



## S-4: A FIRST HARMONIZATION BILL

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Canadian bijuralism and the harmonization of federal legislation with the civil law of Quebec have already generated volumes of print. The meritorious qualities ascribed to Canada's legal duality have, with good cause, been the subject of praise in numerous discussions and articles. The purpose of this paper is, however, neither to review such commentaries nor to re-examine the origins and benefits of bijuralism but rather, it focuses on one specific result of the Harmonization Program: Bill S-4, *Federal Law-Civil Law Harmonization Act No. 1*.<sup>2</sup> This bill is particularly noteworthy since it will, if passed, represent a pioneering legislation in the field. Its predecessor, Bill S-22<sup>3</sup>, died on the Order Paper as a result of the Fall 2000 elections, but not without having first paved the way for its succession by the positive impression it produced in Parliament. The vast majority of the senators present for the bill's consideration in Committee<sup>4</sup> responded very favourably to both the full endorsement given by the Minister of Justice and the innovation of its content.

It should be noted at the outset that this paper is intended to be descriptive rather than argumentative in tone. Also, the author having contributed to the harmonization proposals which are described cannot be expected to provide an objective critique and so, the task of critically reviewing the content is left to others. It is, nevertheless, appropriate to say a few words on the origins of the subject under consideration and we begin Part 1 with a brief summary of background information critical to an understanding of the initial results of harmonization. Part 2 addresses the principal subject matter, focussing on the main elements comprising Bill S-4.

### 1. Origins of Bill S-4

In anticipation of the coming into force of the *Civil Code of Quebec* on January 1, 1994 and of the effects of the new Code on the application of federal law in the Province of Quebec, the Department of Justice of Canada established in 1993 a team of jurists, the Civil Code Section, to study those effects. The Section's jurists quickly ascertained that federal legislation would require amendment to reflect the new Civil Code vocabulary and concepts.

Following on this determination, it was necessary to decide how to go about harmonizing federal legislation with the new civil law of Quebec. The first stage, which seemed obvious to

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<sup>1</sup> This paper contains the ideas of a number of jurists who are presently with the Civil Code Section or who were previously with that Section. The author wishes to thank all those who have contributed directly or indirectly to its preparation.

<sup>2</sup> Bill S-4, *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*, 1<sup>st</sup> Sess., 37<sup>th</sup> Parl., 2001. Hereinafter "Bill S-4". At the time of writing of this article, the bill is at 2<sup>nd</sup> reading and has been referred for review to the Standing Senate Committee on Legal and Constitutional Affairs.

<sup>3</sup> Predecessor of Bill S-4, bearing the same name and having been tabled in the Senate on May 11, 2000.

<sup>4</sup> Standing Senate Committee on Legal and Constitutional Affairs, June 14, 2000.

everyone, was to select which of the statutes should be harmonized (1.1). Then, since it was necessary to start somewhere, initial expertise was developed in three areas of law (1.2). The first results of these harmonization efforts materialized in 1998 with the tabling of Bill C-50 (1.3), which died on the Order Paper and was reintroduced two years later, with amendments and numerous additions, as Bill S-22 (1.4). Each of these stages is explained in greater detail below.

### 1.1 Selecting Federal Statutes for Harmonization

The body of federal legislation comprises more than 700 statutes, each of which will eventually have to be considered individually to determine whether it applies to Quebec or relies on the civil law of Quebec as supplementary law. In an initial review, the Civil Code Section determined that nearly 350 statutes might apply to Quebec, some of which were selected to be the target of initial harmonization efforts based on various criteria. Those criteria varied from the frequency of use of the act to the degree of difficulty it represented. Once the selection was made, the harmonization process began.

### 1.2 Developing Expertise in Three Areas of Law

The harmonization process is an innovative one. At the start of this initiative, there were no handbooks defining a process or prescribing a methodology to follow.<sup>5</sup> It was therefore deemed wise to begin by developing expertise in only three areas of law: property, security and civil liability law. The statutes selected for harmonization were reviewed only in light of these three areas, which explains why most of the statutes referred to in Bill S-4 are partially harmonized. They will ultimately be further examined and harmonized in light of the remaining areas of civil law.<sup>6</sup> Once fully harmonized, proposed legislative amendments concerning those statutes will be submitted as part of a new harmonization bill.

The development of this expertise, it should be understood, has not occurred in isolation. The Civil Code Section has worked and is continuing to work in close cooperation with the departments responsible for administering the statutes concerned and with the Legislative Services Branch of the Department of Justice. In addition, the Section has often drawn upon the services of well respected university professors.<sup>7</sup> Prior to the first tabling of the harmonization bill, on June 12, 1998, the Minister of Justice had instituted exhaustive public consultations in which many groups from the Quebec legal community took part, in particular the *Barreau du Québec*, the *Chambre des notaires du Québec* and representatives of the Canadian Bar Association (Quebec Section). It is not an exaggeration to say that the harmonization bill generated a consensus within the legal community, and it was the pooling of all this expertise that ensured its success.

### 1.3 Bill C-50

The very first harmonization bill was born on June 12, 1998. In retrospect, it was the present Bill S-4 in embryonic form setting out its basic constituents. For example, the amendments to the *Interpretation Act*<sup>8</sup> were already there, as were those to the three pilot statutes, the *Federal Real*

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<sup>5</sup> The Civil Code Section has since developed a Harmonization Manual, which is not commercially available, although a summary is published in this collection. See L. Maguire Wellington: *Bijuralism in Canada: Harmonization Methodology and Terminology*, The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Second Publication, Booklet 4, Department of Justice Canada, May 2001.

<sup>6</sup> All regulations will also be fully harmonized.

<sup>7</sup> Some of their papers may be consulted in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Ottawa, Department of Justice, 1997.

<sup>8</sup> *Interpretation Act*, R.S.C. 1985, c. I-21.

*Property Act*,<sup>9</sup> the *Bankruptcy and Insolvency Act*<sup>10</sup> and the *Crown Liability and Proceedings Act*.<sup>11</sup> It also amended some 20 miscellaneous statutes in relation to the three aforementioned areas of law. Bill C-50 received a first reading in the House of Commons but died on the Order Paper when the House was prorogued.

#### 1.4 Bill S-22

Bill S-22 was the successor to Bill C-50. It was tabled in the Senate on May 11, 2000. In essence, it restated the content of Bill C-50, with some amendments which had become necessary as a result of comments received during the second public consultation<sup>12</sup> and recent changes to the *Civil Code of Quebec*.<sup>13</sup> It also contained proposed amendments to 25 additional statutes, once again relating to property, security and civil liability law.

Bill S-22 reached second reading and was referred to the Senate Committee on Legal and Constitutional Affairs, which met to discuss it on June 14, 2000. This enabled the Minister of Justice to provide a substantive presentation of the bill to those senators attending. In consequence, parliamentarians were afforded their first opportunity to learn about the harmonization effort at first hand. In general, the senators received it enthusiastically.<sup>14</sup>

Upon Parliament's dissolution in the Fall of 2000, Bill S-22 also died on the Order Paper. However, the hope of seeing the birth of harmonized legislation did not die. At the opening of the following Parliamentary session, the bill was re-tabled. As of January 31, 2001, it bears the designation S-4.<sup>15</sup>

## 2. Content of Bill S-4

The intent of the following sections is to provide an overview of the principal elements of Bill S-4 and to describe the issues underlying each of the choices made. Bill S-4 is divided into nine parts. For our purposes, we will discuss only the first six, as the last three are purely technical (consequential and coordinating amendments, transitional and coming into force provisions). The material will be presented in the following order: first we will discuss the Preamble (2.1), then the repeal and replacement of certain provisions of the *Civil Code of Lower Canada* (2.2), proposed amendments to the *Interpretation Act* (2.3), each of the pilot acts (2.4) and, lastly, the various partially harmonized statutes (2.5).

### 2.1 Preamble

As Bill S-4 is the first of a series of harmonization bills, the Department of Justice has taken this opportunity to include in a Preamble a statement of the context by which the bill is delineated as well as how its objectives can be attained by those statutory measures.

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<sup>9</sup> *Federal Real Property Act*, S.C. 1991, c. 50.

<sup>10</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

<sup>11</sup> *Civil Liability and Proceedings Act*, R.S.C., c. C-50.

<sup>12</sup> This second public consultation round was held prior to the bill's tabling.

<sup>13</sup> Introduction into the Code of prior claims constituting real rights (art. 2654.1 C.C.Q.). This new feature has had an impact on the harmonized definition of "secured creditor" in the *Bankruptcy and Insolvency Act*.

<sup>14</sup> One of the bill's most ardent supporters is Senator Gérald-A. Beaudoin. See his speeches on second reading of Bill S-22 in *Debates of the Senate* (May 18, 2000) at p. 1640 and on second reading of Bill S-4 in *Debates of the Senate* (February 7, 2001) at page 1530.

<sup>15</sup> Bill S-4 is essentially identical to Bill S-22, except for some technical adjustments which were caused by legislative evolution.

Canada is a country in which two legal traditions coexist.<sup>16</sup> The Preamble acknowledges this fact and states that all Canadians are entitled to bijural legislation, that is to say legislation in keeping with both the common law and the civil law traditions.<sup>17</sup> It also mentions that the civil law finds its principal expression in the *Civil Code of Quebec* and that this fact reflects the unique character of Quebec society.<sup>18</sup>

The Preamble further states that the bijural nature of the legislation will permit a more harmonious interaction of federal legislation and provincial legislation.<sup>19</sup> This interaction occurs where federal law relies on provincial law for its completion. The Preamble clearly states that it is provincial law in matters pertaining to property and civil rights, in this case the common law and the civil law, that plays this role.<sup>20</sup>

In addition, the Preamble provides that one of the government's objectives is to ensure that federal legislation reflects the four legal audiences: Francophone users of civil law and common law and Anglophone users of civil law and common law.<sup>21</sup> It also states some of the benefits of bijuralism, such as providing a window on the world and facilitating exchanges with countries governed by either of these legal traditions.<sup>22</sup> Lastly, it provides that a harmonization program of federal legislation with the civil law of Quebec has been instituted to achieve these goals.<sup>23</sup>

## 2.2. Repeal and Replacement of Provisions of the *Civil Code of Lower Canada*

Contrary to the rest of the bill, Part I is not intended to amend the text of existing federal statutes. It is rather intended to create a new and independent Act within the *Harmonization Act*, thereby making it necessary to give it another title.<sup>24</sup> The new Act comprises the repeal of provisions of the *Civil Code of Lower Canada* and the adoption of provisions related to marriage.

### 2.2.1 Repeal

The *Civil Code of Lower Canada* is a pre-Confederation act since it came into force in 1866, a year before the *Constitution Act, 1867*<sup>25</sup> came into effect. Consequently, the subject matter covered by the Code do not take into account the division of powers resulting from the 1867 statute. The Code therefore deals with subject matter which come under Parliament's authority such as marriage, maritime law and interest on money, as well as subject matters over which the provincial legislatures have clear jurisdiction (for example, sale contracts, successions, hypothecs).

When the Quebec legislature decided to pass a new Civil Code to replace the *Civil Code of Lower Canada*, it was only able to repeal and replace those Code provisions whose subject matter

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<sup>16</sup> See clause 8 of the bill.

<sup>17</sup> First recital.

<sup>18</sup> Second recital.

<sup>19</sup> Third recital.

<sup>20</sup> Fifth recital.

<sup>21</sup> Sixth recital.

<sup>22</sup> Fourth recital.

<sup>23</sup> Seventh recital.

<sup>24</sup> Title of Part 1, as found in clause 2 of the bill: *Federal Law and Civil Law of the Province of Quebec Act*.

<sup>25</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

fell under its constitutional authority.<sup>26</sup> As a result, it was able to repeal all the private law provisions whose subject matter was not reserved for the federal level under the *Constitution Act, 1867* and replace them with the new provisions of the *Civil Code of Quebec*. However, all provisions now under Parliament's jurisdiction which have not been expressly repealed or rendered inoperative by federal legislation remain under federal authority.<sup>27</sup>

The survival of these provisions may be a potential source of conflict and could well have an impact on the supplementary law applicable to federal legislation. While there is no doubt in the minds of some that by replacing the *Civil Code of Lower Canada*, the *Civil Code of Quebec* has become the suppletive law applicable to federal law, others believe the *Civil Code of Lower Canada* could still play a role in this regard. To resolve this uncertainty, clause 3 of the bill repeals all the pre-Confederation provisions of the *Civil Code of Lower Canada* relating to subjects that fall within the legislative jurisdiction of Parliament.<sup>28</sup>

### 2.2.2 Replacement

The bill does not replace the repealed pre-Confederation provisions except as regards the substantive conditions of marriage. After paying special attention to the areas of particular interest to the federal government, such as claims and Crown assets, the experts consulted found that the federal law currently in place resolves any uncertainty that might result from this repeal and that, failing an existing federal standard, the private law of the provinces, in this instance the civil law, may complement federal law.

The scenario is somewhat different with respect to marriage. The experts who considered this question felt that replacement statutory measures were necessary to prevent any uncertainty as to the law that should govern the substantive conditions of marriage as a consequence of the repeal of these provisions in the *Civil Code of Lower Canada*.

Marriage is a subject of shared federal and provincial jurisdiction. By virtue of its authority over marriage and divorce,<sup>29</sup> Parliament may state the substantive conditions governing the validity of marriage<sup>30</sup>. Consequently, it alone has the authority to repeal the obsolete provisions of the *Civil Code of Lower Canada* which state these conditions and which still survive in the federal legal order.<sup>31</sup> The provincial legislatures may provide for the conditions specific to the celebration of marriage.<sup>32</sup> As it is not always easy to distinguish between the two types of conditions, overlap is not

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<sup>26</sup> This is the effect of s. 129 of the *Constitution Act, 1867*.

<sup>27</sup> A. Morel, "Pre-Confederation Civil Law and the Role of Parliament after the New Civil Code" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Ottawa, Department of Justice Canada, 1997, pp. 120 ff.

<sup>28</sup> Clause 3(2) of the bill, which renders the *Interpretation Act* applicable to this repeal, is intended to protect acquired rights.

<sup>29</sup> Subs. 91(26), *Constitution Act, 1867*.

<sup>30</sup> For an explanation of why jurisdiction over marriage is vested in the Canadian Parliament, see namely F. Chevette and H. Marx, *Droit constitutionnel* (Montreal, Les Presses de l'Université de Montréal, 1982 at p. 656); S.I. Bushnell, "Family Law and the Constitution" (1978) 1 R.C.D.F. 202 at pages 204-205, citing the Honorable Hector Louis Langevin (*Confederation Debates* at p. 388):

"The word 'Mariage' has been placed in the draft of the proposed Constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the Confederacy, without, however, interfering in any particular with the doctrines or rites of the religious creeds to which the contracting parties may belong."

<sup>31</sup> Examples of such provisions are: sections 115 (requirement of spouses being of a certain age and, according to some, being of different sex), 116 and 148 (necessity of spouses giving a free and enlightened consent), 117 (physical capacity to have sexual relations), 118 (condition of monogamy), etc.

<sup>32</sup> Subs. 92(12), *Constitution Act, 1867*.

a rare occurrence<sup>33</sup>. The constitutional validity of some of the provisions of the *Civil Code of Quebec* related to marriage may be disputed because they are too close to the substantive conditions normally exclusive to Parliament.<sup>34</sup> Given the survival of obsolete provisions in the *Civil Code of Lower Canada* and the constitutional uncertainty of certain provisions of the *Civil Code of Quebec*, the experts felt that legislative intervention by Parliament was desirable.

As outlined in Section 4 of the bill, the replacement provisions therein apply only to Quebec. Why? Because the problem exists only in Quebec. In fact, in the other provinces and territories, the substantive conditions of marriage come mainly from common law. They also originate from certain pre-Confederation statutes related to marriage and divorce. Since they could not be validly replaced by the provinces because of the division of powers of 1867, these parts of statutes outlining substantive conditions of marriage remain in force—unless Parliament removed them<sup>35</sup>—along with common law principles.<sup>36</sup> The vacuum created by the lack of intervention by the Canadian Parliament is thereby remedied for those provinces and territories, contrary to Quebec where those statutes and common law principles are not applicable.<sup>37</sup>

In Quebec, if the *Civil Code of Lower Canada* was repealed without any replacement provisions relating to marriage and if the provisions of the *Civil Code of Quebec* were declared unconstitutional, this would result in a real uncertainty with respect to the applicable law in that province relating to marriage. It was in that context that Parliament has decided to intervene only for Quebec.

However, in order to better harmonize federal rules with those of the Province of Quebec, the marriage provisions of Bill S-4 were drafted in a manner compatible with those of the *Civil Code of Quebec* based on provincial authority respecting the celebration of marriage. Furthermore, clause 4 of the bill provides that sections 5 to 7 are to be interpreted as though they formed part of the *Civil Code of Quebec*. This means that these provisions must be read in conjunction with those of the *Civil Code of Quebec* which complete them. The consecration to clause 4 of the complementarity link uniting federal law and provincial law allowed the proposal of a minimal number of replacement provisions. Thus, if the clauses of Part I do not address one aspect, the rules relating to nullity for instance, the Code must be consulted.

The replacement provisions deemed essential are the following. Clause 5 provides that the future spouses shall be of different genders. The mention of the heterosexual nature of marriage is consistent with article 365 of the *Civil Code of Quebec*, which provides that marriage “may be contracted only between a man and a woman expressing openly their free and enlightened consent”. In this respect, the bill is also consistent with the rule of interpretation contained in the *Modernization of Benefits and Obligations Act*.<sup>38</sup> This rule of interpretation which outlines that

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<sup>33</sup> The legitimacy of overlapping is considered in accordance to the theory of the double aspect. See *Hodge v. The Queen*, [1833] 9 App. Cas. 117; P. Hogg, *Constitutional Law of Canada*, 3<sup>rd</sup> ed., Toronto, Carswell, 1992 at pages 381-383. In the event of conflict, federal rules prevail over those of the provinces due to the principle of supremacy of the laws of Parliament: P. Hogg, *ibid.*, at pages 418, 419 and 434.

<sup>34</sup> For example, the requirements respecting consent and spouses being of different genders (art. 365, C.C.Q.), age, consent of the parents or tutor, monogamy and prohibited degrees (art. 373, paragraph 2, subparagraphs 1 and 3). See *Droit de la famille 2063*, [1994] R.J.Q. 2631 (S.C.).

<sup>35</sup> For instance, *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46; *Annulment of Marriages Act (Ontario)*, R.S.C. 1970, c. A-14.

<sup>36</sup> See in particular *Hyde v. Hyde & Woodmansee* (1866) L.R. 1 P. & D. 130, at page 133.

<sup>37</sup> S. 8, *Quebec Act*, 1774.

<sup>38</sup> *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 (known before as Bill C-23).

nothing in the act affects the meaning of the word “marriage”, which is still “the lawful union of one man and one woman to the exclusion of all others”.<sup>39</sup>

Clause 6 of the bill provides: “No person who is under the age of sixteen years may contract marriage”, a rule which corresponds to that established by the *Civil Code of Quebec* respecting the celebration of marriage.<sup>40</sup> Lastly, clause 7 states: “No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null.” This prohibition is also consistent with that provided for in the *Civil Code of Quebec*.<sup>41</sup>

### 2.3. Interpretation Act

Although the existence of Canadian bijuralism stems from the *Quebec Act* of 1774, it is not formally recognized in any statutory provision. The same is true of the principle of complementarity of federal law with the law of the provinces respecting property and civil rights. What is more, there are no rules of interpretation to guide those required to apply bijural legislation. All these reasons led the Department of Justice, after consulting various experts, to amend the *Interpretation Act* to add two provisions designed to correct these deficiencies. The proposed provisions are set out in Part 2 of the bill, more particularly in clause 8.<sup>42</sup>

#### 2.3.1 Section 8.1

The proposed section 8.1 has two inseparable objectives: to recognize Canadian bijuralism and to consecrate the principle of the complementarity of federal law and provincial law with respect to property and civil rights.

Firstly, section 8.1 expressly recognizes the principle of Canadian bijuralism outlining that the civil law and common law are both sources of property and civil rights law.

Secondly, section 8.1 recognizes the existence of the complementarity link uniting the federal law and the law of the provinces. As the principle of complementarity is recognized in the jurisprudence, this provision only states the current status of the law. Thus, the principle is set out whereby, in a province, when a federal enactment does not address a matter relevant to property and civil rights which is essential to its application, the rules of private law applicable in that province must be sought in a suppletive manner. In doing this, section 8.1 consecrates the principle whereby the interpretation of federal enactments in Quebec must not be done to the detriment of the civil law tradition. In other words, the civil law must have, in Quebec, the role that the common law has in other parts of the country relatively to federal enactments that apply to same.

We should mention that the proposed section 8.1 *in fine*, “at the time the enactment is being applied”, comprises an ambulatory aspect which ensures the consideration of the evolution of law in the province of application and which refers to the provincial rules governing the application of the law in time.

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<sup>39</sup> S. 1.1, *ibid*.

<sup>40</sup> Art. 373(1), C.C.Q.

<sup>41</sup> Art. 373(3), C.C.Q.

<sup>42</sup> The following paragraphs provide an overview of the objectives pursued by proposed sections 8.1 and 8.2. Another writer, Henri Molot, has conducted a more thorough analysis of these proposals in the context of this collection. See Henry Molot: *Clause 8 of Bill S-4: Amending the Interpretation Act, The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, Second Publication, Booklet 6, Department of Justice Canada, May 2001.

### 2.3.2 Section 8.2

The proposed section 8.2 is intended to facilitate an understanding of the new drafting techniques designed to reflect Canadian bijuralism in federal legislation.<sup>43</sup>

One of these techniques, the double, consists in entrenching both civil law and common law terminology in federal legislation relating to private law (for example “real property or immovable”). Another technique is to draft a provision so as to use only a single term common to both legal traditions which will nevertheless have a proper meaning depending on the legal tradition within which it is applied (for example “lease/*bail*”).

In this context, section 8.2 ensures that the interpreter of a federal statute containing a double or a common term will consider only the terminology or the meaning compatible with the legal tradition of the province in which the legislation applies. In other words, it ensures that the interpreter of a bijural provision will not misunderstand the meaning that must be given to Parliament's new drafting techniques and that he knows how to give them the desired effect.

### 2.4. Pilot Statutes

As stated above, the Civil Code Section's harmonization work has involved three major areas: property, security and civil liability law. For each of these areas, a federal statute has served as a pilot project. The harmonized pilot statutes are found in Parts 3, 4 and 5 of the bill.

#### 2.4.1 Federal Real Property Act

The *Federal Real Property Act* appeared to be the ideal pilot statute for the property area because it governs the acquisition, administration and disposition of real property by the Canadian government. In addition, studies showed that many harmonization problems had to be addressed given the fundamental differences between the common law and civil law regarding the law of property.

Rather than consider in detail each of the recommendations for harmonizing this act, we will merely cite a few examples.

One of the most obvious changes made to the act concerns the term “*immeuble*”, which appears, in particular, in the title of the act. The problem here stems from the fact that the term refers solely to the civil law system. Consequently, the French-language common law is not reflected. To solve this problem, it was necessary to find neutral terminology, to draft the act in another way to avoid using the term, or to add terminology specific to the system not represented. In property, the two systems of law have evolved in such different ways that it was difficult, if not impossible, to find terminology not more associated with one system than the other. In view of this difficulty, we opted for the double technique,<sup>44</sup> which appeared to be the most accommodating of the specific characteristics of each system. Thus, wherever the term “*immeuble*” appears in the act, we added the term most commonly used in common law to reflect the same notion: “*bien réel*”.<sup>45</sup>

The same problem arose in the English version of the act, which employs terminology that, unlike the French version, refers solely to the common law. The concept of “real property” is

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<sup>43</sup> For an overview of these techniques, see L. Maguire Wellington, *supra*, note 5.

<sup>44</sup> See L. Maguire Wellington, *supra*, note 5 at p. 9.

<sup>45</sup> Source: National Program for the Integration of Both Official Languages in the Administration of Justice (POLAJ).



unknown in civil law. As for the French version, we added the terminology appropriate for the legal system which is not represented, being the civil law equivalent “immovable”, wherever the expression “real property” was used. In this way, both systems of law are reflected in each of the language versions.

The definition of the terms “licence/*permis*” in subclause 11(2) of the bill is another example of harmonization. As currently worded, this definition is semi-bijural, that is to say it is directed at only two of the four audiences.

The French version, where it refers to “*droit d'usage ou d'occupation d'immeubles qui ne sont pas un droit réel*”, is intended solely for a civil law audience. The concepts of “*droit réel*” and “*immeuble*” only have meaning in civil law. Furthermore, in civil law, “*droit d'usage*” is one of the dismemberment of ownership and, in that sense, is a “*droit réel*”. Being intended to mirror the English version, the French wording results in incoherence from a civil law standpoint.

The English version, on the other hand, where it uses the concept of “licence”, defining it as meaning “right of use or occupation of real property other than an interest in land”, is intended solely for a common law audience. The concepts “interest”, “real property” and “licence” have meaning only in common law.

To correct these problems of harmonization, the paragraphed double technique<sup>46</sup> was used to clearly mark the terms associated with each of the two systems. The first part of the new definition is common to both systems. Thus, the word “licence” (“*permis*”) is defined as meaning “any right to use or occupy real property or an immovable...” Each system is then identified on the basis of exceptions. For the civil law, the definition excludes real rights and the rights of a lessee under a lease of an immovable. For the common law, it excludes an interest in land. In this way, the irreconcilable realities of the civil law and common law are rendered more clearly in the same definition.

#### **2.4.2 Bankruptcy and Insolvency Act**

The *Bankruptcy and Insolvency Act* (hereinafter the “*B.I.A.*”) was identified as a pilot act for harmonization with security law. The private law of the provinces governs normal relations between individuals, in particular those between creditors and debtors. Where insolvency incurs, an imbalance arises in relations between the two. The *B.I.A.* is designed to govern these situations. Its purpose is to bring about the discharge of the insolvent debtor to enable him or her to establish new relations with creditors. It is also designed to protect the rights that creditors hold under normal common law rules or rules set out in the *B.I.A.* In so doing, it makes numerous references to the notions and concepts specific to private law, in particular as regards security. In fact, the complementary ties between the *B.I.A.* and the private law of the provinces are so strong that we thought it is indispensable to make them the subject of a pilot study<sup>47</sup>.

One of the most important harmonization proposals in the act is set out in clause 25 of the bill, which amends the definition of “secured creditor” in section 2 of the *B.I.A.* This provision has been amended in a number of respects to introduce the new civil law concepts respecting security.

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<sup>46</sup> See L. Maguire Wellington, *supra*, note 5 at p. 11.

<sup>47</sup> For a more thorough analysis of certain amendments to the *Bankruptcy and Insolvency Act*, see A. Vauclair and M.-F. Parent: Harmonization of Federal Legislation with the Civil Law of the Province of Quebec: Some examples from the *Bankruptcy and Insolvency Act*, The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Second Publication, Booklet 8, Department of Justice Canada, May 2001.

Since the introduction of prior claims in Quebec civil law,<sup>48</sup> the courts have had to determine the rights they confer on holders. Thus far, according to well-settled case law, a prior claim is not a real right and does not confer the right to follow the property subject to it.<sup>49</sup> A prior claim confers only the right to be paid first where the property is sold.

Although the claims of municipalities and school boards for property taxes on the immovables subject to them are prior claims under the *Civil Code of Quebec*, the definition of “secured creditor” in the *B.I.A.* does not include prior claims in its enumeration.

In December 1999, the *Civil Code of Quebec* was amended to grant the prior claims of municipalities and school boards the character of real rights with the right to follow the property into whosoever's hands it may be.<sup>50</sup> The clear intent was to restore to municipalities the status of “secured creditor” within the meaning of the *B.I.A.*

Historically, by virtue of the privilege granted to them by the *Civil Code of Lower Canada*, a concept which has now disappeared, Quebec municipalities always had “secured creditor” status for their property taxes. It is therefore understandable why they wanted to regain this status. It should be noted that municipalities in the rest of Canada rely on a similar notion (“*lien/privilège*”) in order to obtain the status of “secured creditor”.

After the *Civil Code of Quebec* was amended in December 1999, it became necessary to amend the definition of “secured creditor” to include prior claims constituting real rights. Since the legislative policy of Quebec's legislature had changed, it was inevitable to take it into account, particularly since this right was becoming increasingly similar to the situation prevailing in the common law provinces.

Once again, we do not want to go into the details of all the other harmonization amendments made to the *B.I.A.*, but will simply mention that a number of those changes are designed to correct problems of semi-bijuralism in which the terminology in each of the language versions refers to concepts known in only one of the two systems (for example, the terms “bond”, “guarantee” and “fiduciary obligations” in the English version refer to the common law system only). In addition, certain problems arise from the use of terms that are obsolete or meaningless in civil law (for example, “*privilège*” and “*nantissement*”) and the harmonization proposals are an attempt to correct them.

### **2.4.3 Crown Liability and Proceedings Act**

For the purpose of harmonization in extra-contractual civil liability matters, we took the *Crown Liability and Proceedings Act* (hereinafter the “*CLPA*”) as a pilot act. This act refers to the provincial rules respecting civil liability on a complementary basis. It thus maintains close ties with the private law of the provinces and, as such, lends itself particularly well to harmonization.

Many clauses in the bill are devoted to the harmonization of this act. Examples are thus numerous and, once again, we will limit ourselves to a few.

Example 1. Clause 34 of the bill amends section 2 of the *CLPA* by repealing and replacing the definition of the concept of “tort” (“*délit civil*”). In both versions of the act, the present definition of the

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<sup>48</sup> Articles 2650 ff., C.C.Q.

<sup>49</sup> See *Château d'Amos Ltée*, [1999] R.J.Q. 2612 (C.A.Q.).

<sup>50</sup> Art. 2654.1, C.C.Q.

terms “tort/délit civil” causes a problem of obsolete terminology because the concepts of “delict” and “quasi delict” (“délit” and “quasi-délit”) were removed from the *Civil Code of Quebec* and were replaced by the concept of extra-contractual civil liability.<sup>51</sup>

To correct this problem and prevent the use of a term which refers solely to common law, such as “tort”, the bill uses generic terms defined in light of each of the two systems. The two terms selected are “liability” and “responsabilité”. As these two terms, in a general context, refer to both extra-contractual and contractual liability in both civil and common law, they had to be defined in order to restrict them to extra-contractual liability only, which is contemplated by Part I of the act. The technique used for this definition is the paragraphed double. Thus the terms “liability/responsabilité” are defined in civil law terms in the first paragraph and in common law terms in the second. In this way, the definition is appropriate for the four audiences. In addition, the use of generic terms throughout the act ensures that the text is not unduly cluttered and that neither system carries greater weight than the other.

Example 2. Clause 36 of the bill, which amends section 3 of the act, is also an illustration of the paragraphed double technique. This section is full of problems of harmonization. Obsolete terminology is one and is caused by the use of the concept of “délit civil”. Semi-bijuralism is another and results from the use of the civil law concept of “responsabilité civile délictuelle” at the same time as the common law concept of “tort”. Lastly, unijuralism is another problem. In this last case, the problem arises from the absence of the civil law concept of fault as well as the use of wording inconsistent with civil law thinking: “breach of duty attaching to the ownership, occupation, possession or control of property/les manquements aux obligations liées à la propriété, à l’occupation, à la possession ou à la garde du bien”. To take into account the notions and concepts specific to each system, the provision was drafted in the form of a paragraphed double, the first paragraph being intended for the civil law audience and the second for the common law audience.

## 2.5 Mosaic of Partially Harmonized Acts

The rest of the bill (Part 6) provides for legislative amendments to harmonize 45 other acts. All these amendments are in relation to the three areas of law: property, security and civil liability. The legislative techniques used to correct the problems of harmonization are the same as those employed for the pilot acts: definition, double, paragraphed double and neutral or generic terms.<sup>52</sup> Although the concepts harmonized in these acts may be different from those harmonized in the pilot acts, the harmonization problems they give rise to all fall into the categories developed by the Department of Justice: obsolete terminology, semi-bijuralism, unijuralism and apparent bijuralism.<sup>53</sup> The variety of problems and solutions developed for these acts creates a solid background for future harmonization work which will rely on them.

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<sup>51</sup> Art. 1457, C.C.Q.

<sup>52</sup> See L. Maguire Wellington, *supra*, note 5.

<sup>53</sup> *Ibid.*

## **Conclusion**

As may be seen from this overview, the harmonization of federal legislation with the civil law of Quebec is a complex task. Expertise is gradually developing, but new problems continually arise and present a significant challenge for harmonizers who must accommodate two languages, two legal systems and an expectation of readable statutes. The first harmonization bill represents only a very small portion of the harmonization work that lies ahead. Its content is innovative and ingenious but the underlying methodology can always be improved. Nevertheless, this bill will undeniably stand as a model and source of inspiration for all future harmonization work.

The Department of Justice continues its harmonization efforts and is working on the content of a second harmonization bill. It envisages that this bill would, in particular, include new proposals for legislative amendments to the legislation partially harmonized in Bill S-4.<sup>54</sup> The existing body of legislation is not only enormous, it is constantly growing and evolving. As far as possible, therefore, the harmonization effort of the Civil Code Section will pay equal attention to the extensive body of legislation in the process of development, thus preventing problems of harmonization that would have to be corrected after the fact.

There is no longer any need to prove the value of bijuralism. It is a feature of our country that positions us favourably on the international stage. This first bill, once passed, will undoubtedly be the envy of many countries and communities now coping with the problems of coordinating their legal systems. We therefore wish it swift passage.

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<sup>54</sup> Their harmonized regulations would be included in a schedule.