
Symposium: Canadian Bijuralism and Harmonization of Federal Tax Legislation

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ABSTRACT

Canadian bijuralism denotes the coexistence of two private law systems in Canada: the civil law in Quebec and the common law in the other provinces. From this legal duality, which dates back to the Quebec Act, 1774, follows a special interaction between federal legislation and provincial private law. This interaction is based on the principle of complementarity where the concepts, rules, and principles of the private law of the provinces are used to apply the federal norm. This interaction is put aside where rules of private law are expressly created to express the federal norm; in this case, there is dissociation with the private law of the provinces.

Tax legislation is not exempt from this rule. Both linguistic versions must apply coherently and equitably in the two private law systems throughout Canada. This undertaking poses a major challenge considering that, in addition to the notable differences between the civil law and common law traditions, there may be major differences between the laws of the various common law provinces that result from variations in provincial legislation.

The objective of harmonization is to build bridges between Canada's two legal traditions. Harmonization thus aims to ensure the compatibility and applicability of federal legislation in each of the two legal traditions and official languages through the use and acceptance of concepts and institutions from the civil law and the common law, as well as the use of the appropriate terminology to refer to those concepts and institutions.

Clearly an important step in achieving this objective is the addition of sections 8.1 and 8.2 of the Interpretation Act. While section 8.1 recognizes Canadian bijuralism and expressly enshrines the principle of complementarity between federal legislation and the provincial private law in force at the time the enactment is being applied, section 8.2 facilitates comprehension of bijural enactments.

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In this regard, this approach evokes two important court decisions dealing with harmonization. Even before section 8.1 was enacted, *St-Hilaire* reaffirmed the principle of complementarity of provincial private law in the interpretation of federal private law legislation. *Schreiber* illustrates that the amendments made by the Federal Law-Civil Law Harmonization Act, No. 1 must not be viewed as altering the substance or scope of the law, but rather as introducing civil law terminology or common law terminology in French.

Although application of the harmonization process has been limited thus far to legislative drafting, it is nevertheless wrong to believe that this is the extent of its application. Rather, harmonization and the application of bijuralism standards should be performed during the development of tax policy so that such policy is formulated to take into account the reality of Canadian bijuralism. Without changing the tax principles of vertical and horizontal equity and neutrality in taxation, bijural thinking must begin at the outset of the process of formulating or stating a federal rule. Given these considerations, in the context of tax law, harmonization tends to make federal legislation more compatible with the civil law as well as the common law in French in order to facilitate its interpretation and application both in Quebec and in the other provinces.

KEYWORDS: BIJURALISM ■ HARMONIZATION ■ TAX POLICY ■ FEDERAL/PROVINCIAL ■ INTERPRETATIONS ■ PROPERTY ■ QUEBEC

CONTENTS

Canadian Duality: Bijuralism	135
Complementarity and Dissociation: The Interplay of Federal and Provincial Law	139
Common Law and Civil Law: A Brief Comparison	140
Property Law	141
Characteristics of Both Legal Systems	141
The Concept of Ownership	142
Property: A Conceptual Difference	143
Trusts	143
Lease	145
Mortgage/Hypothec	147
The Harmonization Program and Its Objectives	147
Progress to Date and Legislative Amendments	151
New Interpretation Rules	153
Section 8.1 of the Interpretation Act	153
St-Hilaire: Private Law Versus Public Law	154
Section 8.2 of the Interpretation Act	156
Schreiber: Interpretation of Harmonized Provisions	156
Research Projects in Bijuralism and Harmonization	157
Conclusion	158

Private law in Canada is founded on two distinct legal traditions—civil law, applied in Quebec, and common law, applied in the other provinces and territories. This bijuralism affects the drafting of federal legislation, which must endeavour to reconcile differences (for example, in terminology and concepts) between the two private law systems. As part of the implementation of the federal government's policy on

legislative bijuralism, a program to harmonize federal legislation with the civil law of Quebec was initiated in 1999. The purpose of this paper is to present a general overview of the harmonization program and its progress as of October 2002.

Before we explore some of the differences in the provincial private law and their potential impact on federal tax legislation, it is useful to provide background information on the duality of our legal system and on the particular interaction between federal law and provincial private law in Canada. We will then review the most important differences between the common law tradition and the civil law tradition in order to illustrate the challenge at hand in applying federal tax legislation fairly and efficiently. Finally, we will briefly explain the harmonization program, its objectives, and its techniques, and report on the harmonization work done thus far.

This issue of the journal includes a lead article and three papers that study in depth some of the problems that arise in the application of the Income Tax Act¹ as a result of differences in provincial private law. For example, the institution of trust and the concept of ownership vary considerably in the private law of the common law provinces² and Quebec's civil law regime. Moreover, even between common law provincial jurisdictions, there are varying interpretations of such concepts as charitable activity and residence. As the accompanying studies will demonstrate, such diversity in provincial private law can result in significant differences in the application of federal legislation—tax and other—from one province to another.

CANADIAN DUALITY: BIJURALISM

Bijuralism in the Canadian context is the coexistence of two major legal traditions, civil law and common law.³ Federal legislation not only must be drafted in both official languages, but also must respect and be compatible with these two systems of private law.⁴

After the 1760 conquest, common law and equity had been introduced throughout Canada under the Royal Proclamation, 1763.⁵ Canadian bijuralism dates back to the Quebec Act, 1774,⁶ which recognized that in matters of property and civil rights (private law), the civil law tradition, inspired by French civil law, applied in Quebec in the same way that the common law tradition, inspired by British common

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the ITA”).

2 The expression “common law provinces” is used to refer to all Canadian provinces except Quebec and includes the territories.

3 Michel Bastarache, “Bijuralism in Canada,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication* (Ottawa: Department of Justice, 2001), booklet 1, 19-26, at 19; Louise Maguire Wellington, “Bijuralism in Canada: Harmonization Methodology and Terminology,” *ibid.*, booklet 4, 1-2.

4 Lionel A. Levert, “The Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?” *ibid.*, booklet 1, 5-9, at 6-7. See also Maguire Wellington, *ibid.*, appendix III.

5 October 7, 1763.

6 14 George III, c. 83 (UK).

law, applied outside Quebec. Conversely, in matters other than property and civil rights (public law), the common law tradition has applied and continues to apply both in Quebec⁷ and outside Quebec. The duality of our legal heritage has also been entrenched in the Constitution Act, 1867, whereby provinces have maintained exclusive jurisdiction over matters of property and civil rights.⁸ This enactment confirmed Quebec's right to keep its civil law regime of French origin and the right of the other provinces to keep their common law regime of British origin. While the federal Parliament may have jurisdiction over certain private law matters⁹ and may set out its own private law rules, the bulk of Canadian private law is provincial law.

The distinction between matters of private law and matters of public law is critical in the context of this discussion because bijuralism extends only to matters of private law. In federal tax legislation, concepts or rules that are borrowed from provincial private law include, for example, the concepts of ownership, partnership, and liability, and any other private law matter that involves the relations between persons. Accordingly, the possibility arises that such concepts or matters may have a different meaning and application in one legal tradition as compared with the other, or even that they may have no meaning or application in the other legal tradition. On the other hand, if a concept or rule referred to in federal legislation belongs to public law as opposed to private law, that concept or rule should have the same meaning and application throughout Canada, whether the federal legislation is applied in the common law jurisdictions or in Quebec. These principles have been reviewed and confirmed by the Federal Court of Appeal in *St-Hilaire v. Canada*:

In the first place, it is *The Quebec Act, 1774* [R.S.C., 1985, Appendix II, No. 2] that sealed the fate of the two legal systems that were to govern the applicable law in Quebec: the French civil law as it existed prior to 1760 with its subsequent alterations in Quebec in regard to anything affecting property and civil rights, and the common law as it existed in England at the same time with its subsequent alterations in Quebec and in Canada in regard to anything affecting the public law. Article VIII of *The Quebec Act, 1774*, which prescribed that "in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada," was the precursor of subsection 92(13) of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982 c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]]. . . .

Fourthly, the federal private law in Quebec is composed of the private law defined in a statute of the Parliament of Canada and the civil law if it is necessary to resort to an external source in order to apply a federal statute. The Parliament of Canada may

7 Michel Morin, "Introduction historique au droit civil québécois," in Louise Bélanger-Hardy and Aline Grenon, *Éléments de common law et aperçu comparatif du droit civil québécois* (Scarborough, ON: Carswell, 1997), 59-68, at 62-63; and Levert, *supra* note 4, at 5.

8 Constitution Act, 1867, 30 & 31 Vict., c. 3, as amended, section 92(13).

9 See Constitution Act, 1867, section 91: class 18, Bills of Exchange and Promissory Notes; class 21, Bankruptcy and Insolvency; and class 26, Marriage and Divorce.

enact private law legislation that will form a complete code in which case there is no need to resort to an external source, the civil law, or it may enact private law legislation which, because it is incomplete, will refer either expressly or by implication to the civil law for its implementation.

Fifthly, the Parliament of Canada may derogate from the civil law when it legislates on a subject that falls within its jurisdiction.¹⁰

Although the court's decision specifically addressed the relationship between federal legislation and Quebec civil law, the same rules apply with regard to any other province.

What is the significance of recognizing the duality of our legal traditions in federal tax legislation? Having evolved differently, our two private law systems involve divergent, often incompatible institutions, rules, and approaches. Yet it is necessary that federal tax legislation apply equally and coherently across the country in both linguistic versions and in both legal traditions. Aside from the need to reconcile linguistic differences that may exist between the French and English versions of legislation, there is a further requirement to reconcile the differences that result from our different private law systems. How does the drafter of tax legislation ensure that it applies to francophones and anglophones alike, and also applies equally to taxpayers within the civil law and the common law regimes? To meet this challenge, federal tax legislation must use terminology that is compatible with each of the two legal systems, in both official languages. This is the central objective of the policy on legislative bijuralism, adopted by the Department of Justice in 1995. In the policy statement, the Department of Justice affirms that it

formally recognizes that it is imperative that the four Canadian legal audiences (Francophone civil law lawyers, Francophone common law lawyers, Anglophone civil law lawyers and Anglophone common law lawyers) may, on the one hand, read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory.¹¹

In accordance with this policy, in 1999 the Department of Justice implemented the program for the harmonization of federal legislation with the civil law of Quebec.¹² This program is also a consequence of the coming into force of the Civil

10 *St-Hilaire v. Canada*, [2001] 4 FC 289, at paragraphs 40, 43, and 44 (CA).

11 Canada, Department of Justice, "Policy on Legislative Bijuralism," reproduced as appendix III in Maguire Wellington, *supra* note 3, at 23.

12 Mario Dion, "Preface," in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, *supra* note 3, booklet 1, vii-x, at vii. See also Mario Dion, "Legal Perspective of the New Millennium International Meeting of Francophone Legal Experts—Harmonization of Federal Law with Quebec Civil Law: Canadian Bijuralism and Its Actualization," *ibid.*, 27-32, at 28-30.

Code of Quebec¹³ on January 1, 1994. The CCQ introduced important changes in a number of substantive rules and in civil law terminology that have affected the application in Quebec of federal acts and regulations. Harmonization aims to ensure that both civil law institutions and concepts are respected and that the correct terminology is used when referring to them. Nicholas Kasirer, while appearing before the Standing Senate Committee on Legal and Constitutional Affairs, described harmonization in the following terms:

Harmonization, as a musical technique, shows how the four voices of federal legislation are being fine-tuned with full respect being paid to bilingualism and bijuralism. . . .

First then, what does “harmonization” imply as a matter of legislative technique? Harmony takes different forms in music theory. Multiple voices can come together as one or differently to achieve a unified effect. Quite plainly, the federal Parliament has chosen the model of polyphonic music as opposed to monophonic song for Bill S-4,^[14] and one presumes for the legislation that will be sung in this chamber hereafter.

By “polyphony” I mean that musical form whereby multiple voices, each singing in a different register, combine differently to form a musical whole. . . .

Polyphonic legislation would thus be the method by which the legislative song, as it were, emerges as a whole through the harmonious combination of four different voices—the common law in English and French and the civil law in English and French, which taken separately are radically different but taken together express the whole of the legislative norm.

The task is daunting, but it is the imperative of section 133 of the Constitution Act, 1867, which give French and English equal authority as expressions of legislative text and the coexistence of the common law and the civil law as varying bases of suppletive law for federal legislation that imposes this polyphonic legislative form.

Plainly, the former reality, in which the English text represents the common law and the French text represents the Civil Code, not only ignored the reality of a vibrant civil law culture in English in Quebec but also the promise of a common law culture in French outside of Quebec such that two of the voices of Canadian law were in some measure silenced.¹⁵

Harmonization is thus a pragmatic exercise, an approach to drafting federal legislation to ensure that it is compatible with and applicable within each of our two legal traditions in both of our official languages.

Viewed from a drafting perspective, Canadian bijuralism appears to impose a tremendous challenge with respect to the structure and interpretation of Canadian legislation (and particularly tax legislation, which depends so much on an equitable

13 SQ 1991, c. 64 (herein referred to as “the CCQ”).

14 Subsequently enacted as the Federal Law-Civil Law Harmonization Act, No. 1, *infra* note 84.

15 Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Evidence*, March 14, 2001, 2:28-29, available on the Web at http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/lega-e/02cv-e.htm?Language=E&Parl=37&Ses=1&comm_id=11 (accessed November 1, 2002).

distribution of tax burdens and benefits). However, as a country immersed in two legal traditions, which are also the world's two major legal systems, Canada is placed in a privileged position within the international community.¹⁶ According to a study undertaken in 1998 by the Faculty of Law of the University of Ottawa,¹⁷ civil law and common law systems represent 72 percent of the world's legal systems; civil law systems alone account for 43.8 percent. Canadian bijuralism thus simultaneously offers a tremendous domestic challenge and "gives us a window on the world."¹⁸ Indeed, bijuralism viewed from an international perspective expands considerably our legal connectivity to the global village.

COMPLEMENTARITY AND DISSOCIATION: THE INTERPLAY OF FEDERAL AND PROVINCIAL LAW¹⁹

Having acknowledged the need for bilingual and bijural tax legislation, we will next examine the relationships between federal and provincial private law. Federal legislation does not often stand alone but depends on provincial private law for meaning:

Federal law is not "an island unto itself." Some federal enactments are fully comprehensive and self-contained. Others, however, can only be fully understood and comprehended if reference is made to extrinsic legal sources. In most instances, those external sources are composed of provincial law. While the content of provincial law may vary from province to province, the validity of any such provincial law, in large measure, depends of [sic] s. 92 of the *Constitution Act 1867*.²⁰

As noted earlier, the division of legislative powers under the Constitution Act, 1867 provides that provincial legislatures have exclusive jurisdiction over matters of property and civil rights. Most of Canada's private law is provincial. Therefore, where federal legislation refers to private law terms and concepts such as mortgage, property, trust, and lease, without defining them, those terms and concepts take

16 Stéphane Dion, "Symposium on the Harmonization of Federal Legislation with Quebec Civil Law," in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 3, booklet 1, 1-4, at 2; and Morris Rosenberg, "Evolution of Legal Systems, Bijuralism and International Trade (University of Ottawa)," *ibid.*, booklet 1, 33-37, at 36.

17 *Apportionment (in Percentage) of Political Entities According to Their Legal System*, University of Ottawa, available on the Web at <http://www.uottawa.ca/world-legal-systems/eng-pourcentage.htm> (accessed November 4, 2002).

18 Dion, supra note 16, at 4.

19 On this subject, see Jean-Maurice Brisson and André Morel, "Federal Law and Civil Law: Complementarity, Dissociation," in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies* (Ottawa: Department of Justice, 1999), 217-64.

20 Henry L. Molot, "Clause 8 of Bill S-4: Amending the Interpretation Act," in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 3, booklet 6, 1-19, at 1.

the meaning that applies in the private law of the province in which the provision is being applied. This interaction of federal and provincial legislation is called complementarity. Provincial private law, in this relationship, can be viewed as the backdrop to or legal infrastructure of federal legislation. Provincial private law provides the suppletive law by completing federal legislation where it is silent or incomplete on an issue. In common law provinces, this backdrop or infrastructure is the general common law; in Quebec, it is the CCQ and civil law principles of general application.

It is always open to federal policy makers, under the Constitution Act, 1867, to write out their own private law rules and to derogate from the relationship of complementarity with provincial private law. This second relationship is called dissociation. Policy makers typically choose dissociation where they want to achieve greater consistency in the implementation of federal policy. For example, in the area of family law, there are often variations in the interpretation of concepts from one province to another. The lack of symmetry necessary for the coherent administration of federal policies and programs sometimes calls for definitions in federal legislation of terms such as “child” or “common law partner,” which displace, for purposes of the federal statute, definitions that may be provided in provincial private law. Overall, however, it is usually more convenient and logical for the federal legislator to work with the existing provincial private law infrastructure than to reinvent it in every federal statute. Thus, even where federal definitions or specific federal rules are provided, they often refer, in varying degrees, to concepts or rules found in provincial private law.

The important differences that exist in our legal traditions and in the private law of the provinces may produce tax results in one province that are not desirable from a legislative or policy perspective (undesirable asymmetry). These adverse tax results must be anticipated and the gaps between common law and civil law must be adequately bridged with specific provisions if federal tax legislation is to apply effectively and equitably throughout Canada.

For a better understanding of some of the issues that must be addressed in the process of harmonizing federal legislation, the next section briefly sets out some of the major differences between the common law and the civil law.

COMMON LAW AND CIVIL LAW: A BRIEF COMPARISON

As discussed above, differences exist between Quebec civil law and the common law. Sometimes they are trivial; often they are gaping. Conceptually, both systems are fundamentally different.

Civil law relies heavily on codification. In the CCQ, which contains most of Quebec’s civil law rules, certainty predominates over flexibility. Confronted with a given set of facts, in civil law one must determine which of the rules found in the CCQ is to be applied. Because no court can change a written rule, if a rule becomes the source of injustice, the only solution available will be to amend the law. This process can be both difficult and time consuming.

By contrast, a distinguishing feature of the common law is its flexibility. If the result of the application of common law rules is inadequate, certain equitable remedies may be available. One of the most interesting and challenging features of English law for civil law practitioners is the interaction of common law and equity, and the possibility, for example, that title to property at common law may coexist with title at equity.²¹ This duality stems from the coexistence of the courts of law and the courts of equity where equitable principles were developed to temper the effects of some of the common law rules.²² “While the courts of common law and equity are now fused in virtually all jurisdictions, the separate rules of law and equity remain in force. . . . Thus, the distinction between legal and equitable interests still maintains.”²³ The latter distinction was reaffirmed in *Canson Enterprises Ltd. v. Boughton & Co.*²⁴ and in *Martin v. Goldfarb*.²⁵ On the other hand, the only equitable rules that apply in civil law are those expressly provided for in the CCQ or other statutes.²⁶

The discussion that follows considers only a few examples of differences between common law and civil law that may affect the application of federal legislation throughout Canada.

Property Law

In the field of property law, the differences between the civil law and common law systems have raised and continue to raise many questions for tax law purposes, including questions pertaining to the acquisition and disposition of property. Listing the characteristics pertaining to the nature and scope of ownership allows one to identify some of the differences between the two legal regimes.

Characteristics of Both Legal Systems

Civil law takes a Cartesian approach to the law of property. CCQ article 899 provides, “Property, whether corporeal or incorporeal, is divided into immovables and movables.” The CCQ then lists property that is or is deemed to be immovable;²⁷ all other property, if not qualified by law, is deemed to be movable.²⁸

21 It is mainly in the fields of the law of property and the law of trusts that this duality creates important differences with the civil law.

22 Barbara Pierre, “Classification of Property and Conceptions of Ownership in Civil and Common Law” (1997) vol. 28, no. 2 *Revue générale de droit* 235-74, at 247.

23 A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property*, 2d ed. (Aurora, ON: Canada Law Book, 1985), vol. 1, 12-13.

24 [1991] 3 SCR 534.

25 (1998), 41 OR (3d) 161 (CA).

26 See, for example, CCQ articles 975 and 1434.

27 CCQ articles 900 to 906.

28 CCQ article 907 states, “All other property, if not qualified by law, is movable.”

By comparison, at common law, property is fundamentally divided between real property and personal property. The rules pertaining to the classification of property owe their origin “to the rules of civil procedure that governed litigation at common law during the Middle Ages.”²⁹ Even though the forms of action at common law were abolished, these labels have remained.³⁰ A real action could be undertaken to obtain the return of land under dispute.³¹ Property subject to such actions was eventually designated as real property. The personal action was originally one for which only damages could be awarded. Personal property eventually became the label ascribed to the property subject to such actions.³² A hybrid category developed for the lease, which is now a chattel real but is nevertheless considered as personal property.

Property under civil law is thus qualified according to its nature, whereas it is the form of action that is the qualifying element at common law.

The Concept of Ownership

In civil law, ownership is central. Effectively, there is always just one right of property in respect of movables or immovables. Whether property is movable or immovable, one will always try to answer the question “Who owns or has title to the property?” At common law, on the other hand, one’s analysis will depend on whether the property is personal or real. One can own personal property in a manner similar to the civil law conception of property ownership, but “ownership” is a concept that clashes with the doctrines of estates and tenures in common law.³³ With regard to real property,³⁴ the law historically developed around the idea that land is owned by the Crown, which grants rights and interests; it recognizes no absolute ownership of land and instead recognizes estates or interests in land (theory of the bundle of rights).³⁵ Possession is an essential feature of the law of real property. At common law, one’s inquiry will pertain not to the question of ownership of land but to the duration of possession (doctrine of estates) and the quality of possession (doctrine of tenures).³⁶

29 Bruce Ziff, *Principles of Property Law*, 3d ed. (Scarborough, ON: Carswell, 2000), 73.

30 Michel Bastarache and Andréa Boudreau Ouellet, *Précis du droit des biens réels*, 2d ed. (Cowansville, QC: Yvon Blais, 2001), 15.

31 *Ibid.*, at 14; and Oosterhoff and Rayner, *supra* note 23, at 9.

32 Bastarache and Boudreau Ouellet, *supra* note 30, at 14; and Oosterhoff and Rayner, *supra* note 23, at 9.

33 Personal property is not subject to the doctrines of estates and tenures, and is thus considered to be under absolute ownership: Bastarache and Boudreau Ouellet, *supra* note 30, at 18.

34 Oosterhoff and Rayner, *supra* note 23, at 6.

35 *Ibid.*

36 Bastarache and Boudreau Ouellet, *supra* note 30, at 18.

Property: A Conceptual Difference

At common law, property is composed of and can be fragmented into various coexisting rights and interests.³⁷ Furthermore, common law and equity make it possible for different people to hold concurrently a common law title and an equitable title (beneficial ownership) for the same property.³⁸ Such a coexistence of titles is not possible in civil law since there is no such distinction between legal and equitable title.

CCQ article 947 provides, "Ownership may be in various modes and dismemberments." Dismemberments do not entail a change in the ownership of the property but rather involve a separation of the attributes of ownership: *usus*, *fructus*, and *abusus*. Thus, dismemberments are the usufruct, the use, the servitude, and the emphyteusis.³⁹ For example, the usufruct is defined as "the right of use and enjoyment, for a certain time, of property owned by another as one's own, subject to the obligation of preserving its substance,"⁴⁰ whereas a right of use is "the right to enjoy the property of another for a time and to take the fruits and revenues thereof, to the extent of the needs of the user and the persons living with him or his dependants."⁴¹ On the other hand, the modes of ownership are co-ownership and superficies.⁴² The modes of ownership do not call for a separation of the attributes of ownership; the right of ownership remains whole. In a co-ownership,⁴³ the exercise of the attributes of ownership on a subject matter is, however, limited by the fact that two or more persons detain the same right of ownership. Moreover, a superficies is characterized by the fact that it results in the physical division of the subject matter of the right of ownership and superimposes two complete and distinct rights of ownership on the divided subject matter. For example, the owner of land with buildings erected upon it may choose to sell the buildings while remaining the owner of the land.⁴⁴

Trusts

Another area in which both legal systems are very different is the law of trusts. In common law, the trust is a creation of the courts of equity and is best described as a relationship among three parties: the settlor, the trustee, and the beneficiary. The following definition of the concept of trust is most comprehensive:

37 Oosterhoff and Rayner, *supra* note 23, at 6 and 11.

38 *Ibid.*, at 7.

39 CCQ article 1119.

40 CCQ article 1120.

41 CCQ article 1172.

42 CCQ article 1009.

43 CCQ article 1010.

44 CCQ articles 1011 and 1110.

A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestui que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.⁴⁵

The trust involves a split or duality in the title to the transferred property; the trustee has the legal title while the beneficiary, or beneficial owner, holds the equitable title.⁴⁶ The equitable obligation is associated with the idea of a conscientious or moral duty owed to the beneficiary. It is sufficiently strong as to allow tracing of the property in the hands of a third party in certain circumstances:

[T]he beneficiary is allowed to trace the trust property into its product. The beneficiary has a similar right against anyone to whom the trustee has transferred the property, provided the transferee was a volunteer or took with notice of the trust.⁴⁷

In civil law, the trust (*fiducie*) does not have the same colourful history.⁴⁸ Before 1879, a trust could be used only for charitable purposes under a valid will.⁴⁹ The concept of trust was introduced into the Civil Code of Lower Canada nearly 15 years after that statute was adopted.⁵⁰ The trust, as it was known between 1879 and the civil law reform in 1994, was the subject of many debates as to its nature and effects.⁵¹

45 *Green v. Russell*, [1959] 2 QB 226, at 241; [1959] 2 All ER 525, at 531 (CA); and *Tobin Tractor v. Western Surety* (1963), 42 WWR 532, at 542 (Sask. QB).

46 For a more detailed discussion, see the paper in this issue of the journal by Catherine Brown.

47 A.H. Oosterhoff and E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Scarborough, ON: Carswell, 1998), 26.

48 Marcel Faribault, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province de Québec* (Montréal: Wilson & Lafleur, 1936), 40-45.

49 Article 869 of the Civil Code of Lower Canada, LC 1865, c. 41, entitled An Act Respecting the Civil Code of Lower Canada (herein referred to as "the CCLC"), stated, "A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees." CCLC article 964 stated, "The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor subject to deliver over, rather than that of a mere executor or administrator, does not retain the property in the event of the lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession." On this subject, see also Faribault, *supra* note 48, at 40-45.

50 Articles 981a to 981n were added to the CCLC on January 1, 1889 (SRQ 1888, article 5803), having been first introduced in a distinct act, *Acte concernant la fiducie/An Act Respecting Trusts* (SQ 1879, c. 29), on October 31, 1879. See Jacques Beaulne, *Droit des fiducies* (Montréal: Wilson & Lafleur, 1998), 2, footnote 3. Also see Faribault, *supra* note 48, at 45 and 48.

51 Beaulne, *supra* note 50, at 1-4. See also France Allard, "The Supreme Court of Canada and Its Impact on the Expression of Bijuralism," in *The Harmonization of Federal Legislation with the*

The institution was not well integrated with the civil law theory of property, to say the least.⁵² Before 1994, better-known civil law institutions such as the usufruct, the right of use, and the substitution were far more prevalent.

In 1994, the CCQ introduced a new concept of trust that was more compatible with the civil law concept of property. The trust became an autonomous patrimony.⁵³ Once the settlor has transferred property to the trust and the trustee has agreed to hold and administer it, no one owns the property—neither the settlor, nor the trustee, nor the beneficiary.⁵⁴ There is no duality of title to the property, as in common law. The trustee never becomes the owner of the property at law, and although the title is established in his name, in the quality of trustee, he is a mere administrator of the trust property.⁵⁵ Thereafter, the trustee has only duties and obligations, and the beneficiary has certain rights to require benefits or payments.⁵⁶

Duality of title as between the legal owner and the beneficial owner is thus an important difference between common law and civil law. Other differences between both systems exist not only in the field of trust law but also in other fields related to the law of property, such as leases and mortgages.

Lease

The major difference between common law and civil law with respect to the lease of land and buildings stems from fundamental differences in the law of property. From a common law point of view,⁵⁷ a lease is defined as “a document creating an

Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication, supra note 3, booklet 3, 1-25, at 18-19. For a comprehensive analysis of the debate, see Sylvio Normand and Jacques Gosselin, “La fiducie du Code civil: un sujet d’affrontement dans la communauté juridique québécoise” (1990) vol. 31, no. 3 *Les Cahiers de Droit* 681-729.

52 Allard, supra note 51, at 18; and Beaulne, supra note 50, at 3-4.

53 CCQ article 1260 states, “A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.”

54 CCQ article 1261 states, “The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.”

55 CCQ article 1278 states,

A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation.

A trustee acts as the administrator of the property of others charged with full administration.

56 CCQ article 1284 states, “While the trust is in effect, the beneficiary has the right to require, according to the constituting act, either the provision of a benefit granted to him or the payment of both the fruits and revenues and the capital or of only one of these.”

57 At common law, originally, a lessee could obtain damages only under a personal action further to an eviction by the lessor. The lease was thus classified as personal property. Over time, it

interest in land for a fixed period of certain duration, usually in consideration of the payment of rent.”⁵⁸ Where a leasehold estate or interest is created, the lessor retains the seisin and conveys possession of the land to a tenant for a given period of time. The lessor retains a reversionary interest in the land—that is, the right to possession of the land reverts to the lessor at the end of the lease.⁵⁹

Mossman and Flanagan describe the division of interests under a lease as follows:

[T]he concept of “ownership” does not neatly apply to a leasehold estate, because neither the lessor nor the tenant enjoys sole and exclusive rights of ownership. Both the tenant and [the] lessor have interests (or estates) in the same piece of land. The tenant has a possessory interest (or an estate in possession) for the duration of the leasehold estate, and the lessor retains a reversion.⁶⁰

In civil law, the lease is one of the various nominate contracts enumerated in the CCQ. It belongs to and is best analyzed in the context of the law of contract and not the law of property. The rules pertaining to the lease are perfectly integrated with the civil law concept of property. The lessor remains at all times owner of the property. The lessee has the right to enjoyment of the property throughout the term of the lease in exchange for payment of the rent.⁶¹ He has no real right in the property, but only a right of claim.⁶² Moreover, when the lease is terminated, the lessee is required to surrender the property to the lessor in the condition in which he

could no longer be denied that the lessee’s interest was closely attached to the land, and the courts recognized toward the end of the 15th century that a lessee could request repossession of the leased land (action in rem).

58 Robert Megarry and H.W.R. Wade, *The Law of Real Property*, 4th ed. (London: Stevens & Sons, 1975), 613.

59 Bastarache and Boudreau Ouellet, *supra* note 30, at 78-79.

60 Mary Jane Mossman and William F. Flanagan, *Property Law: Cases and Commentary* (Toronto: Emond Montgomery, 1998), 251.

61 CCQ article 1851 defines a lease as

a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for rent, with the enjoyment of a movable or immovable property for a certain time.

The term of the lease is fixed or indeterminate.

62 CCQ article 1854 states:

The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the lease.

He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.

CCQ article 1855 states, “The lessee is bound to pay the agreed rent and to use the property with prudence and diligence during the term of the lease.” See also Pierre-Gabriel Jobin, *Le louage*, 2d ed. (Cowansville, QC: Yvon Blais, 1996), 27-29.

received it.⁶³ Thus, the lease in no way affects ownership of property, but only its enjoyment.

Mortgage/Hypothec⁶⁴

The basic difference between the civil law “hypothec” and the common law “mortgage” relates to the ownership of the property. In the common law provinces, except those in which the Torrens system of land titles registration applies,⁶⁵ a mortgage conveys legal title to real property to the mortgagee (creditor).⁶⁶ In all common law provinces, if personal property is mortgaged (under a chattel mortgage), legal title to the property is always conveyed to the mortgagee (creditor) as security for the repayment of the loan.⁶⁷ In both cases (that is, for both real property and personal property), legal title to the property is transferred back to the mortgagor (debtor) upon repayment of the loan to the mortgagee. In contrast, under civil law, when a hypothec is granted, the debtor retains ownership of the property. The hypothecary creditor only has a charge, a real right in respect of the property.⁶⁸

THE HARMONIZATION PROGRAM AND ITS OBJECTIVES

As discussed above, the need for harmonization stems from the coexistence of differing legal traditions in Canada and from the relationship of complementarity

63 CCQ article 1890 states:

Upon termination of the lease, the lessee is bound to surrender the property in the condition in which he received it but he is not liable for changes resulting from aging or fair wear and tear of the property or superior force.

The condition of the property may be established by the description made or the photographs taken by the parties; if it is not so established, the lessee is presumed to have received the property in good condition at the beginning of the lease.

64 This section of the paper was written by Joseph Sirois.

65 See, for example, in Alberta, Land Titles Act, RSA 1980, c. L-5; in British Columbia, Land Title Act, RSBC 1996, c. 250; and in Saskatchewan, The Land Titles Act, RSS 1978, c. L-5. For a discussion of the origins of the Torrens system, see Bastarache and Boudreau Ouellet, *supra* note 30, at 247-53. See also François Brochu, “Le système Torrens et la publicité foncière québécoise” (2002) vol. 47, no. 3 *McGill Law Journal* 625-65.

66 *Noakes & Co., Limited v. Rice*, [1902] AC 24, at 28; (1901), 71 LJ Ch. (ns) 139, at 141 (HL). Lord Halsbury refers to Lord Lindley in *Santley v. Wilde*, [1899] 2 Ch. 474, at 474; (1899), 68 LJ Ch. 681, at 686 (Ch.). See J.E. Roach, *Les hypothèques immobilières en common law* (Cowansville, QC: Yvon Blais, 1991), 5.

67 John Augustus Barron, Arthur Henry O’Brien, and R.M. Willes Chitty, *Barron and O’Brien on Chattel Mortgages and Bills of Sale: A Treatise on the General Law of Mortgages and Sales of Personal Property*, 3d ed. (Toronto: Canada Law Book, 1927), 2; *Sands v. Standard Ins. Co.* (1878), 26 Gr. 113, at 116; and *Martin v. Bearman* (1880), 45 UCQB 205, at 212. Centre de traduction et de terminologie juridique, *Lexique anglais-français de la common law*, 2d ed. (Moncton, NB: École de droit, Université de Moncton, 1990).

68 CCQ article 2660.

that exists between federal legislation and provincial private law. It should be emphasized that harmonization is not a byzantine or academic exercise, but rather a practical undertaking aimed at adapting federal legislation to the civil law environment. Harmonization aims to bridge the gaps that exist between Canada's two legal traditions and to ensure effective and equitable application and enforcement of federal legislation.

The harmonization program is administered by the Legislative Services Branch of the Department of Justice. This program involves a systematic review and revision of the existing body of federal legislation—some 700 statutes and their regulations—to ensure compatibility with civil law when the legislation refers to provincial private law rules and concepts. This revision is similar in its scope and process to the revision of federal legislation that took place in the late 1980s to ensure conformity with the Canadian Charter of Rights and Freedoms.⁶⁹

The shortcomings of existing federal legislation and the objectives of harmonization were summarized by former Minister of Justice Anne McLellan in 1997 as follows:

Despite the historical coexistence in Canada of two major western legal traditions, federal legislation has tended to make civil law, at least at times, an orphan. At times, it created statutes whose very concepts were unique or peculiar to the common law; at times it used terms that had no civil law equivalent or no technical meaning in civil law; and at times it used terms whose meanings were so different in civil and common law that Quebec's courts tended to favour the common law interpretation as a better reflection of Parliament's intent.

The harmonization project therefore represents an opportunity to correct previous oversights, omissions and unjural constructions in existing federal legislation, and to replace them with wording that accurately reflects the vocabulary, concepts, norms and institutions of Quebec's civil law.⁷⁰

Tax law has been identified as one of the key areas requiring harmonization, along with regulatory law and commercial law. Considering that tax legislation imposes a financial burden on individuals, it is imperative that it be applied so as to distribute tax obligations and tax benefits equitably to all Canadians, regardless of the legal system that governs them.

In broad terms, three types of problems are of concern in the harmonization process:

69 Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being schedule B of the Canada Act 1982 (UK), 1982, c. 11.

70 Notes for a speech by Anne McLellan, minister of justice, at a conference on the harmonization of federal legislation with Quebec civil law and Canadian bijuralism, Montreal, Quebec, November 24, 1997 (available on the Web at <http://canada.justice.gc.ca/en/news/sp/1997/bijur.html>).

1. *Unijuralism*.⁷¹ Terms and concepts that have meaning only in common law have to be adapted to the civil law tradition if federal legislation is to apply effectively in Quebec. Examples of unijuralism in tax law include the use of the common law concepts of beneficial ownership, leasehold interest, joint ownership, and bare trust, none of which have equivalents in Quebec civil law.
2. *Semi-bijuralism*.⁷² This drafting approach, which consists in using exclusively common law terminology in the English version and exclusively civil law terminology in the French version, is no longer appropriate to address Canada's four legal audiences (common law and civil law in each official language).
3. *Obsolete terminology*.⁷³ Some of the language used in federal legislation incorporating civil law terminology became obsolete in 1994 as a result of the reform of Quebec civil law. Many concepts that had been used in the predecessor CCLC were either changed or replaced in the CCQ. Consequently, federal legislation must be updated to reflect the current terminology of Quebec civil law. An example of a change that affects tax legislation is the concept of "executor," which has become in Quebec civil law a "liquidator of the succession." Similarly, the concepts of "offences and quasi-offences" have been replaced by the concept of "extracontractual civil liability."

A variety of drafting techniques can be used to correct these kinds of problems. In each case, the choice of the most appropriate solution will depend on "the situation, the structure of the enactment in which the legislative provision is to be included, the legislative corpus as a whole, and the imperative . . . of simultaneously addressing four different groups."⁷⁴ The following are the principal drafting techniques used to harmonize federal legislation with Quebec civil law:

- *Common term*.⁷⁵ The common term (neutral, generic, or general) drafting technique consists in using, for civil law and common law, a neutral term that either has no special connotation in either of the two legal systems or has a similar meaning in both legal systems. This technique is least susceptible of creating differences in application from one system to the other.
- *Definition*.⁷⁶ In a bijuralism context, the definition drafting technique consists in giving a term a meaning that is common to both civil law and common law. This technique can already be found in tax legislation; the definitions of the expressions "release or surrender," "child," and "common law partner" provided in the ITA offer good examples. By defining rules and concepts for

71 Maguire Wellington, *supra* note 3, at 10-11.

72 *Ibid.*, at 11.

73 *Ibid.*, at 11-12.

74 *Ibid.*, at 8.

75 *Ibid.*; and Levert, *supra* note 4, at 7-8.

76 Maguire Wellington, *supra* note 3, at 9.

purposes of federal legislation, the legislator avoids, in whole or in part, references to and potential differences in provincial private law.

- *Double*.⁷⁷ Another drafting technique is the double, which consists in formulating the legal rule using, side by side, the terminology applicable to each legal system. This technique may not be preferred where simplicity and concision would be lost, notably in long tax provisions.

Harmonization and bijuralism should inform not only the drafting of tax legislation but also the development of tax policy. Thus, it is advisable that tax policies not be expressed in a unijural manner or rely on common law concepts that have no equivalent in the civil law tradition. (Examples suggested earlier are “leasehold interest,” “joint ownership,” and “beneficial ownership.”) It is preferable to use more neutral terms and concepts that apply readily to both legal traditions or, where this is not possible, to use doubles as described above. This is a challenge to be addressed in current and future tax policy development. Existing tax policies that are structured around common law terms, concepts, and rules must be reviewed and adapted.

Since harmonization will require changes or additions to the terminology used in both linguistic versions of an enactment, to ensure that they are compatible with both civil law and common law, the emergence of new terminology in bijural provisions may present a problem for the anglophone who is not familiar with civil law terminology and for the francophone who is not familiar with common law terminology. This concern raises the issue of “marking” harmonization changes to indicate whether a provision contains civil law terminology, common law terminology, or terminology consistent with both legal systems. Is it necessary to mark⁷⁸ the harmonized terminology by means of an editorial convention such as italicizing civil law terminology and underlining common law terminology? Would it be appropriate to create a lexicon⁷⁹ of private law terminology used in the English and French versions of federal legislation?

The Department of Justice and several academics and practitioners have reflected upon these issues and concluded that marking legislation for civil law or common law terminology, or creating a lexicon in federal legislation, was not desirable for several reasons.⁸⁰ The legislature has always spoken in one form with respect to language. One official language version is not printed in a typeface different from

77 Ibid., at 9-10; and Levert, *supra* note 4, at 8.

78 The issue of highlighting terms was raised by, among others, Claude Fabien of the Faculty of Law of the University of Montreal when he presented evidence before the Standing Senate Committee on Legal and Constitutional Affairs on March 1, 2001. See Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Evidence*, Ottawa, March 1, 2001, 1:26-28, 1:29-30 (available on the Web at http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/lega-e/01evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=11) (accessed December 19, 2002).

79 This issue also was raised by Claude Fabien, *ibid.*, at 1:27-28, 1:29-30.

80 See the evidence presented by Alain-François Bisson of the Faculty of Law, Civil Law Section of the University of Ottawa, *ibid.*, at 1:28-29.

the other. Similarly, with the movement to ensure that the law speaks to all legal audiences, it would be inconsistent to distinguish one legal concept from another by different typefaces or other forms of marking. The symbolism of the uniform appearance of Canadian statute books is important. No language or legal concept is more or less important than another; all are equal in all respects and none is singled out.⁸¹

Everyone agreed, however, that the new techniques of bijural legislation needed to be communicated effectively to the legal community and to the population in general. It was therefore decided to create bijural terminology records, an administrative tool to facilitate the interpretation of provisions containing harmonization changes. Pursuant to a commitment taken before the Standing Senate Committee on Legal and Constitutional Affairs,⁸² the Department of Justice has made these bijural terminology records available through its Web site.⁸³ These records briefly explain the problems of incompatibility found in the legislative provisions that were amended in the first harmonization act,⁸⁴ as well as in the Income Tax Amendments Act, 2000,⁸⁵ and describe the solutions adopted. The records also identify civil law and common law terminology in both official languages. The bijural terminology records can be used in the interpretation or application of harmonized enactments.⁸⁶ Their usefulness in this respect has already been demonstrated by the Supreme Court of Canada in the *Schreiber* case.⁸⁷ The court relied on these records to confirm that the harmonization changes that had been brought forward in the State Immunity Act were aimed at introducing civil law terminology.

PROGRESS TO DATE AND LEGISLATIVE AMENDMENTS

To date, one omnibus harmonization act has been passed—the Federal Law-Civil Law Harmonization Act, No. 1.⁸⁸ Its main components are amendments to the

81 Furthermore, there are several technical difficulties with a marking system. To be effective, a marking system would have to be applied consistently; failure to mark a legal concept would be worse than having no marking at all because it could lead to erroneous conclusions. As well, there would be serious difficulties in determining whether a term or concept should be marked or not. Finally, a marking system would unquestionably increase the complexity of the legislation.

82 *Proceedings of the Standing Senate Committee*, supra note 15, at 2:26 (accessed December 19, 2002).

83 Available on the Web at <http://www.canada.justice.gc.ca/en/ps/bj/harm/>.

84 Federal Law-Civil Law Harmonization Act, No. 1, SC 2001, c. 4; given royal assent May 10, 2001; came into force June 1, 2001.

85 Income Tax Amendments Act, 2000, SC 2001, c. 17; given royal assent June 14, 2001.

86 André Ouellette and Mathieu Legris, “La place du droit privé au sein des lois fédérales: L'affaire St-Hilaire et les fiches terminologiques bijuridiques” (2002), vol. 23, no. 1 *Revue de planification fiscale et successorale* 197-216.

87 *Schreiber v. Canada (Attorney General)*, 2002 SCC 62.

88 Supra note 84.

Interpretation Act⁸⁹ and to approximately 50 federal statutes in matters of property law, civil liability, and sureties. The Department of Justice is working on another series of harmonization proposals for inclusion in a second harmonization bill. Public consultations were held from January to April 2003 on this second set of proposals.

On the tax front, harmonization changes have been made in several tax bills adopted since the spring of 2001. These are summarized below.

1. *Income Tax Amendments Act, 2000 (Bill C-22)*.⁹⁰ The first harmonization changes to tax legislation can be found in the Income Tax Amendments Act, 2000. Part I of this act contains a few harmonization adjustments. Part II pertains solely to harmonization of federal tax statutes with the civil law of Quebec in respect of three concepts: executor, mortgage, and joint ownership.
 - a. *Executor*. Before these amendments, reference was made solely to the concept of “executor.” As noted above, the enactment of the CCQ made this term obsolete, replacing it with the concept of “liquidator of the succession”/“liquidateur de la succession.” In this case, the solution consisted in adding this new civil law concept beside the expression “executor”/“exécuteur testamentaire,” which is still used in common law.
 - b. *Mortgage*. The second problem was one of semi-bijuralism: the English version of the provisions referred only to “mortgage.” The English version was adjusted by adding the civil law concept of “hypothec.” Nothing was added to the French version, since “hypothèque” is appropriate in French for both common law and civil law.
 - c. *Joint ownership*. Adjustments were made to certain provisions in which reference was made to the concept of joint ownership, a common law concept that calls for a right of survivorship. This concept does not exist in civil law. In order to correct the problem, the neutral term “co-ownership”/“copropriété” is used to refer to all forms of co-ownership in both civil law and common law.

These harmonization amendments were made to the ITA, the Excise Tax Act,⁹¹ and the Income Tax Application Rules.⁹²

2. *Customs Act (Bill S-23)*.⁹³ Changes were made to the Customs Act,⁹⁴ including the addition of the civil law concept of “hypothec” beside “mortgage”

89 RSC 1985, c. I-21.

90 Supra note 85.

91 RSC 1985, c. E-15, as amended (herein referred to as “the ETA”).

92 RSC 1985, c. 2 (5th Supp.), as amended.

93 An Act To Amend the Customs Act and To Make Related Amendments to Other Acts, SC 2001, c. 25; royal assent October 25, 2001.

94 RSC 1985, c. 1 (2d Supp.).

and the double “real property or immovable” in the English version and “immeuble ou bien réel” in the French version.

3. *Excise Act, 2001 (Bill C-47)*.⁹⁵ Changes similar to those found in the Customs Act were made in the Excise Act,⁹⁶ along with an additional adjustment: the civil law concept of “solidarity” was added beside that of “joint and several” in provisions dealing with liability.

Harmonization is a continuing process in the field of federal tax legislation. Comparative law analyses are being conducted and further changes will be made, as required, to adapt such legislation to the concepts and rules of Quebec’s private law.

NEW INTERPRETATION RULES

Sections 8.1 and 8.2 of the Interpretation Act constitute the cornerstone and provide the rules for the interpretation of federal legislation in light of Canadian bijuralism.⁹⁷ The rationale for these provisions has been explained as follows:

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.⁹⁸

Section 8.1 of the Interpretation Act⁹⁹

Section 8.1 of the Interpretation Act “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.”¹⁰⁰ The section reads as follows:

Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by

⁹⁵ An Act Respecting the Taxation of Spirits, Wine and Tobacco and the Treatment of Ships’ Stores, SC 2002, c. 22; royal assent June 13, 2002.

⁹⁶ RSC 1985, c. E-14.

⁹⁷ Marie-Claude Gervais, “Harmonization and Dissonance: Language and Law in Canada and Europe—Program To Harmonize Federal Legislation with the Civil Law of the Province of Quebec, Assumption of Complementarity and Methodological Issues,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 3, booklet 1, 10-18, at 18.

⁹⁸ Marie-Noëlle Pourbaix, “S-4: A First Harmonization Bill,” *ibid.*, booklet 6, 1-12, at 7.

⁹⁹ For a comprehensive analysis of section 8.1 of the Interpretation Act, see Molot, supra note 20, at 11-19.

¹⁰⁰ Pourbaix, supra note 98, at 7.

law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

This provision affirms a fundamental premise of Canadian bijuralism, namely, the equal authority of civil law and common law in matters of property and civil rights. In addition, the provision codifies the principle of complementarity of provincial private law. We emphasize that the principle of complementarity is cast very broadly so as to apply in regard to not only civil law but all provincial private law, including general common law and provincial statutory law. Section 8.1 also establishes the ambulatory character of terms of provincial private law that are used in federal legislation.

The principles that are found in this provision were the object of many judicial debates in the past. Before the trilogy of decisions of the Supreme Court of Canada in *Quebec North Shore Paper Co. v. C.P. Ltd.*,¹⁰¹ *McNamara Construction et al. v. The Queen*,¹⁰² and *R v. Thomas Fuller Const. et al.*,¹⁰³ there were two schools of thought, the first supporting the thesis that there existed “a federal common law in all matters falling within the jurisdiction of the federal government”¹⁰⁴ fully independent of provincial law, and the second one arguing for the recognition of the complementary nature of provincial private law in matters where federal legislation was incomplete or silent. The Supreme Court rejected the first thesis and “opened the door to the recognition of bijuralism with respect to federal legislation.”¹⁰⁵

A new debate ensued from this recognition: does provincial private law complete only federal private legislation, or does it apply in all cases regardless of the qualification of an act as private or public legislation? This precise issue has been addressed by the Federal Court of Appeal in the *St-Hilaire* case.¹⁰⁶

St-Hilaire: Private Law Versus Public Law

Mrs. St-Hilaire, a Quebec resident, stabbed her husband, Mr. Morin, during a violent domestic quarrel. She was charged with second-degree murder and pleaded guilty to a reduced charge of manslaughter. Mrs. St-Hilaire, as sole heir and surviving spouse, claimed the surviving spouse's allowance under the Public Service Superannuation Act.¹⁰⁷

101 [1977] 2 SCR 1054.

102 [1977] 2 SCR 654.

103 [1980] 1 SCR 695.

104 Allard, *supra* note 51, at 21.

105 Allard, *supra* note 51, at 23.

106 *St-Hilaire*, *supra* note 10.

107 RSC 1985, c. P-36 (herein referred to as “the PSSA”).

The Treasury Board refused to pay, on the basis of the common law rule of public policy that no one may profit from his or her crime. Mrs. St-Hilaire applied to the Federal Court Trial Division for a declaratory judgment that civil law rules applied and that these rules entitled her to the benefits provided in the PSSA.

Justice Blais allowed Mrs. St-Hilaire's application and ordered the Treasury Board to pay her the amounts claimed.¹⁰⁸ The Trial Division decided that under the civil law of Quebec, no rule applied to disallow Mrs. St-Hilaire's claim. The Federal Court of Appeal allowed the appeal. The court was divided on the interpretation of the civil law rules of succession but unanimous on the issue of the complementarity of federal legislation and provincial private law where the former is silent on the meaning of a concept.

Justice Décaré rejected the argument that provincial private law is to complete only federal private legislation and not public legislation:

What, in my view, should determine whether or not it is necessary to resort to the private law (in Quebec, the civil law) is not the public or private nature of the federal enactment at issue but the fact, quite simply, that the federal enactment in a given case must be applied to situations or relationships that it has not defined and that cannot be defined other than in terms of the persons affected. In some ways the circle is closed and we come back to the point of departure, in section VIII of *The Quebec Act, 1774*: when these affected persons are litigants and their civil rights are in dispute and have not been defined by Parliament, it is the private law of the province that fills the void. In short, the civil law applies in Quebec to any federal legislation that does not exclude it.¹⁰⁹

He concluded that the concept of "succession" is a private law concept and consequently that it must be interpreted in light of the private law of the province in which the provision is to be applied:

I do not think there can be any doubt that this part of the Act, which refers to "succession" without defining it, should be interpreted in Quebec in light of the civil law. This is a good example of the danger in concluding that a federal statute is either public law or private law and that once it is public law any reference to a private law concept must be interpreted in light of the common law. I have a hard time imagining how, in the case at bar, Mr. Morin's succession would be determined otherwise than under the *Civil Code of Québec*. In my opinion, there is no avoiding the fact that a federal statute, albeit one characterized as public law, that refers to a private law concept such as succession without defining it, should be interpreted in Quebec in terms of the civil law.¹¹⁰

108 *St-Hilaire v. Canada*, [1999] 4 FC 23 (TD).

109 *St-Hilaire*, supra note 10, at paragraph 65.

110 *Ibid.*, at paragraph 68.

In keeping with this decision, one will first need to determine whether the federal legislation refers to a private law rule, principle, or concept. Then, one must determine whether the federal legislation contains its own private law rule. If federal legislation is silent (as in the *St-Hilaire* case) or incomplete on the matter in issue, reference is to be made to provincial private law.

Section 8.2 of the Interpretation Act¹¹¹

Since harmonization involves the redrafting of certain federal enactments, section 8.2 of the Interpretation Act was added in order “to facilitate an understanding of the new drafting techniques designed to reflect Canadian bijuralism in federal legislation.”¹¹² More specifically, the inclusion of this provision is intended to ensure that the redrafting process does not give rise to any ambiguity with regard to the goal pursued.¹¹³ Section 8.2 reads as follows:

Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

In accordance with this provision, for example, a taxpayer who comes across a double such as “mortgage or hypothec” or “real property or immovable” will have to read the provision as referring to the concept of “hypothec” or “immovable” in Quebec and “mortgage” and “real property” in all other Canadian provinces. This interpretive approach was recently approved by the Supreme Court of Canada in *Schreiber v. Canada (Attorney General)*.¹¹⁴ Although the case does not pertain to taxation, we believe the decision will apply to all harmonized enactments.

Schreiber: Interpretation of Harmonized Provisions

Mr. Schreiber had been arrested and detained in Canada for one week pursuant to a request from Germany. He sued Germany and Canada, claiming \$1 million in damages. He alleged that Germany did not have immunity of jurisdiction because the exception to state immunity found in paragraph 6(a) of the State Immunity Act¹¹⁵ was applicable. This exception initially applied to cases of “any death or personal injury.” Paragraph 6(a) was amended by the Federal Law-Civil Law Harmonization Act, No. 1 and now excludes from state immunity proceedings that relate to “any death or personal *or bodily* injury [emphasis added].”

111 For a comprehensive analysis of section 8.2 of the Interpretation Act, see Molot, *supra* note 20, at 11-19.

112 Pourbaix, *supra* note 98, at 8.

113 Gervais, *supra* note 97, at 17.

114 *Supra* note 87.

115 RSC 1985, c. S-18.

Mr. Schreiber argued that adding “bodily injury” to “death or personal injury” had broadened the scope of the exception to state immunity. Accordingly, he submitted that “bodily injury” referred to damage to the human body and “personal injury” to all other forms of damage, such as mental distress and damage to his reputation. Counsel for the Crown, on the other hand, argued that the insertion of “bodily injury” was intended to “ensure that the wording used in legislation which relies upon complementary provincial law reflect Canada’s bijural and bilingual nature.”¹¹⁶

The Supreme Court agreed with the attorney general’s interpretation of the provision. Justice Lebel, writing the court’s unanimous decision, rejected Mr. Schreiber’s interpretation because it took into account neither the purpose of the changes made nor the French version of the provision:

Given that the purpose of the *Harmonization Act* is to highlight bijural terminology used by common law and civil law systems, and does not substantively change the law as set out in the statute, we are left interpreting s. 6(a) of the *State Immunity Act* using the usual techniques of interpretation.¹¹⁷

The court then analyzed the French version of the statute in its attempt to give meaning to the terminology used in the English version. Since the expression used in the French version (“dommages corporels”) clearly referred only to injury to the human body, the court rejected Mr. Schreiber’s claim against Germany.

In this case, the nature of the changes—harmonization—was to be taken into consideration in interpreting the enactment. Such harmonization changes were not construed as substantively changing the law. The insertion of civil law terminology in the English version was not interpreted as changing the scope of the provision in question.

RESEARCH PROJECTS IN BIJURALISM AND HARMONIZATION¹¹⁸

A number of research projects on various issues pertaining to Canadian bijuralism in the tax field have been completed, and others are in progress. The first reports, most of which have been published, pertained to the following subjects: a comparative study of the concept of “partnership” in the civil law and common law; the concepts of “right” and “interest”; the concepts of “business,” “employee,” and

116 *Schreiber*, supra note 87, at paragraph 69.

117 *Ibid.*, at paragraph 77.

118 The Department of Justice established the program of research contracts on Canadian bijuralism to assist the department in its harmonization work deriving from the coexistence of Canada’s two private law systems. The purpose of this program is also to promote the development of expertise in Canadian bijuralism among law students and to contribute to the dissemination of knowledge on the subject matter through publication of legal texts. For more information, see the Department of Justice Web site at <http://canada.justice.gc.ca/en/dept/rc/index.html>.

“residence”; the retroactive effect of conditional obligations; and the concept of “licence” (in property law) as used in the ETA.¹¹⁹

Law students are also invited annually to participate in harmonization research. Projects are currently in progress on the concept of “indefeasibly vested”/“dévolution irrévocable” and on time limitation periods.

Four other reports were recently completed and are published in this issue of the journal. In the lead article, David Duff analyzes the new interpretation rules and their impact on Canadian tax case law. In the paper following this one, Diane Bruneau examines the interaction of the trust provisions of the ITA with Quebec civil law. Next, Mark Brender focuses on the use of the concept of “beneficial ownership” in tax legislation and underlines the difficulties for the civil law audience. Finally, Catherine Brown analyzes the same concept from a common law perspective.

The Department of Justice will examine the various solutions proposed in these and subsequent research reports and discuss them with the Department of Finance and the Canada Customs and Revenue Agency, to determine the feasibility of introducing further harmonization changes to existing tax legislation.

CONCLUSION

The enactment of sections 8.1 and 8.2 of the Interpretation Act do not in any way change the tax policy principles of equity and neutrality. That tax legislation must provide for an equitable distribution of tax burdens and tax benefits in light of a taxpayer’s ability to pay, and irrespective of the province in which income is earned, is not in dispute at all. What is in issue, however, is the formulation or the expression of the federal tax rules in a bijural environment.

Given the codification of the principles of equality of common law and civil law, and complementarity of provincial private law with federal legislation, provincial private law principles, rules, and concepts should apply in the interpretation of federal tax legislation unless other specific rules are provided by law. This means that federal tax provisions cannot be interpreted having regard exclusively to common law concepts and terminology, and that their interpretation must also be compatible with civil law concepts and terminology. Accordingly, federal tax legislation must be more finely attuned to Quebec civil law for purposes of its application in that province.

It should be emphasized further that the requirement of compatibility with provincial private law extends not only to Quebec civil law but also to the private law of the other provinces and territories. If there are material differences in the provincial private law of common law provinces, owing, for example, to the specific

119 Most of the research reports have been published by the Department of Justice in collaboration with the APFF: *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: A Collection of Studies in Canadian Tax Law* (Montreal: Association de planification fiscale et financière, 2002).

statute law applicable in a given province, such differences must be adequately taken into consideration in tax legislation.

As is described in David Duff's article, our courts have played an important role in interpreting federal tax legislation in light of Canada's legal duality. In most cases, the courts have interpreted federal tax legislation so as to respect the civil law tradition in Quebec and the general common law in the other provinces. Sometimes, the consequence of respecting provincial private law will be that the tax treatment will differ depending on the province of application. In a minority of cases, however, the courts have refused to apply the civil law in Quebec, favouring an interpretation resulting in uniformity of application, admittedly for tax equity reasons.

This interpretive approach must now be reconsidered following the adoption of the principle of complementarity in section 8.1 of the Interpretation Act. This is not to say that the principle of complementarity mandates tax inequities. Rather, it simply means that respect for the diversity of provincial private law and the equality of the civil law and the common law are also important legal principles that must be taken into consideration in the interpretation of federal tax legislation. The legislator may always derogate from provincial private law and specifically set out independent federal rules, where the application of provincial private law leads to differences in tax treatment. The issue is not one of choosing between tax equity and respect for provincial legal diversity,¹²⁰ but rather one of understanding that, where federal law is silent or incomplete on a subject matter, provincial private law will complete it.

In closing, it may be said that the rules of interpretation in sections 8.1 and 8.2 of the Interpretation Act now clearly and broadly establish the requirement of compatibility with provincial private law. These rules apply not only to traditional interpreters such as the courts, but also to drafters, policy makers, tax administrators, and all readers of bijural tax enactments. These rules should also inform and influence the development and articulation of tax policy and of tax planning for effective national and international transactions.

120 Michel Bastarache (justice of the Supreme Court of Canada) stated the following on the question of legal diversity, *supra* note 3, at 24: "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. . . . 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."