNIVERSITY OF OTTAWA)**

CANADIAN BIJURALISM AND HARMONIZATION OF THE LAW

**Speaking Notes of Mario Dion,
Associate Deputy Minister,
Civil Law and Corporate Management,
Department of Justice Canada**

Ottawa, Ontario

October 20, 2000

Introduction

Madam Chairperson, Mr. Chairperson, distinguished guests:

In its broadest sense, bijuralism connotes a factual situation—the coexistence of two legal traditions. Eighty percent of the world’s population is governed by either the common law or the civil law. Canada is one of only a few countries to be governed by both these systems. This is both a distinction and an advantage. It is also interesting to note that, in Canada, existing federal legislation contains no express reference to the coexistence of the *common law* and the civil law.

On the other hand, both the richness and amazing uniqueness of Canadian bijuralism are the product of our country’s history, and as history evolved, so too did the complementary relationship that exists between the common law and the civil law.

By adapting methodologies and analytical frameworks from different legal systems, bijuralism offers innovative solutions that adapt themselves to the requirements of a constantly changing world. Through the prism of bijuralism, Canadian jurists have a broader perspective on the law, finding their place and their identity in the law as they practise it, whether in Vancouver, Winnipeg, Montreal or Halifax.

I was delighted to accept Dean Louis Perret’s invitation to speak to you about Canadian bijuralism and harmonization of the law.

Bijuralism, as practised in Canada in general, and in the Department of Justice in particular, is first and foremost the interaction between the common law and the civil law. How has Canada given concrete expression to this reality? That will be the focus of my presentation. First, however, I want to discuss the distinguishing features of the two systems and review the highlights of the legal history of Canadian bijuralism.

THE DISTINGUISHING FEATURES OF THE CIVIL LAW AND COMMON LAW SYSTEMS AND THEIR INTERACTION

Given the nature of the differences between the civil law and the common law, and especially because of the similarities, the coexistence of these two legal traditions within a single country does not really pose a problem. As Deputy Minister Morris Rosenberg reminded us in this regard at the opening session, the notion of mixed law does not generate any difficulties at first glance: in his words, “*it refers to a system of law whose institutions derive from different legal systems and result from the cumulative application or interaction of techniques that belong to or are associated with those systems*”.

The methods of production and interpretation of the systems and their interaction

From the standpoint of interpretation, the methods applied by the courts in civil law and statute law remain the same, both drawing on Western legal tradition. As authors point out, the principal objective, in both systems, is the same: to determine, from a text, the intention of the legislature. In both systems, the court looks for this intention, having regard to the text, context, purpose, and history, making the assumption that the legislature does not contradict itself and is logical.

However, the two systems do differ somewhat in methods and attitude when it comes, for example, to legislation: in the common law countries, statute law has long been the exception, and this has given rise to certain rules of strict or narrow interpretation of statutes that are considered to be a departure from the common law. In contrast, the law that is based on the *Civil Code of Quebec*, for example, is general law and not exceptional law and is interpreted broadly.

Moreover, the method of reasoning in civil law is different from the method of reasoning in statute law: it is in fact deductive. The deductive method consists, as we know, in [Translation] “reaching a conclusion based on suppositions that are accepted as premises, using logical rules”.¹ Derived from Roman law, the civil law therefore stresses the values underlying the applicable rules.

The rule of precedent, which is specific to the common law, is analogical and inductive. General principles are enunciated from the particular examples that constitute past cases. Certainly, beginning in the 20th Century, the role of the common law as a method and the guiding role of the case law—and hence of judges—that it implies was superseded by the enactment of an ever-growing number of statutes. The common law, moreover, remains an entity that is coherent, but composed of particular judgments.

You can appreciate how interesting it can be to examine the coexistence of these two systems that have existed throughout history, influencing one another at times and interacting with one another at other times. We discovered, through the presentation of our American colleague, that even our neighbours to the South have been influenced by them.

The interaction of these two legal systems can manifest itself in a variety of ways. But it is through the interaction of their respective rules or principles, in a way that sometimes results in the legislator or the interpreter of the law harmonizing them or in the need to coordinate the relationship between them, that we see the most interesting developments: the interaction of the two systems can influence the evolution of one or the other, or sometimes even the evolution of both systems.

¹ *Le Petit Robert*, 1991, s.v. “dédire”.

Canada is not the only country to experience these developments. The United Kingdom, the United States and Europe offer specific illustrations of the possible forms of interaction between these legal systems.

Great Britain

As was alluded to by Dean Bridge this morning, the legal system of Great Britain is bijural: the English common law and the Scottish civil law exist side by side because the Act of Union provided that Scotland would retain its private law.

In 1998, Westminster adopted *The Scotland Act 1998*, which creates a Scottish parliament whose jurisdiction over certain fields is not exclusive: the Parliament of the United Kingdom retains its power to legislate.

We thus witnessed the introduction of a method of adapting laws through the incorporation of particular provisions. Today, there is a growing body of parallel legislation that applies exclusively to the territory concerned and the same statute often incorporates provisions specific to each system. Moreover, in keeping with the bijural nature of the legislation, language is sometimes used that reflects both realities, either by choosing neutral terms, or indicating the equivalents in Scottish law.

The United States

In the United States, when colonization began, the territory that would later become Louisiana was subject to French law, specifically the *Coutume de Paris*. In 1762, Spain acquired Louisiana and imposed its law in 1769. Spanish law had the greatest influence on Louisiana because, although Spain ceded the territory back to France in 1800, France allowed Spanish law to continue in force. Similarly, following the Louisiana Purchase of 1803, Congress did not impose the common law on this territory. As soon as Louisiana became a state in 1812, Congress lost the power to do so.

As soon as it entered the Union, the State of Louisiana therefore provided in its constitution that it would not be allowed to adopt unwritten law, thereby excluding the common law.²

Europe

The European Community, for its part, is in the process of developing a general law in which the English common law and the French-based civil law are playing an important role. In economic matters, however, the European Community is establishing itself as a specific, autonomous source of law, with the hierarchy of its texts (regulations, directions, recommendations, notices, communications) and especially with the role of the Court of Justice of the European Communities, which has consistently affirmed the primacy of community law over national laws. The Community is also endeavouring to create conditions favourable to integrated development through harmonization of national legislation or the creation of a community law.

² See *inter alia* A. Levasseur, "La réception du système de la common law par le système législatif français en Louisiane", in M. Doucet and J. Vanderlinden, eds., *La réception des systèmes juridiques : implantation et destin. Textes présentés au premier colloque international du Centre international de la common law en français (CICLEF)* (Brussels, Bruylant, 1994) at 381. A. Levasseur, "Le bijuridisme dans un système fédéral ou d'autonomie locale — États-Unis" (*Rapport national, XIII^e Congrès international de droit comparé*, Montréal, 1990).

CANADIAN BIJURALISM AND FEDERAL LEGISLATION

Historical and legal background of the coexistence of the common law and the civil law in Canada

Canadians have experienced the establishment of two legal systems in Canada—one comes from the region of Paris, and has survived in what was New France at the time when sovereignty was transferred after the Conquest, while the law in effect in the other provinces originated in England.

Here in Canada, the preservation of this legal duality derives from the division of legislative powers set out in the Canadian Constitution: the provinces have the power to legislate in relation to property and civil rights under subsection 92(13) of the *Constitution Act, 1867*, that is, in relation to the essential subject-matter of private law. Nine of the ten Canadian provinces, along with the two territories and possibly the brand new one as well, apply the rules of the common law. Quebec, on the other hand, uses the civil law for its private law.

The *Coutume de Paris*, through the royal edicts and the orders of the governors, was the main source of law in New France until the British conquest.

In 1763, under the Treaty of Paris, the King of England ordered, by royal proclamation, the creation of “Courts of Judicature and public Justice for hearing (...) all Causes (...) according to the Laws of England”. But despite the attempt by the new mother country to impose its laws, the citizens continued to organize their private relationships outside the new courts, and where necessary sought a decision from the curate, the notary or the *seigneur* on whom they were dependent.

The inhabitants’ determination to preserve their private law was a contributing factor in the compromise expressed in the *Quebec Act*, which was enacted by the Parliament in London in 1774. Section 8 restored the absolute authority of the French laws from before the conquest, with certain minor reservations, except in criminal and penal cases. This is the origin of the coexistence of French civil law and British law in Canada.

The *Quebec Act* has never been repealed, and today, despite the restrictions introduced by the *Constitution Act, 1867*, it is still the foundation of Quebec private law.

By giving the provinces exclusive jurisdiction in relation to property and civil rights, subsection 92(13) of the *Constitution Act, 1867* comprises the origin of the complementarity of federal law and provincial private law. Only those rules that are enacted in accordance with that provision by the provincial legislatures are permitted to supplement federal enactments that are silent as to any aspect that falls within property and civil rights and that is essential for the purposes of those enactments.

Provincial private law will therefore apply only in relation to matters within the ancillary jurisdiction of Parliament, that is, to a field which is primarily within the jurisdiction of the provinces under subsection 92(13) of the *Constitution Act, 1867*, but which may be regulated by Parliament to the extent that is necessary for an objective that is itself within the exclusive jurisdiction of Parliament.

Starting from a single common foundation, Roman law, the two systems that Canadians have inherited must accordingly interact, and the need then arises for unique arrangements to enable that

relationship to function, as well as the need to expand our horizons and, as the Deputy Minister, Morris Rosenberg, said in his inaugural address, to achieve a new synthesis of our contemporary values.

Let us now examine how federal legislation, which has its origins in the common law tradition, is harmonized with the civil law.

Harmonization of federal legislation with the civil law of the province of Quebec

Firmly committed to modernizing its legislative enactments, Canada's goal is to achieve a better linkage between federal Acts and regulations and the civil law of the province of Quebec.

Anxious that its legislation use concepts and vocabulary that are compatible with the revised civil law of Quebec resulting from the coming into force in 1994 of the new *Civil Code of Quebec*, the federal Parliament firmly committed itself to harmonizing federal legislation with the civil law of Quebec, without changing the common law. Its purpose is to ensure that civil law jurists can recognize in federal legislation their private law concepts and apply federal legislation more effectively in Quebec.

The harmonization project was launched thanks to the vision and efforts of the Honourable Anne-Marie Trahan. The initial work was a collaborative effort involving Quebec's Department of Justice, the *Barreau du Québec* and the *Chambre des notaires*, and received the crucial support of the academic community. This cooperation is continuing and law schools are today being asked to provide applicants who are law graduates, under the Research Contract Program in Canadian Bijuralism, interested in distinguishing themselves in the field of comparative law and advancing legal research through the vehicle of Canadian bijuralism.

The initial harmonization work produced Bill C-50, which was tabled in Parliament in June 1998, but which died on the *Order Paper* when the House of Commons was prorogued. Since then, additional legislation has been harmonized in the fields of property law, civil liability and securities.

Bill S-22, which was tabled in the Senate on May 11, 2000, brings together in a single piece of legislation these new proposed amendments and the provisions that were in Bill C-50. The purpose of this Bill is to harmonize forty-eight federal statutes. It also amends the *Interpretation Act* by including in it provisions designed to recognize the coexistence of Canada's two legal traditions, repeals the pre-Confederation provisions of the *Civil Code of Lower Canada* of 1866, which deals with subjects that have been under jurisdiction of the Parliament of Canada since 1867, and replaces the pre-Confederation provisions of the *Civil Code of Lower Canada* relating to marriage. That is all I will say concerning this Bill since the Honourable Senator Beaudoin intends to discuss it in greater detail this evening.

Bill S-22 is the first in a series of bills that will harmonize the complete body of federal legislation, both existing statutes and those in the process of being enacted. The regulations will also be harmonized.

Last June 5, for the first time, a notice of Ways and Means motion was also tabled in the House of Commons to amend the *Income Tax Act*, the income tax regulations and certain Acts relating to the *Income Tax Act*. This is the first time that we are partially harmonizing a proposed amendment to tax legislation. Tax law, moreover, has been identified as one of the new key fields to be harmonized, as have the fields of regulatory law and business law. In the coming years, the

Department of Justice Canada intends to focus on harmonization of Acts and regulations in these fields. Besides the question of terminology, a number of substantive law questions will be examined as part of this review, all with a view to meeting the program's other objectives—more effective application of legislation in the province of Quebec and an eventual reduction in the amount of litigation arising from the interaction between federal law and the private law of the provinces.

The procedures for harmonizing federal legislation with the new terminology and concepts in the recent *Civil Code of Quebec*, and the techniques of bijural and bilingual legislative drafting are innovative and, needless to say, require refinement. Canada's experience in this field is unique and, in the words of the Honourable Senator Gérald-A. Beaudoin, "confers upon us a special place in the world". Senator Beaudoin was speaking in June of this year during debate on Bill S-22,³ *Federal Law-Civil Law Harmonization Act, No. 1*, which was tabled in the Senate on May 11, 2000.

This experience leads quite naturally to the creation of a number of neologisms, new concepts and the development of new research and harmonization procedures.

The Civil Code Section has in fact begun to systematize its harmonization procedures, given the multitude of methodological implications resulting from the harmonization work.

The methodological components of the harmonization initiative and tools of the trade

The first methodological implication is one that derives from an analysis of the interaction between federal statutes and the civil law. The unique aspect of the harmonization initiative stems from the linkages between federal law and the civil law of Quebec.

When legislation enacted by Parliament in relation to property and civil rights is silent and we must look to subsidiary rules in order for that legislation to be applied in Quebec, the civil law in effect in that province will be the suppletive law that must be used in interpreting the federal legislation, unless otherwise indicated by Parliament.

However, there are exceptions to the rule of the complementarity of federal law and the civil law, which Professors Morel and Brisson describe as "dissociations". In those cases, a rule that is foreign to the private law of the province where the legislation is to be applied is used to fill the void in the federal statutory rule, and this will rule out any application of the law of that province as the suppletive law.

A juridical situation will sometimes be said to be *unijural* when a statutory provision is based on a concept or on terminology that is unique to the common law in both the English and French versions:

For instance, the use of the expressions "special damages" in English and "*dommages-intérêts spéciaux*" in French in subsection 31(3) of the *Crown Liability and Proceedings Act*⁴ is an example of a *unijural situation*: the expression "special damages" and the French equivalent "*dommages-intérêts spéciaux*" are expressions unique to the common law. In the civil law, the correct expression would be "pre-trial pecuniary loss" in English and "*pertes pécuniaires antérieures au procès*" in French.

³ *Debates of the Senate* (Hansard), 2nd Sess., 36th Parl., Vol. 138, Issue 58 (18 May 2000), online: Parliament of Canada http://www.parl.gc.ca/36/2/parlbus/chambus/senate/deb-e/58db_2000-05-18-e.asp?Language=E&Parl=36&Ses=2

⁴ R.S.C. 1985, c. C-50.

Sometimes a legal situation will be characterized as *semi-bijural* where the French version of a legislative provision is based on notions or terminology specific to the civil law and the English version on notions or terminology specific to the common law:

The use, for example, of the terms “real property” in English and “*immeuble*” in French in section 20 of the *Federal Real Property Act*⁵ is a case of semi-bijuralism. You will note that, in this case, the terminology specific to the civil law (*immeuble*) is used in the French version only, while the terminology specific to the common law (real property) is used in the English version only.

This provision becomes bijural by incorporating the terms “*biens réels*” in the French version to take into account the French common law and the word “immovable” in the English version to take into account the English civil law.

The preceding example has a second methodological implication: the need to develop rules of conduct for legislative drafting. This need therefore results in the production of manuals for drafting and interpreting future statutes.

Although both versions of the text are equally authoritative, it is important to ensure that the civil law concept and the common law concept are given the meaning that is specific to each, depending on the legal system from which they derive and which is in force in the province where the legislation applies. Certainly this is a laudable objective. However, as the legislative counsel present here and our Chief Legislative Counsel, Lionel Levert, know, recommending and drafting amendments to specific provisions is never easy where the issues to be resolved are complex, because federal legislation must target four audiences simultaneously, and in the process must be not only bilingual, but also bijural.

Concurrently with the creation of new terms and the development of new research procedures, we are thus also witnessing the development of new legislative drafting techniques. For example, sometimes the preferred technique will be the *double*, the *simple double* or the *paragraphed double*, which consists in expressing, through different terms, the legal rule applicable to each system. Sometimes the drafter will strive for terminological neutrality, a technique that consists in using a neutral term that has no connotation in either legal system.

As you can see, the use of the *double* has the advantage of limiting, in a given provision, the application of the legal rule to Quebec and the rest of Canada. On the other hand, the use of the *neutral term* technique promotes concision, thereby avoiding the use of unnecessary words.

Conclusion

In any study of legal systems, the process of reflection must, in our opinion, go beyond a comparative analysis to encompass an appreciation of the similarities of these systems and the advantages of their interaction. We have seen many illustrations—even in today’s presentation—of the truth of this observation.

Today, the nature of the law must, as a matter of priority, adapt to the imperatives of globalization and the requirements of the national rule of law that is a participant in the phenomenon.

Our notion of the law has therefore evolved, and as a result, we must re-examine its foundations in a new context, characterized by the development of pluralism. I urge you to undertake

⁵ L.C. 1991, c. 50.

this process of reflection and I look forward to pursuing the dialogue with all those for whom bijuralism means sharing and cooperation.

Thank you.