

## **When Legal Systems Meet: Bijuralism in the Canadian Federal System**

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## Introduction

One of the more challenging, yet least examined areas of federal and federating state relationships, is that of legal systems and legal traditions. For several countries wherein there exists more than one legal system (for example, within Great Britain –England and Scotland) or among a group of countries contemplating a closer legal association (for example, the European Community) the matter of applied law can become most complex. In Canada the existence and applicability of two great legal systems, the British common law and the French civil law, has been acknowledged in a very extensive effort to develop legal terminology which permits law both to be understood and to be applied equally in both systems.

The term “bijuralism” has emerged as a descriptive term for the “coexistence of two legal traditions within a single state”. Canada, therefore, is considered to a *bijural* country because the civil law and the common law coexist in both official languages. We have suggested the term *multijural* to accommodate those states wherein “more than two legal systems coexist” and which may include “more than two official or widely employed languages”<sup>1</sup>.

As Canada has emerged in the forefront of bijuralism we have sought to apply an inclusive definition in order to examine the issue of within a diversity of contexts and states. For example, where several forms of customary law and traditions exist within states we would argue that the term *multijural* would be applicable. Furthermore, when one overlays custom, tradition and formal legal codes with linguistic diversity be it official languages or simply regional languages with general regional applicability, *multijuralism* helps us to understand and to analyse the manner in which diverse peoples within a single state envision their specific relationship to the body or bodies of applicable law. Thus, in many federal and federative states, formal and informal bijuralism and *multijuralism* may coexist. Spain, Switzerland, Italy, France (Corsica), the United Kingdom instantly come to mind within Europe. Elsewhere, in Africa countries such as the Republic of

South Africa and Nigeria and, in Asia countries such as India, Indonesia and Malaysia suggest that research may be appropriate insofar as multiple legal traditions and languages co-exist.

In this discussion we shall simply introduce the topic of bijuralism and offer some explanation for why Canada has moved forward into the lead in the world in moving formally towards a bijural legal system. Bijuralism is much more widespread than might first be presumed. Bijuralism implies the co-existence of two legal traditions and their interaction and formal integration into specific contexts, for example, a legal agreement or contract. Bijuralism in the Canadian context is as much a part of the developing federal system as it is a part of the country's legal system.

That Canada is a federal state is of great significance in this initiative because the applicable constitution's allocation of constitutional competencies clearly places Canada in the category of federal state. Furthermore, as argued in various contexts elsewhere (Brown-John, 1988; 1995; 1996; 1997), Canada may very well be the "most federal" of all federal states as provinces have moved into the status of equal partners within the single Canadian polity.

Arguably, successful federal and federative states which incorporate two or more formal or informal legal systems or traditions and two or more languages –official or regional– are in a position where the very nature and quality of the federal or other relationship offers a requirement for laws to be drafted, applied and interpreted with facility among legal traditions and languages. Clearly, laws should mean the same thing to all people within a political system. And, just as importantly, laws should be interpreted by judicial authorities with the same level of comprehensibility for those affected by such interpretations.

Almost by definition federal states are complex. Constitutions define competencies and residual authorities. Sovereignities can be bifurcated within federal states. Canada, for example, offers an excellent example of divided sovereignty. Take, for example, ownership of public lands such as national parks<sup>2</sup>. The concept begins within the constitutional term: "Crown ownership of land". All land which is not privately owned in Canada belongs

to “the state” manifest in constitutional terms as “The Crown” or, more specifically, “the Crown by Right of Canada”<sup>3</sup>.

Theoretically it is an indivisible “Crown” and thus, in principle *all land irrespective of its physical location which land has not been otherwise assigned belongs to the Crown by right*. Naturally, while the Crown is “presumed indivisible”, in practise the responsibilities and role of the Crown are entirely “divisible”<sup>4</sup>. As an Executive entity the “Crown” is divided in accordance with the distribution of powers set forth in the Constitution. Thus, while it may still be one indivisible Crown, it is a Crown (however titled) nevertheless which exercises both provincial and federal powers as set forth in the Constitution and as interpreted by the Courts.

The “Crown by right of Canada” and the “Crown by right of any province” are distinct legal entities<sup>5</sup>. Hence it follows, for example, that provinces may assign “Crown lands” to provincial parks while the federal government may assign federal Crown lands to federal or national parks. As a ‘legal person’, the Crown by right of Canada or in right of a province has exactly the same powers to do anything it chooses as would any other legal person be that person an individual or corporation.

More importantly if the federal government, for example, proposes to expand a federal national park and to include land within provincial jurisdiction, it may do so only with the agreement of the provincial government. To illustrate, Section 2 of the *National Parks Act* (Interpretation) defines “public lands” as:

“...lands belonging to Her Majesty in right of Canada or of which the Government of Canada has, subject to the terms of any agreement between the Government of Canada and the government of the province in which the lands are situated, power to dispose, including any waters on or flowing through, and the natural resources of, those lands”.

Understanding the division of sovereignty is important in the context of bijuralism because of the constitutional division of powers within the Canadian constitution. Sections 91 and 92 are the primary division of constitutional competencies in Canada. Additional competencies are specified in Sections 92A (natural resources), 93 (education –exclusively

provincial), 94A (pensions) and 95 (concurrent powers –agriculture and immigration)<sup>6</sup>. ‘Property and civil rights’ are exclusively assigned to the provinces (Section 92(13)) and yet, as suggested above, even the creation of a “national” park within a province raises issues of property rights and the prospect of federal-provincial negotiated relations.

Federalism is much more than a distribution of powers and political competencies. American commentator Ivo Duchacek (1970) and Swiss analyst Max Frenkel (1984) both argued vigorously that a federal relationship without a corresponding ‘federal political culture’ cannot function as a federal state. Culture clearly incorporates a desire and a will to respect the inherent diversity of the federally constituted political system. That diversity includes language, culture, histories and religions. In the Canadian case, as in many other states, it also includes legal traditions. Commenting upon Canada, the dean of federal studies the late Daniel Elazar (1987, 1995) noted that Canada had emerged as a “compound polity” with a “strong will to federate in the pursuit of national unity, which in turn, has intensified the political cultural dimensions of its federalism”<sup>7</sup>.

As Canada moves forward in the development of bijuralism it can be argued that the very dynamics of federalism are both affected and, perhaps, strengthened. For this reason it seems appropriate to offer an introduction to the Canadian experience with bijuralism for those who would find in this applied experience insights into how diversity within federal and federative political systems function.

### **Bijuralism in Canada: Background<sup>8</sup>**

In some respects the origins of bijuralism can be traced both to the roots of the constitutional division of powers and to the intricacies of statutory interpretation.

The constitutional roots are both interesting and, at times, controversial. A British conquest was affirmed in The Treaty of Paris of 1760. The legal system then in place (Coutume de Paris) was continued and this, in turn, promoted a practise and the development of custom distinct from anything the British might have imposed. In an effort to

introduce some form of British juridical system, Governor Murray issued an order in September 1764, establishing civil courts. However, judgements were to be made in accordance with British law although the courts could take into account French custom and laws insofar as they related to French inhabitants of the colony. The status of French laws and customs was extended to all cases involving inhabitants of the Quebec colony in July 1766. The Governor's new order effectively created a "bijural" system by requiring that juries be composed of British born subjects in civil actions among British born subjects and that juries be composed of 'Canadians' in civil cases involving only 'Canadians'. Where cases involved British subjects and 'Canadians', upon request, juries could be comprised of equal numbers<sup>9</sup>.

A new British statute, the *Quebec Act, 1774*, provided that existing French law (*jus commune*) would continue to apply to matters of property and civil rights within the Quebec colony. Bijuralism was officially entrenched in the 1774 statute as it provided that the English common law was to apply to matters of public and criminal law while civil law matters were to be governed by the civil law and existing codes. This distinctive legal system for Quebec was confirmed again in 1841, after the rebellions in Upper and Lower Canada, in the 1841 *Act of Union* of the two Canadas.

Full confirmation of the status of the civil law as the law applicable to civil actions in Quebec was established with promulgation of the *Code Civil du Québec* in 1866 –one year before Canadian Confederation.

This bifurcation of applied civil and criminal law was continued into Canada's constitution, the 1867 *British North America Act*<sup>10</sup> where criminal law was placed within federal jurisdiction (Section 91) and property and civil rights were assigned to provincial jurisdiction (Section 92). Hence, by 1867 the two distinct legal systems were well entrenched. Quebec preserved its civil law while the other provinces retained their common law systems.

The confirmation of "property and civil rights"<sup>11</sup> as exclusive provincial competencies forms a basis for what is termed, in practise, a "complementary relationship" between federal law and provincial private law. Thus, provincial laws can "complement" federal laws where such

federal laws are silent on particular matters. Provincial private law, however, cannot be employed to offset the federal Parliament's failure to exercise its primary power over a matter<sup>12</sup>. In other words, the provinces cannot employ their power over property and civil rights to invade a federal related competency. This subject of "complementarity" will be explored in more detail below when we examine changes in the federal *Interpretation Act*.

On the subject of statutory interpretation, it needs to be remembered that statutory interpretation really consists of rules, directives, instructions, maxims, notions and even presumptions emerging from centuries of judicial interpretation of laws and/or statutes. Statutory interpretation takes on greater significance when a judicial system must function in a bilingual or multilingual context especially where concepts and notions of law are not entirely similar as between the two legal systems. Two distinct legal traditions, each premised upon unique qualities, can either perceive the same type of subject differently or, in some cases, not even acknowledge a concept. Take, for example, a subject so fundamental to the common law, the status of "the Crown".

The complete Canadian legal system actually consists of two legal systems –the civil code of Quebec and the common law of the other nine provinces and three territories. Both legal systems reflect valued linguistic and cultural dimensions of the Canadian federal system. The Crown, because it is in effect "the state", inherently possesses certain privileges in the common law. For example, in taxation law the Crown possesses the privilege of hypothec –the right to retain the obligation of a debtor (eg. as in a mortgage) to compensate a creditor. The Crown privilege in common law is the right to attach a an outstanding debt to a creditor or taxpayer in preference to all other debt claimants. The concept of Crown privilege is embedded in the common law however the same is not so in civil law. Indeed, the 1866 *Civil Code of Québec* provides for a basic form of Crown recourse in only four provisions usually including the phrase *les délits civils*<sup>13</sup>.

Thus, just prior to Canadian Confederation in 1867, the status of the



civil law was affirmed for Quebec in the 1866 Civil Code of Quebec<sup>14</sup>. The Civil Code, however, contains no privileged place for the Crown in private law. In practise this has meant that certain legal recourses were available for, and against, the Crown within common law jurisdictions in Canada the same recourses were not available in the same manner to residents of Quebec. Estates and inheritance, for example, traditionally posed difficulties and the concept of “freedom of willing” was adapted even by Quebec courts from English law.

Furthermore, in practical terms the legal profession in Canada operates in one or more of four different legal systems: Francophone civil law; Francophone common law; Anglophone civil law; and, Anglophone common law. For citizens seeking equity and recourse in law precisely what the law might be or mean especially in respect to property could be confusing and frustrating. Bijural terminology is intended to provide specific terms for each language group and its corresponding legal tradition (See: Table 1)<sup>15</sup>.

**Table 1**  
**Bijural Terminology**

English-language common law: 1. “real property” 2. “mortgage” 3. “lease”	French-language common law: 1. “bien réel” 2. “hypothèque” 3. “bail”
English-language civil law: 1. “immovable” 2. “hypothec” 3. “lease”	English-language civil law: 1. “immeuble” 2. “hypothèque” 3. “bail”

In Canada the existence of legislation in one or more languages always has necessitated more explicit or even flexible rules for statutory interpretation than those which have emerged often in an *ad hoc* manner from application and interpretation of the common law. For example, the original 1867 Canadian Constitution contains direction for the interpretation of bilingual legislation. This was expanded upon in the *Constitution Act, 1982*. Furthermore, because all federal legislation in Canada must be in both official languages there has been a necessity for much more detailed

guidance to statutory and regulatory interpretation<sup>16</sup>. Bilingualism, of course, may involve literal and conceptual similarities. However, when concepts are subject to judicial review and interpretation conceptual precision is absolutely essential. Bijuralism involves the transposition of legal terminology into both two languages and into two legal systems such that those affected by law, eg. taxation, marriage, inheritance, contracts, have a reasonable expectation that they will receive equitable treatment irrespective of where federal law is applied and especially where it is applied in conjunction with complementary provisions of provincial law.

The requirement of bilingualism imposes upon both those who draft legislation and who interpret that legislation what is sometimes referred to as the *shared meaning rule* which requires those engaged in drafting and interpretation to assign the same meaning to words and phrases employed in statutes and regulations. As Justice P. Viau has observed:

Deux langues, c'est d'abord deux styles, en matière de rédaction du moins. Et ailleurs aussi. Lois françaises et lois anglaises sont conçues différemment. Les mêmes idées ne se dissimulent pas de la même façon derrière des mots dont le sens et la portée sont parfois difficiles à cerner<sup>17</sup>.

English legal style, it has been noted, “subordinates every consideration to the search for precision. It attempts to say all, define all, to intimate nothing, and to never assume the intelligence of the reader...in the French style...one tries to find the precise word, and to formulate a general rule...”<sup>18</sup>. The civil law traces its roots to Roman law while the common law traces its roots to judicial interpretation beginning in about the 15<sup>th</sup> century in Britain and interpretations of the Royal Courts of Westminster on common (or customary) law and equity.

The opportunity to make the Canadian legal system truly bijural emerged largely in response to a decision by the Government of Quebec to revise the Civil Code in 1955. Eventually this enormous task bore fruit with promulgation of a new *Civil Code of Quebec* on January 1<sup>st</sup>, 1994<sup>19</sup>.

At the federal level there has been in place a “joint legislative drafting policy” since 1978. However, that policy did not seek to ensure that all four of Canada’s legal audiences were employing the same legislative and

regulatory language<sup>20</sup>. In 1993 a civil law section was created within the federal Department of Justice intended to begin the process of harmonizing federal laws with the then forthcoming, 1994, *Civil Code of Quebec*. In 1995 the federal department of Justice approved a standing policy on legislative bijuralism. And, by 1999 a permanent programme component of the Department of Justice was assigned responsibility for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec. In January 2001, a Bill was Tabled in the Senate of Canada (Bill S-4) and eventually became law on June 1<sup>st</sup>, 2001 as the *Federal Law-Civil Law Harmonization Act, No.1*.

In terms of operational federalism, the move towards a fully bijural legal system is very critical. For not only must federal law be applied to many areas of vital importance to individual citizens but federal law and provincial law in respect to the same general areas cannot be in conflict. Indeed, the concept of *complementarity* has been an important device for formally linking two levels and two traditions of law.

Complementarity assumes that provincial legislation “complements” federal legislation in matters of property and in civil law matters<sup>21</sup>. Termed ‘complementarity’ or ‘suppletive application of provincial legislation’. Thus, in interpreting a relevant federal statute the courts are enjoined to take into consideration the rules, concepts and principles in force in a particular province at the time, and on the occasion, the federal statute is being applied. In a classic case, for example, *Canadian Merchant Marine Ltd. v. Canadian Trading Company*<sup>22</sup> the courts sought to link principles emerging from civil law with common law application. However, even this limited attempt is overshadowed by the much more common application of common law principles to civil law matters. Allard (2001) has suggested that “in the Supreme Court of Canada case law prior to repatriation of the appellate jurisdiction [in 1949, from the British Judicial Committee of the Privy Council]. There are cases in which civil law rules had an influence on common law rules”.

However, Glenn (1987, 1989) qualifies that but trend by noting that the influence of civil law upon common law was indirect and usually involved

citation of English decisions which incorporated French civil law sources<sup>23</sup>. Eventually it became clear that there did not exist a reciprocal relationship between civil law and common law insofar as they pertained to respective legislative jurisdictions in Canada. Of course, there was also a widespread concern among Quebec civil law commentators and practitioners that “creeping” common law would eventually undermine the validity of the civil law tradition (Mignault, 1932; Azard, 1965; Baudouin, 1966; Normand, 1987). Clearly, if a legal tradition and legal system are to be considered on equal value and validity –especially where jurisdictions intermingle– then it is imperative that real bijuralism exist.

Brisson (1992), Brisson and Morel (1996) and Allard (2001) all have explored the relationship between federal law and Québec’s Civil Code insofar as a complementary exists. Historically, there was a widespread assumption that the common law prevailed in all matters within federal jurisdiction (Hogg, 1997, 181; 2000, 192) notes that until 1976, “there was substantial support for the view that a federal court could be given jurisdiction over any matter in relation to which the federal Parliament had legislative competence, even if that matter was not in fact regulated by federal statute law”. He concludes, “on this basis the ‘laws of Canada’ could include a rule of provincial statute law or a rule of the common law if its subject matter was such that the law could have been enacted or adopted by the federal Parliament. Then, in two decisions, the Supreme Court of Canada rejected the existing test of federal legislative competence.

We will not engage in detailed discussion of two key cases beyond noting that they opened the door, as Allard suggests (2001, 22) “to the recognition of bijuralism with respect to federal legislation ...the expression ‘laws of Canada’, was given a narrow interpretation”.

In *Quebec North Shore Paper Co. v. Canadian Pacific (1976)*<sup>24</sup> involving an alleged breach of contract to construct a marine terminal as part of a larger contract for transportation of newsprint from a paper manufacturing plant in Quebec to locations in the United States. The contract stipulated that it was to be interpreted in accordance with the civil

law of Quebec. Federal legislative competence was assured because the contract involved international transportation and, thus, fell within federal jurisdiction under Sections 91(29) and 92(10) of the *Constitution Act, 1867*. However, as the matter at issue was predominantly an issue of interpretation of contract and as the federal Parliament had not enacted any law governing such a contract, the Supreme Court held that a lower court (Federal court) could not constitutionally assume jurisdiction because the case was not governed by any existing applicable federal law.

A somewhat similar situation arose in connection with construction of a federal penitentiary in Alberta in *McNamara Construction v. The Queen (1977)*<sup>25</sup> where, again, a breach of contract was alleged. The *Constitution Act, 1867* confers jurisdiction over penitentiaries to the federal government, Section 91(28). In the case of the province of Alberta the test was the common law itself but again the Supreme Court held that there had to be an explicit act by the federal Parliament to provide for an “applicable and existing federal law.”

There has been significant criticism of both the *Quebec North Shore* and *McNamara Construction* cases because of the manner in which federal legislative competence was constrained. Hogg (1997, 182-183), for example, has argued that,

Any laws within federal legislative competence could easily be converted into federal laws by the enactment of a federal statute incorporating them by reference (or adopting them) as federal statute law. Since this can be so easily done, it seems to me that laws within federal legislative competence should be regarded as laws of Canada<sup>26</sup> without requiring the referential incorporation.

He adds “I can see no reason why the rules of the common law in a field of federal legislative competence should not qualify as ‘laws of Canada’”. On the other hand, Allard (2001, 23) notes “while these decisions generate criticism at the procedural level, their effect on the recognition of a true complementary relationship between provincial law and federal law is clear”. He draws two conclusions:

The first is that, since federal law is not autonomous, it must, in order to apply where federal law is silent, have a basis in provincial law rather

than in a purely federal common law. The second is that, in the absence of a federal common law, provincial law must serve as the general law for federal law.

Insofar as concerns federalism in Canada the situation is such that provincial law has been clearly affirmed as primary law in property and civil rights matters unless the federal government has explicitly exercised its legislative competence where such competence exists. In practise this not only broadens the scope of provincial jurisdiction by effectively limiting an application of general principles of federal common law, but it opens the way to full fledged conceptual autonomy for Quebec's civil law. Bijuralism effectively means, in the Canadian federal system, that when the courts apply federal laws which do not specifically exclude the application of provincial property and civil rights laws and concepts and, with specific application to Quebec, concepts which are specific to Quebec civil law now exist on a full and equal basis with the common law of all other provinces. In effect, the move towards a full bijural legislative system assures Quebec's civil code of its continued relevance and vitality.

Successful federalism works best when there exists mutual respect for the traditions, cultures and languages which activate the federal relationship. Indeed, concomitant with a successful federal relationship is the pervasiveness of a democratic political culture. If democracy is to be truly respected then it is equally imperative that laws, obligations and rights be equally respected. The move towards effective bijuralism in Canada suggests not only respect for unique and valued cultures and traditions but, more fundamentally, an enhancement of the essence of democracy. Arguably, then, in its most fundamental form democracy itself in Canada is invigorated through a process of bijuralism. Let us look briefly at the 2001 *Harmonization Act*.

## **Federalism and Legislative Harmonization in Canada**

In one very astute observation, a senior legal official in Canada's Department of Justice has reflected that:

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* (Molot, 2001,1) .

The federal Parliament has no capacity to legislate in relation to provincial areas of jurisdiction nor does it have any power to legislate in relation to provincial laws made within those constitutional competencies.

In practise, this division of powers is affirmed in the federal *Interpretation Act*<sup>27</sup>. Section 3(1) of this Act expressly limits the application of the provisions of the Act to federal legislation. Noteworthy is the fact that an *Interpretation Act* was the very first statute passed by the newly created Parliament of Canada in 1867. In an appearance before the federal Parliament's Standing Committee on Justice and Legal Affairs in 1967, the then Deputy Minister of Justice, D.S. Thorson, pointed out that the purposes of an *Interpretation Act* were sixfold, to:

- I. establish uniform definitions and expressions in legislation;
- II. eliminate the need for constant repetition in the law;
- III. simplify the drafting of legislation;
- IV. facilitate interpretation of legislation;
- V. consolidate in one place rules of legislative construction and interpretation; and,
- VI. benefit parliamentarians, the courts and all persons concerned with understanding and interpreting legislation.

In Canada the modern *Interpretation Act* also includes specific words and provisions authorising appointments of public officials and their removal, extending liability to the Crown (Her Majesty), and assorted other provisions essential to the enactment and implementation of legislation.

The *Federal Law-Civil Law Harmonization Act, No. 1*<sup>28</sup>, among many other things, provides for a very key amendment to the *Interpretation Act*.

In its preamble the *Harmonization Act* expresses as purposes of the Act “the harmonious interaction of federal and provincial legislation”

including “interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be”. Furthermore, the preamble seeks to “facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions”. This is achieved by adding a new Section 8 (Rules of Construction) to the *Interpretation Act* as follows:

<b>Property and Civil Rights</b>	<b>Propriété et droits civils</b>
8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte
8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces	8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre des ces systèmes

This specific amendment to the federal *Interpretation Act* has great significance for the Canadian federal system in several respects. First, it places the civil law of Quebec on an equal footing with the common law before all Canadian courts. No longer should there be a concern of a ‘creeping’ of common law principles into the judicial interpretation on the civil code (Baudoin, 1966; Brisson, 1992). A process which really began in 1774 but which has often been subsumed due to other exigencies such as war and depression can now be said to have reached a formal condition.



The civil law insofar as it applies to those constitutionally empowered property and civil rights in Quebec is now secure. Second, it is clear, that in several other areas where federal jurisdiction interacts with provincial jurisdiction such as marriage, divorce, contracts and some forms of taxation, if federal law has not provided for a full and complete interpretation principles and concepts of the Quebec civil code may be employed. Complementarity is now the rule according to Section 8.1 and 8.2 of the federal *Interpretation Act*.

Third, there is an interesting prospect that Section 8 will offer some room for the incorporation of concepts inherent in the legal traditions and customs of the people of Canada's First Nations. It is not specific in the section, but arguably to the extent that the courts may wish to make the Canadian legal system even more inclusive, there is room for innovation in legal interpretation. Finally, Section 8 offers as assurance to the legislators and to the various constituencies they represent that the law will mean the same thing to all Canadians at all levels of government and before all courts. In some respects this is little more than a practical recognition that despite many inherent differences within a federal political system, in the final analysis there is a reasonable expectation that equity will persist in the application of law across the country.

This latter point takes on importance when one recalls that law is much more than statute. Law is applied through regulations, rules and interpretations. Law is also applied by public officials exercising administrative discretion and regulatory tribunals engaged in the delivery of public policy.

Beyond the *Interpretation Act*, the federal *Harmonization Act, No.1 (2001)* is a very extensive document as it amends dozens of federal statutes to ensure that their terminology reflects the bijuralistic goal. For example, the title of the federal *Real Property Act/Lois sur les immeubles fédéraux* has been replaced with a new title: *Federal Real Property and Federal Immovables Act/ Lois sur les immeubles fédéraux et les biens réels fédéraux*. Virtually every federal statute has some reference to "property" so, as a result, all had to be amended to encompass "property

and immovables”<sup>29</sup>. The point should be stressed and that is when federal legislation in respect to property and civil rights is incomplete or silent on a specific concept thereby requiring supplementary use of provincial legislation, it is imperative that terminology be complementary or conceptually transferable. As Wellington (2001) noted: “The objective of harmonization is not to merge the common law and the civil law into one legislative norm, but rather to reflect the specificity of each system in federal law”.

Wellington adds (2001,3) that the process of harmonization incorporates an assessment which includes statutory interpretation, constitutional law, private law in both civil and common law jurisdictions and, comparative law. The process consists of four stages ranging from an initial verification that a particular statute or provisions of a statute might apply to Quebec, then to “in context verification” placing a particular statutory enactment into its constitutional context and whether Parliament’s intent or any international treaty obligation is at issue. This includes “context verification” also examines the question of complementarity, eg. did Parliament intend provincial legislation to complement federal legislation in property and civil rights matters. There are circumstances where a federal statutes specifically prohibits the supplementary application of provincial law, for example, Canadian maritime law<sup>30</sup>.

Once the context has been assessed, the third stage consists of explicit identification of points of contact between federal and provincial private law. For example, a legislative drafter might wish to ask whether it was Parliament’s intention to dissociate an enactment from civil law or whether Parliament would have wanted a civil law concept to be added. Finally, the “points of contact” are analysed in detail and an full effort is made to verify that any new meaning or terms to be incorporated in a statute reflect the full intention of Parliament as well as the historical evolution of the statute itself. Eventually new terminology and concepts must also be reflected bilingually irrespective of the particular legal system<sup>31</sup>. Thereafter recommendations are made for the harmonization of a particular statute or sections of a statute (Wellington, 2001, 7-8). These

recommendations apparently involve one or more of four steps: 1) replacing an old term with a new one; 2) revising the wording of an already enacted provision in accordance with a new bilingual term; 3) simple elimination of outdated or obsolete terms with no replacement; and, if necessary, proposing a French language equivalent for a common law term.

When necessary techniques are employed to develop common terms be they neutral, 'generic' or general so that the same term can be employed in both civil and common law, eg. "lease"/"bail" or "loan"/"prêt". Definitions are also employed in order to provide specific meanings to terms in both civil law and common law, eg Section 25 of the *Harmonization Act, No.1* (2001) reads:

**25. The definition "secured creditor" in subsection 2(1) of the *Bankruptcy and Insolvency Act* is replaced by the following:**

"Secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting the real right, within the meaning of the Civil Code of Quebec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or installment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by

**25. La définition de «créancier garanti», au paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, est remplacé par ce qui suit:**

"Créancier garanti" Personne titulaire d'une hypothèque, d'un gage, d'une charge ou d'un privilège sur ou contre les biens du débiteur ou une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement. S'entend en outre:

a) de la personne titulaire, selon le *Code civil du Québec* ou les autres lois de la province de Québec, d'un droit de rétention ou d'une priorité constitutive de droit réel sur ou contre les biens du débiteur ou une partie de ses biens;

b) lorsque l'exercice de ses droits est assujéti aux règles prévues pour l'exercice des droits hypothécaires, au livre sixième du *Code civil du Québec* intitulé *Des priorités et des hypothèques*:

<p>the debtor to secure the performance of an obligation, If the exercise of the person's rights is subject to the provisions of Book Six of the <i>Civil Code of Quebec</i> entitled <i>Prior Claims and Hypothecs</i> that deal with the exercise of hypothecary rights;..</p>	<p>(i) de la personne qui vend un bien au débiteur, sous condition ou à tempérament,  (ii) de la personne qui achète un bien au débiteur avec faculté de rachat en faveur de celui-ci,  (iii) du fiduciaire d'une fiducie constituée par le débiteur afin de garantir l'exécution d'une obligation</p>
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R.S.C. (1985) c. B-3

While this is a long definition it does illustrate the point that legislative bijuralism can be facilitated by providing specific definitions for specific concepts.

Harmonization also can occur through expressing a legal rule for each legal system in different terms. This is called *doubling* and can be done by placing one term for each legal system next to each other. This also done by offering concepts specific to each legal system in separate paragraphs. This is know in Great Britain as a *Scottish clause* which permits the British Parliament to enact special legislative provisions applicable to Scottish law.

On the whole it would appear that the effort to harmonize legislation in Canada to fully accommodate two distinct legal systems is a very positive contribution to the maturation of the entire federal system. Indeed, what the Canadians have proposed to any interested party is that the pioneering work in the filed of legislative harmonization and bijuralism offers example and direction to other states and communities grappling with better ways to serve their citizens.

Canadian federalism has had the remarkable experience of maturing as it moves from generation to generation. Their have been severe strains and even limited violence in the 1970's. Proposals by the Province of Quebec to secede are part of the political inter-lay of the federal relationship and while they may be muted now there is always a possibility that tension can lead to conflict and severance within the federal system. Whether that would be legal or not is another issue (Brown-John, 2002).

Yet federalism is a dynamic process and requires constant accommodation of the interests and rights of all parties. Moreover,

federalism as we are discovering in Canada also requires respect and the *Harmonization Act*, (2001) suggests that in a very fundamental manner that respect is becoming fully and effectively entrenched in Canada's legal system.

## **Conclusion**

Our late friend and colleague, Daniel Elazar, in one of his last published essays made a plea for a world "where people are encouraged to be citizens and not just consumers, and leaders must be responsible to them in some meaningful way" (2002, 25). For such a world to persist we need to garner constant respect for rights and property. It is no accident that both federalism and democracy thrive best where rights and property are fully respected.

We suggest that Canada's federal system has moved, quietly, forward on both the levels of improved democracy and enhanced federalism with a major effort to provide a full and respected status to both legal systems which constitute the environment within which Canadians live and prosper. Bijuralism is a concept which captures both the practical requirement to develop meaningful law and to provide guidance for those who prepare the laws and those who interpret the laws. Bijuralism inherently suggests that laws should not only form intelligible patterns of ideas and concepts but that those concepts should be mindful and respectful of the rich traditions from which they emerge. The Civil Code of Quebec is a vital practical and historic component of the unique fabric of Canadian society. That the harmonization process provides an apparent absolute assurance that the civil law, insofar as it pertains to property and civil rights, has a place of equal prominence and status within the federal system seems to be worthy and noble endeavour.

We feel that sharing some information about Canada's bijural legal system may open the way for other progressive and creative political systems to likewise seek to engage all legal traditions in the promotion of democracy, civil rights and respect for individuals<sup>32</sup>.

The task is enormously complex but surely the rewards in terms of

improved federal-provincial relations in Canada will pay long-term dividends.

## Notes

1. One observer has suggested that a more accurate description would employ the term “plurijuralism” or “legal pluralism”. This has been suggested in an effort to accommodate both Aboriginal Canadian rights and the somewhat different approaches to the common law among Canadian provinces. See: Brierley, (1992). Only about 15 countries in the world share the combination of civil law and common law.
2. Of which there are 40 in Canada. One of which, Wood Buffalo National Park, is larger than Belgium.
3. For those unfamiliar with the role of The Crown in Canada some explanation is required. Her Majesty Queen Elizabeth II is Queen of Great Britain. She is also Head of the Commonwealth which includes Canada. Constitutionally she is also Queen of Canada *by right of Canada*. In practise this means that the Parliament of Canada approved, by Resolution, her right to represent the Crown (Head of State) in Canada. Constitutionally she is represented at the federal level by the Governor General and at the provincial level by Lieutenant Governors. The Government of Canada makes no financial contribution to the Queen other than when she or another member of the Royal family visit Canada as guests. Personally, the Queen has no formal authority over any matter within Canada and is simply an highly respected symbol of the dignity and authority of the state.
4. In: *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] QB 892 (CA), in which aboriginal peoples brought a suit in the United Kingdom to enforce original treaty obligations to aboriginal peoples undertaken by the Crown during the colonial period, the Court held that the obligations had long since passed to Canada and were enforceable only against the Crown “by right of Canada” in Canadian courts. The Crown was clearly divisible: the “Crown by right of Canada” and the “Crown by right of the United Kingdom”.
5. There is an enormous legal history of recognition of this divisibility of the Crown in Canada beginning with an 1892 of the British Judicial Committee of the Privy Council: *Liquidators of the Maritime Bank v. Receiver General of New Brunswick* [1892] AC 437.
6. The two concurrent powers in Section 95 (Agriculture and Immigration) effectively constitute the most restricted set of concurrent powers of any formal federal constitution.

7. McGill Sociologist Maurice Pinard (1976) explored the link between culture, political parties and attitudes towards a federal or national culture in Québec.
8. The existence within Canada of native legal traditions some of which have become part of applied Canadian law especially in criminal and property matters suggests a limited informal multijural legal system.
9. See Brunet, et al (1952, 112-113). The provision reads: "...dans toute cause ou action civile entre sujets-nés britanniques, le jury devra se composer de sujets-nés britanniques seulement; que dans toute cause ou action entre Canadiens le jury devra se composer de Canadiens seulement; et dans toute cause ou action entre sujets-nés britanniques et Canadiens, le jury devra se composer d'un nombre égal de chaque nationalité si l'une ou l'autre partie en fait la demande...".
10. U.K. 1867, 30-31 Victoria, c. 3. And, since 1982, *The Canada Act, 1982*, (U.K.) 1982 c.11.
11. Property and civil rights generally has been interpreted to include all forms of civil society relations including contracts.
12. *Union Colliery v. Bryden*, 1899) AC 580 at 588.
13. As will be discussed in more detail later, this terminology was altered when the Civil Code was revised and promulgated as a new Quebec Civil Code in 1994. The extensive revisions of the 1866 Code prompted the federal government to review the entire relationship between federal law and provincial law especially civil code law.
14. France abandoned its colony of New France to the British conquerors by the Treaty of Paris of 1763. In a British statute of 1774 (*An Act for making more effectual Provision for the Government of the Province of Quebec in North America* usually termed simply "The Quebec Act"), the civil code was affirmed. It was subsequently re-affirmed on two other occasions as the applicable legal system for "Lower Canada" or "Canada East" as Quebec was known prior to the 1867 Confederation of Canada. Between 1760 and 1774 the applicable law in Quebec remained the *Coutume de Paris*.
15. As near as can be determined the first reference to bijural in reference to terminology of legal drafting in Canada seems to have been in 1984 in a Department of Justice, Translation Bureau, *Terminology Update*, vol. 17 (7 & 8).
16. For example: the federal *Interpretation Act*, RSC 1985, c.1-21; the federal *Statutory Instruments Act*, RSC 1985, c. S-22. Even regular statutory revisions require consideration of bilingual wording: eg. *Revised Statutes of Canada 1985 Act* (3d Supp), c.40. Also see: Beaupré (1986) and Côté (1990) re: bilingual statutory interpretation.
17. Quoted in Gervais and Séguin (2001), "Some Thoughts on Bijuralism in Canada and the World" in Canada, Department of Justice: *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and*

*Canadian Bijuralism*. Ottawa, Department of Justice. P. 4. (This is a CD-Rom version).

18. Justice Louis-Phillipe Pigeon quoted in *ibid*, p.4.
19. Almost 80% of the original 1866 *Civil Code of Lower Canada* were amended by the 1994 *Civil Code*.
20. The 1978 policy emerged from recommendations of Canada's Commissioner of Official Languages. In response, the federal Department of Justice established two internal committees, the Garon Committee in 1977 and, the Desjardins Committee in 1978 to examine the issues identified by the Official Languages Commissioner.
21. The problem can be seen, for example, in situations where issues transcend constitutional jurisdictions. For example, while the provinces have exclusive jurisdiction over property [Section 92(13)], certain areas of property and civil law, for example bankruptcy and insolvency, bills of exchange, marriage and divorce, fall within federal jurisdiction [Sections 91(18), 91(21) and 91(26)] of the *Constitution Act*, 1867. Indeed, some federal statutes even include concepts derived from provincial private law, eg. security and the notion of 'distribution'; see, for example, the federal *Bankruptcy and Insolvency Act*, RSC (1985), c.B-3, section 136.
22. [1922] 64 SCR 106.
23. Baudouin (1975) concluded that there was not one single example of civil law principles influencing common law issues. Indeed, it is very unlikely that prior to 1949 any decision on Quebec law was ever cited as a precedent before the British Judicial Committee of the Privy Council –Canada's final court of appeal until 1949.
24. [1977] 2 S.C.R. 1054.
25. [1977] 2 S.C.R. 655.
26. In accordance with Section 101 of the *Constitution Act*, 1867.
27. S.C. 1967-1968, c. 7.
28. S.C. 2001 c. 4.
29. There are over 700 federal statutes which will be harmonized eventually. Initially each statute has to be reviewed in terms of two things: 1) does it have application to Québec and thus, 2) does it rely upon the civil law in some manner as supplementary law? An initial review suggested that no fewer than 350 federal statutes might apply to Québec.
30. This specific prohibition of recourse to provincial law in a federal statute is termed *dissociation*.
31. For over 20 years there has existed a National Programme for the Integration of Two Official Languages in the Administration of Justice (POLAJ). See: [http://www.pajlo.org/english/who/pajlo\\_eng.html](http://www.pajlo.org/english/who/pajlo_eng.html).



32. Canada's Department of Justice appears to be anxious to share its experience and technical skills. Contact: <http://Canada2.justice.gc.ca>

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