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The Challenges of Interpreting Multilingual, Multijural Legislation

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THE CHALLENGES OF INTERPRETING MULTILINGUAL, MULTIJURAL LEGISLATION

*Ruth Sullivan**

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I. INTRODUCTION

After centuries of imperialism, war and migration, the territory of most modern nations encompasses multiple language and cultural groups.¹ However, the extent to which this diversity is formally reflected in positive law differs from one nation to another and reflects a range of factors — from the historical evolution of the nation to current demographics and power relationships. The decision to designate more than one language as official or to apply more than one legal system within a nation has important practical consequences and also carries important symbolic weight. But both the practical and symbolic significance vary depending on whether the decision to recognize multiplicity is entrenched in a rigid constitution, is embodied in ordinary (and therefore amendable) legislation or is merely a government policy.

The impact of constitutional or legislative recognition of diversity also depends on the response of courts and other official interpreters to the relevant legal texts. In 1985, for example, the Supreme Court of Canada was called on to interpret and apply a provision of the Canadian Constitution that requires Acts of the Legislature of Manitoba to be enacted in French and English.² In its result, the court declared virtually all of Manitoba's statutes invalid because they were enacted only in English.³ In this case, respect for constitutional values prevailed over considerations of cost and convenience. The court's primary concerns were the constitutive role of language in culture and its relations to law and governance.⁴ In a subsequent deci-

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1. See generally DANIEL NETTLE & SUZANNE ROMAINE, VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES ch. 2 (2000).

2. Manitoba Act 1870, S.C. ch. 3, § 23 (1870) (Can.).

3. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (To avoid legal chaos, the court suspended the declaration for a period sufficient to allow Manitoba to prepare and enact a French version of its statute book.).

4. Justice Dickson wrote:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights

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sion, however, the same court was prepared to uphold legislation incorporating by reference massive amounts of unilingual material.⁵ In this case, considerations of cost and convenience trumped the concern for bilingual community.⁶

In assessing the impact of multilingualism and multijuralism in a state, the above-mentioned legal variables are important, but equally important is the extent to which the official languages and recognized legal systems are embedded in local culture.⁷ The key questions here are whether it is possible to work, play and receive services in the recognized languages, and the degree of harmony between legal and cultural norms.

The significance of these variables can be illustrated by comparing Canada to the United States. Canada became a federal state in 1867 when the British Parliament enacted the Constitution Act, 1867.⁸ This Act established a constitutional frame-

and duties they hold in respect of one another, and thus to live in society.

Id. at 744.

5. See Reference *Re Manitoba Language Rights*, [1992] 1 S.C.R. 212, 229–31.

6. The Court wrote:

In [some cases of incorporation by reference], translation is impracticable because of the fact that these standards are continually revised by the standard setting bodies. It would be difficult for a legislature to maintain an authoritative translation in the face of this practice. Sometimes in cases where international or national standards are used, translations are already available. But where they are not, it would defeat the purpose of incorporating an outside document to require translation in compliance with [the language requirements of] s. 23 and, in any event, it is unlikely that translation would guarantee accessibility to materials which are, practically speaking, inaccessible to the majority of citizens because of their technical nature.

Reference *Re Manitoba Language Rights*, [1992] 1 S.C.R. 212, 230–31.

7. See Denise G. Réaume, *Official-Language Rights: Intrinsic Value and the Protection of Difference*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 245 (W. Kymlicka & W. Norman, eds., 2000). See also Michael Bastarache & André Tremblay, *Language Rights*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 653, 672–74 (Gérald-A. Beaudoin & Ed Ratushny, eds., 2d ed. 1989); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *LA. L. REV.* 677, 678–80 (2000); Roderick Macdonald, *Legal Bilingualism*, 42 *MCGILL L.J.* 119, paras. 42–43 (1997) [hereinafter *Legal Bilingualism*]; Claire L'Heureux-Dubé, *Bijuralism: A Supreme Court of Canada Justice's Perspective*, 62 *LA. L. REV.* 449, 450–54 (2002).

8. CAN. CONST. (Constitution Act, 1867), *Vict.* 30–31, ch. 3, § 30–31 (U.K.).

work that is similar in many respects to that of the United States.⁹ Both countries are predominately English-speaking, common law jurisdictions, and both include one internal unit whose citizens upon joining the federation were French-speaking and whose legal system was civil law.¹⁰ This makes both countries a mixed jurisdiction as that term is understood in comparative law.¹¹ However, the roles of the French language and the civil law in Canada are very different from their role in the United States.

In Canada, Francophone civilists have a significant presence in the country's national institutions.¹² Québec elects seventy-five of three hundred and one members of Parliament,¹³ and the last three long-serving Prime Ministers of Canada have been Québec lawyers.¹⁴ Francophone civilists are also well represented in the federal civil service, which is responsible for developing legislative proposals and drafting the legislative texts that are submitted to Parliament for enactment.¹⁵ Finally, the

9. For example, both are federations established by agreement of former British colonies in which legislative authority is exercised by a central legislature and the legislative assemblies of the constituents; both are electoral democracies; both are founded on British notions parliamentary sovereignty and rule of law; both rely on superior courts to enforce constitutional principles through judicial review. See DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 69 (1987).

10. For a discussion of Louisiana, see Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 *LA. L. REV.* 1283 (1997).

11. For a discussion of mixed jurisdictions, see Tetley, *supra* note 7, at 726 & n.250. See also UNIVERSITY OF OTTAWA, *WORLD LEGAL SYSTEMS*, at <http://www.droitcivil.uottawa.ca/world-legal-systems/engmonde.html> (last visited Mar. 17, 2004).

12. This is the result of the obligations imposed on government by the Official Languages Act. Official Languages Act, R.S.C. ch. 31 (1985) (Can.).

13. See EUGENE FORSEY, *HOW CANADIANS GOVERN THEMSELVES* 38 (5th ed. 2003), available at http://www.parl.gc.ca/information/library/idb/forsey/How_Canadians_Govern_Themselves-5th_Ed.pdf (last visited Mar. 17, 2004).

14. The last three long serving Canadian Prime Ministers were the Honourable Pierre Trudeau, Brian Mulroney and Jean Chrétien, respectively. See CANADA ONLINE, *PRIME MINISTERS OF CANADA: CANADIAN PRIME MINISTERS SINCE CONFEDERATION IN 1867*, at <http://canadaonline.about.com/library/bl/blpms.htm> (last visited Mar. 16, 2004).

15. For an account of the role of the civil service in the preparation of legislation at the federal level, see GOVERNMENT OF CANADA PRIVY COUNCIL, *CABINET DIRECTIVE ON LAW-MAKING*, at <http://www.pcobcp.gc.ca/default.asp?>

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nine-member bench of the Supreme Court of Canada, which is responsible for interpreting and applying all Canadian law, including Québec civil law, has, since 1949, included three civilist judges.¹⁶ The Federal Court and the Tax Court of Canada are similarly mixed, including both French- and English-speaking judges with both civil law and common law backgrounds.¹⁷

In the United States, despite Louisiana's French roots and civil code, neither the language nor the legal system has had much impact on the making or interpretation of federal law.¹⁸ It appears that neither French nor civil law is formally or substantially present in any of the three branches of government at the federal level. In my view, this difference is due, at least in part, to the absence of language rights and duties in the U.S. Constitution.¹⁹

By contrast, section 133 of the Constitution Act, 1867 constitutionally obligates the Canadian Parliament to operate and enact legislation in both French and English.²⁰ This section also

page=publications&Language=E&doc=legislation/lmgcabinetdirective_e.htm (last visited Mar. 17, 2004) [hereinafter CABINET DIRECTIVE ON LAW-MAKING].

16. Historically, the appointments to this court from common law provinces have been Anglophones, while the appointments from Québec have been Francophones. In recent years, however, two Francophones from common law provinces have been appointed along with an Anglophone judge from Québec. This evolution reflects a recognition of the independence of language and legal system and an attempt to overcome essentialist connections between French and civil law on the one hand and English and common law on the other.

17. Both the Federal Court and the Tax Court are federal courts, which are subject to the obligations imposed by § 133 of the Constitution Act, 1867. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 16(1) & 19(1); Official Languages Act, R.S.C., ch. 31, §§ 14–16 (1985) (Can.); Federal Courts Act, R.S.C., F.-7, ch. 8, § 5(4) (2002) (Can.). See also FEDERAL COURT OF CANADA, ANNUAL REPORT FOR 2002-2003 1, available at http://www.fct-cf.gc.ca/publications/annual/AnnRep02-03_e.pdf (last visited Mar. 17, 2003).

18. In the United States, federal law is enacted in English only and no effort is made to harmonize its provisions with civil law concepts or terminology.

19. See generally U.S. CONST.

20. Section 133 of the Constitution Act, 1867 provides:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Québec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any

provides that either language may be used in any pleading or process of the courts established under the Act.²¹ In 1982, limited rights to receive government services in French or English and to have one's children educated in one's preferred language were also constitutionally entrenched.²² These rights are implemented and to some degree supplemented through legislation such as the Official Languages Act,²³ which is considered to be human rights legislation and therefore attracts a liberal interpretation.²⁴ They are also enforced by the courts, sometimes tepidly, but in recent years more vigorously.²⁵ There is a vast literature, in both French and English, exploring the implications of these rights and assessing both legislative and judicial attempts to enforce them.²⁶

Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Québec. The Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those Languages.

CAN. CONST. (Constitution Act, 1867) § 133. *See also* CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 16(1) 17(1) & 19(1). Similar obligations are imposed on New Brunswick by §§ 16(2), 17(2), 18(2) of the Charter and on Manitoba by § 23 of the Manitoba Act. Manitoba Act 1870, S.C. ch. 3, § 23 (1870) (Can.).

21. *Id.*

22. *See* CAN. CONST. (Constitution Act, 1982), pt. I. (Canadian Charter of Rights and Freedoms), §§ 20 & 23.

23. Official Languages Act, R.S.C., ch. 31, § 31 (1985) (Can.).

24. *See* R. v. Beaulac, [1999] 1 S.C.R. 768, paras. 16–17, 22, 25. *See also* Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, paras. 26–28; Lalonde v. Ontario (Commission de restructuration des service de santé), [2001] 208 D.L.R. (4th) 577 (Ont. Can.), paras. 131–38.

25. The leading case is R. v. Beaulac, in which Justice Bastarache wrote: "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada....To the extent that Société des Acadiens du Nouveau-Brunswick [Society of Acadians of New Brunswick] [[1986] 27 D.L.R. 4th 406 (Can.)]...stands for a restrictive interpretation of language rights, it is to be rejected." R. v. Beaulac, [1999] 1 S.C.R. 768, paras. 16–17, 22, 25.

26. A good survey is provided by PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1291–1321 (loose-leaf ed. 2000). *See also* André Tremblay, *Les Droits Linguistiques* [Linguistic Rights], in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 15-2–15-37 (Gérald-A. Beaudoin & Errol Mendes eds., 3d ed. 1996); LANGUAGE AND THE STATE: THE LAW AND POLITICS OF IDENTITY (2d ed. 1991); LES DROITS LINGUISTIQUES AU CANADA [Linguistic Rights in Canada] (Michael Bastarache, ed. 1986); LANGUAGE RIGHTS IN CANADA (Michael Bastarache ed. 1987).

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Another important reason for the different response to linguistic and legal diversity in the two countries is demographics. The Francophones of New Brunswick, Ontario, Québec and Manitoba constituted a significant portion of the population when those provinces became part of Canada, and their descendants continue to exercise considerable political and economic clout today.²⁷ By contrast, there was no civilist Francophone participation in the drafting of the U.S. Constitution. When Louisiana joined the union, the United States was well established as an English-speaking, common law nation.²⁸ Over the years, as one of fifty states, and with a relatively small territory and population, Louisiana has not been well-placed to affect things at the centre.²⁹

Canada also differs from the United States in the way it has conducted its relations with Aboriginal peoples. While neither nation has much to be proud of in this area, Canada has been slower to recognize the legal norms relied on in Aboriginal culture and to develop ways to accommodate them within its constitutional framework.³⁰ However, two relatively recent events have given impetus to a new approach. The first is the entrenchment in 1982 of Aboriginal rights, including treaty rights,

27. See CENTRE FOR RESEARCH AND INFORMATION ON CANADA, LANGUAGES IN CANADA, at http://www.circ.ca/en_html/guide/language/language.html (last visited Mar. 19, 2004); DEPARTMENT OF CANADIAN HERITAGE, MOBILITY, VISITS AND TRAVEL, at <http://www.pch.gc.ca/progs/lo-ol/perspectives/english/interests/EP03d.htm> (last visited Mar. 19, 2004) [hereinafter MOBILITY, VISITS AND TRAVEL]; DEPARTMENT OF CANADIAN HERITAGE, KINSHIP TIES, at <http://www.pch.gc.ca/progs/lo-ol/perspectives/english/interests/EP03c.htm> (last visited Mar. 19, 2004).

28. See Ward, *supra* note 10, at 1290–91.

29. For a general account of the difficulties faced by French civil law in Louisiana, see Kathryn Venturatos Lorio, *The Louisiana Civil Law Traditions: Archaic or Prophetic in the Twenty-first Century?*, 63 LA. L. REV. 1 (2002).

30. For a review of the American record, see FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982); Vine Deloria, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989); James Zion, *Taking Justice Back: American Indian Perspectives*, in ROYAL COMMISSION ON ABORIGINAL PEOPLES, ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 309 (1992). For a review of the Canadian record, see James Youngblood Henderson, *Empowering Treaty Federalism*, 58 SASK. L. REV. 241 (1994) [hereinafter *Empowering Treaty Federalism*].

in the Canadian Constitution.³¹ This recognition has strongly affected the judicial approach to interpreting the historical treaties between First Nations and the Crown.³² The second is the establishment in 1999 of the new Territory of Nunavut, populated largely by the Inuit of Canada's North.³³ This new Territory was established to give a significant measure of self-government to the Inuit as part of a massive land claims agreement.³⁴ As explained by Nunavut's first premier, the goal is to build a government based on traditional Inuit values and knowledge, with Inuktitut as the working language of the legislature and government.³⁵ While Canada has long been a bilingual, bijural nation, with the establishment of Nunavut it is poised to become a multilingual, multijural nation.

The success of this (belated) evolution is by no means assured. As suggested above, the survival of a language and a legal tradition requires various types of support. While not all of these are within the government's control, it seems clear that a degree of government support for the basics of cultural identity is necessary for survival, even if it is not sufficient.³⁶ Con-

31. "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), § 35(1). "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Id.* at § 27.

32. The point is made most forcefully by Justice Cory in *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78. See generally *Empowering Treaty Federalism*, *supra* note 30.

33. See Nunavut Act, S.C., ch. 28, § 28 (1993) (Can.).

34. See Agreement Between the Inuit of the Nunavut Settlement Areas and Her Majesty the Queen in Right of Canada, art. 4 (incorporated into law by the Nunavut Land Claims Agreement, S.C. 1993, ch. 29). See also John Merritt, *Nunavut: Preparing for Self-Government*, 21 NORTHERN PERSPECTIVES 1, 3-6 (1993), available at <http://www.carc.org/pubs/v21no1/nunavut1.htm> (last visited Mar. 17, 2004); Peter Jull, *Building Nunavut: A Story of Inuit Self-Government*, 1 THE NORTHERN REV. 59 (1988) (on file with author).

35. See Paul Okalik, *The Nunavut Challenge: Working Together*, Speech to the Conference on Governance, Self-Government and Legal Pluralism (Apr. 23, 2003), at <http://www.gov.nu.ca/Nunavut/English/premier/press/cgsglp.shtml> (last visited Mar. 16, 2004).

36. Denice G. Réaume, *The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?*, 47 MCGILL L. REV. 593 (2002) [hereinafter *The Demise of the Political Compromise Doctrine*]. See also Michael O'Keefe, *New Canadian Perspectives: Francophone Minorities: Assimilation and Community Vitality*, in *DEFINING THE CONCEPTS*, available at

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stitutional rights and duties must be implemented through appropriately designed and adequately funded initiatives. Courts must also contribute by offering liberal interpretations of linguistic rights and by enforcing them with effective remedies.

In this Article, I focus on the challenges of interpreting legal texts that are enacted in more than one language and draw on more than one legal system. The first challenge facing interpreters of such texts is recognizing and acknowledging difference. It is obvious that French, English and Inuktitut are different languages and that civil law, common law and Aboriginal law are different legal systems. What is less obvious is how the differences matter and how they can be dealt with in an appropriate way.

Recognizing and acknowledging difference is challenging because it requires knowledge of “the other.”³⁷ This is difficult for those who live in the dominant language and tradition, for ordinarily they have no need to know the other. Even when minority rights are constitutionally protected, there is little incentive for those in positions of power to carry out the research and attempt the transformation of consciousness that knowledge of this sort entails. This is arduous work, which is normally carried out by members of the minority group who have little choice in the matter.³⁸ In principle, however, the burden belongs to the official interpreters of legislation.³⁹

Once the lessons of difference are received and understood, the second challenge facing interpreters is to develop an appropriate response. Possible responses range from assimilation in

<http://www.pch.gc.ca/progs/lo-ol/perspectives/english/assimil/defining.htm>
(last visited Mar. 16, 2004).

37. See generally FRANCO RELLA, *THE MYTH OF THE OTHER* (2003). For discussion of Aboriginal peoples in North America as “other” see Frank Pommerheim, *Liberalism, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, at 423.

38. The dominant group in a society is the group that controls goods or benefits that are necessary or desirable for members of the society to flourish. The dominant group has no incentive to change, since it already has what it needs. The burden of change, therefore, falls to the minority whose need motivates its efforts to bridge the gap.

39. In so far as a linguistic community is legally entitled to access law in its own language, the official interpreters of law have a corresponding obligation to acquire the linguistic skills necessary to give meaningful effect to the right.

an effort to achieve unification, to separation in an effort to achieve equality, to dialogue in an effort to achieve integration.⁴⁰ In Canada, these possibilities are expressed in terms of both language and law. Linguistic assimilation is a daily reality for Aboriginal peoples⁴¹ and an ongoing threat for Francophones, especially Francophones outside Québec.⁴² To fend off assimilation, there is a strong tendency to establish linguistic dualism – institutions and practices that are equal-but-separate.⁴³ Only when linguistic traditions are culturally secure is it possible to achieve a genuine bilingualism in which the languages enrich and modify one another through interaction. A similar dynamic operates in law. Aboriginal law, though not extinct, is in a precarious state,⁴⁴ while civil law in North America must constantly struggle against assimilation by the common law.⁴⁵ To ensure survival, proponents must safeguard the autonomy of these traditions. Dialogue among legal traditions can occur successfully only if each speaks from a position of strength.

40. The dialogue leading to integration model is described by Roderick Macdonald as “legal bilingualism:”

Legal bilingualism would ultimately require bilingualism in all its practitioners. Rather than encouraging or even allowing two distinct official legal cultures to form around two languages, the practice of legal bilingualism would draw on both languages to construct one official legal culture. In Canada today, that official legal culture is neither French nor English, neither civil law nor common law; it is all these together, with the ambiguity that such complexity implies.

Legal Bilingualism, *supra* note 7, at 165.

41. See *You Took My Talk: Aboriginal Literacy and Empowerment*, Fourth Report of the Standing Committee on Aboriginal Affairs, House of Commons, Dec. 1990, at 105 app. D.

42. See *MOBILITY, VISITS AND TRAVEL*, *supra* note 27.

43. Linguistic dualism is described negatively in *Legal Bilingualism*, *supra* note 7, at paras. 6–8, 42–44. Cf. *The Demise of the Political Compromise Doctrine*, *supra* note 36, at para. 23, n.32.

44. See Barbara Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 4 MINN. L. REV. 927, 958–62 (1999); John Borrows, *With or Without You: First Nations Law in Canada*, 41 MCGILL L.J. 629 (1996) [hereinafter *With or Without You*].

45. See France Allard, *The Supreme Court of Canada and Its Impact on the Expression of Bijuralism*, in 3 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 3 & n.11, at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3(a)_eng.pdf) (last visited Mar. 19, 2004).

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Having recognized difference and the possible responses to difference, the final challenge for interpreters is to strike the right balance among the possibilities. It is tempting to suppose that the conflict between assimilation and equality-through-separation naturally yields dialogue and integration; but there is no real basis for this supposition. The right interpretive response depends on the legal and cultural framework in which the legislation operates, the nature and extent of the differences between the several languages and legal traditions, the ability of interpreters to recognize and bridge these differences, and not least the language politics and culture politics of the jurisdiction.

In this Article, I attempt to explore the impact of these variables on interpretive theory and practice. I have several goals. The first is to describe the well-established principles governing the interpretation of bilingual legislation in Canada. The second is to describe and comment on some emerging principles governing the interpretation of bilingual legislation that is also bijural (common law and civil law). The third is to draw attention to the challenges of interpreting legal texts that exist in Aboriginal as well as European languages and are grounded in both Aboriginal and European law. In examining these topics, I focus on the way legal texts are produced as well as the judicial response to them. I also consider how the various interpretive approaches fit into the categories described above — assimilation, equality through separation and dialogue leading to integration.

Part II of this Article comments on some features of the evolution of Canada's federal statute book. In Parliamentary democracies, the executive branch proposes and drafts most legislation and has responsibility for publishing and managing the law.⁴⁶ Individual statutes are treated as self-contained structures reflecting a coherent set of objectives and embodying a more or less efficient scheme for achieving those objectives. Statutes are also thought of as comprising a distinct literary genre; like poems or plays, they are governed by fairly rigid

46. See HOGG, *supra* note 26. See also CABINET DIRECTIVE ON LAW-MAKING, *supra* note 15.

conventions of style and organization.⁴⁷ These conventions facilitate comprehension and form the basis for analysis of the legislative text. The statutes that are part of a jurisdiction's law at a given moment constitute its "statute book," comparable to the oeuvre of a poet or playwright.⁴⁸ The statute book is taken to be a coherent and internally consistent (although not an exhaustive) statement of the enacting jurisdiction's law.⁴⁹

A noteworthy feature of Canada's statute books at both the federal and provincial levels is the practice of regular general revision.⁵⁰ In a general revision, the legislature authorizes the executive branch of government to produce an updated version of the legislation currently in force within the jurisdiction.⁵¹ Amendments and repeals since the last revision are incorporated; incoherencies, contradictions and mistakes are corrected; and the style in which the statutes are drafted is updated and made uniform.⁵² Although the substance of the law remains the same, its form may change quite noticeably.⁵³ The practice of revision not only facilitates access to legislation but affords the government a means to communicate its view of law and its responsibilities to the public.⁵⁴ The presentation of the two official languages and legal systems of Canada features importantly in this communication and is examined in Part II.

Part III of this Article sets out the two main rules governing the interpretation of bilingual legislation in Canada, namely

47. For an account of these conventions, see generally ELMER A. DRIEDGER, *THE COMPOSITION OF LEGISLATION: LEGISLATIVE FORMS AND PRECEDENTS* (2d ed., rev. 1976); G.C. THORNTON, *LEGISLATIVE DRAFTING* (3d ed. 1987).

48. Ruth Sullivan, *Some Implications of Plain Language Drafting*, 22 *STATUTE L. REV.* 175, 182 n.13 (2001) [hereinafter *Some Implications of Plain Language Drafting*].

49. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 1 S.C.C. 42, para. 27. See also PIERRE-ANDRÉ CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA* 308 & nn. 3–6 (2000) [hereinafter *THE INTERPRETATION OF LEGISLATION IN CANADA*]; RUTH SULLIVAN, *SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES* 169, 262 & n.80 [hereinafter *SULLIVAN & DRIEDGER*].

50. See Norman Larsen, *Statute Revision and Consolidation: History, Process and Problems*, 19 *OTTAWA L. REV.* 321 (1987).

51. Statute Revision Act, R.S.C., 1974-75-76, ch. S- 20. (1985)(Can.).

52. SULLIVAN & DRIEDGER, *supra* note 49, at 534.

53. *Id.* at 535.

54. See *Some Implications of Plain Language Drafting*, *supra* note 48, at 182–83.

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the equal authenticity rule⁵⁵ and the shared meaning rule.⁵⁶ It explores the rank that should be assigned to them in the pantheon of statutory interpretation rules. It also looks at insights into the nature of law afforded by legislation drafted in two or more languages.

Part IV describes the current initiative of the Canadian government to harmonize federal law with the civil law of Québec. It looks at the new scholarship this initiative has generated, rooted in a civilist perspective, and the resulting amendments to Canada's Interpretation Act. It explores two concepts of bijuralism: suppletive bijuralism, reflecting an equal-but-separate approach to the two legal systems, and derivative bijuralism, reflecting dialogue and the possibility of integration. It ends with a critical analysis of a recent decision by the Supreme Court of Canada which illustrates how very challenging the interpretation of bilingual, bijural legislation can be.

Part V deals with the interpretation of the historical treaties between Britain (later Canada) and the First Nations occupying territory within the current borders of Canada. In interpreting these treaties, the courts regard the written English version, rooted in the common law, as constituting the sole text to be interpreted.⁵⁷ I argue that in fact treaties are also recorded in the oral tradition and legal artefacts of the First Nation parties and these, no less than the written English text, constitute the

55. See *THE INTERPRETATION OF LEGISLATION IN CANADA*, *supra* note 49, at 324; *SULLIVAN & DRIEDGER*, *supra* note 49, at 74–77. The equal authenticity rule requires

that legislation be enacted or made, and not merely published, in both English and French....[B]oth language versions of a bilingual statute or regulation are official, original and authoritative expressions of the law. Neither version has the status of a copy or translation; neither enjoys priority or paramountcy over the other.

Id. at 74–75.

56. For a definition of the shared meaning rule, see *infra* Part III.C. See *THE INTERPRETATION OF LEGISLATION IN CANADA*, *supra* note 49, at 326–28; *SULLIVAN & DRIEDGER*, *supra* note 49, at 81–87.

57. Even in cases where the court emphasizes the importance of receiving evidence of the context in which treaties were signed, including the Aboriginal version of the treaty as preserved in oral history, the “treaty itself” is identified with the English language text and the Aboriginal version is regarded as “con-text.” See, e.g., *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; *R. v. Marshall*, [1999] 3 S.C.R. 456.

official record of the treaty. I also consider the impact this realization should have on the interpretation of the treaties.

Part VI describes the initiatives underway in the Territory of Nunavut to ensure that residents have access to legislation in their language of Inuktitut and to ensure that legislation is rooted in local Aboriginal knowledge and culture. It briefly speculates on the interpretation problems that may result if these initiatives prove successful.

II. THE REFORM OF CANADA'S STATUTE BOOK⁵⁸

In Canada, federal legislation has been bilingual and bijural from the beginning.⁵⁹ A particularly challenging feature of the Canadian situation is that there is not a one-to-one correspondence between the territory where French or English is spoken and the territory where the civil law and the common law constitute the basic legal system.⁶⁰ Federal legislation is addressed to Francophones as well as Anglophones in the common law provinces and to Anglophones as well as Francophones in Québec.⁶¹

Until recently, federal efforts to meet this challenge were inadequate in many respects. Historically, federal Acts and regu-

58. The descriptions and comments in this part are based primarily on my observations while working for the Legislative Services Branch of Canada's Department of Justice in 1989-1991 and again in 2001-2002. They are also based on ongoing but informal discussions with federal drafters. However, they are personal views, which do not necessarily coincide with the position of the Department of Justice or the views of my contacts there. [hereinafter Sullivan Observations].

59. As explained below, these features of the federal statute book flow from the constitutional requirement that federal legislation be enacted in both languages and from the division of legislative powers between Parliament and the provincial legislatures.

60. Many Anglophones live in civil law Québec; many Francophones live in common law provinces, especially New Brunswick, Manitoba and Ontario. See STATISTICS CANADA, at <http://www.statcan.ca/start.html> (last visited Mar. 16, 2004).

61. See Lionel Levert, *Harmonization and Dissonance: Language and Law in Canada and Europe: the Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 6-7 (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

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lations were almost always drafted in English first with a common law context in mind, then translated into French and adapted — more or less — to Québec's civil law.⁶² There were many things wrong with this practice. First, the translations often were legally inadequate.⁶³ Second, the quality of the French often was poor. Because the translators were not lawyers, they lacked the knowledge required to translate legal ideas, and therefore, were reduced simply to translating the words.⁶⁴ This resulted in a French version that preserved English sentence structure and common law drafting style, and bore little resemblance to the elegance and concision of a civil code.⁶⁵ Reliance on translation also led to what might be called the problem of bureaucratic pre-interpretation. This problem arises when translators or other bureaucrats (such as statute revisers) have the power before enactment to resolve ambiguities in the legislative text.⁶⁶

A third problem with previous drafting practice was that outside Québec, adaptation to civil law was a low priority.⁶⁷ As a result, efforts to harmonize federal law with Québec's civil code often were haphazard and inadequate. On occasion, appropriate common law and civil law terminology was used in both language versions.⁶⁸ More often, the common law term for a concept, principle or institution was used in the English version, while the civil law term for an analogous (though not necessarily identical) concept, principle or institution was used in French.⁶⁹ This technique was favoured, in part, because it avoided loading the text with legal terminology from two sys-

62. *Id.* See also *Legal Bilingualism*, *supra* note 7, at para. 30.

63. See e.g., *R. v. Tupper*, [1967] S.C.R. 589; Levert, *supra* note 61, at 6; *Legal Bilingualism*, *supra* note 7, at para. 33.

64. Levert, *supra* note 61, at 6–7.

65. The best illustration of this practice is probably the Criminal Code, R.S.C., ch. C-46 (1985) (Can.). While the current French version of the Code improves on previous versions, it remains inadequate.

66. See Larsen, *supra* note 50, at 341 (noting that “revisers are liable to wander over the line that divides revision and substantive change.”).

67. See Levert, *supra* note 61, at 7.

68. For example, “lease of real property or immovables” in English and “location de biens réel ou immeubles” in French.

69. For example, “agent” in English and “mandataire” in French, “mortgage” in English and “hypotèque” in French. See Criminal Code, R.S.C., ch. C-46., § 207.1 (1985) (Can.) (regulating “gaming and betting”).

tems.⁷⁰ An additional consideration, rooted in Canadian regional politics, was the desire to avoid the backlash that might result from making prominent room for Québec's civil law in the English text. The drawback to this practice was that it ignored the existence of Anglophones in Québec and Francophones in other provinces. In symbolic terms, it sent an essentialist message — that French is the language of the civil law and English the language of the common law. This message invited an equal-but-separate approach to the federal statute book.

In 1978, in an effort to address at least some of these problems, the federal Department of Justice adopted the practice of co-drafting, which requires statutes to be drafted simultaneously by both an English and a French drafter.⁷¹ Both drafters receive instructions (in one or both languages) and each produces a draft for review by the instructing department.⁷²

While co-drafting improved the quality of new legislation, it did nothing for legislation that was already on the books. This problem was tackled in the 1985 general revision of the Statutes of Canada, in which the French version of many statutes was rewritten in a more authentic French style.⁷³

Co-drafting was primarily a response to the bilingual character of federal legislation; it was an attempt to create an authentic French text as opposed to a translation that was merely deemed to be authentic. However, the bijural character of federal legislation complicated the matter. When dealing with legislation that is bilingual but unijural, it is reasonable for the drafting conventions and style of the single legal system to prevail. When dealing with legislation that is bijural as well as bilingual, however, a different approach might be expected. Upon the introduction of co-drafting in Canada, civilist Francophone drafters rightly called into question the imposition of common law conventions and style on the French language version of federal legislation, and they urged a more civilist ap-

70. See Sullivan Observations, *supra* note 58.

71. Levert, *supra* note 61, at 6. Initially, only statutes were co-drafted while regulations were merely co-reviewed by English and French lawyers from the Legislative Services Branch. However, increasingly regulations as well as statutes are co-drafted.

72. See Sullivan Observations, *supra* note 58.

73. See *generally* Revised Statutes of Canada, R.S.C. (Can.).

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proach, not to both versions, but to the drafting of the French version.⁷⁴

This reform was rejected for a variety of reasons. For one thing, much federal law is public law, and public law in Canada (including Québec) is unijural and grounded in the common law.⁷⁵ There is no obvious justification for using civil law conventions and style to draft legislation that is grounded in the common law. Further, to shift back and forth between styles depending on whether an Act or a provision was judged to create public or private law would be unworkable in practice.

A more fundamental reason for rejecting civil law drafting in the French version was the desire to preserve the iconography of the federal statute book, which at that time attempted to communicate not just the equal validity of the two language versions but still more their sameness. It was important that the two versions say the same thing and look the same way on the page.⁷⁶ To this end, starting in 1968, the two versions of federal legislation were presented in parallel columns, English on the left and French on the right.⁷⁷ In both versions, each section or subsection set out a rule in a single sentence, with roughly parallel structure and wording and with identical formatting.⁷⁸ The parallel sections and subsections began at the same point on the page and were attended by identical marginal notes and headings.⁷⁹ If the English version used tabulation or paragraphing, so did the French. While adopting a civilist approach to drafting the French version of federal legis-

74. See Sullivan Observations, *supra* note 58.

75. This results from the fact that English law was introduced into the territory of what is now Québec by the Treaty of 1763 in which France surrendered the territory to England. In the Québec Act of 1774, civil law was reintroduced only in respect of “property and civil rights.” The rest of the law remained English. See 2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool), [1996] 3 S.C.R. 919, para. 76.

76. See generally, *Some Implications of Plain Language Drafting*, *supra* note 48 (The appearance of sameness is especially important when the readers of the text are unilingual and therefore unable to rely on comprehension to determine that they are the same.).

77. See generally S.C. 1968 (Can.); R.S.C. 1970 (Can.) and R.S.C. (Can.). Before 1968, the French and English versions were published in separate volumes. Putting them into the same volume obviously encourages dialogue and integration.

78. See generally R.S.C. 1970 (Can.).

79. *Id.*

lation need not have destroyed the sameness of the law, it would have diminished the appearance of sameness and was therefore unacceptable.

Although Francophone drafters have not been allowed to adopt a civilist style of drafting, the historical rigidities of bilingual drafting have been relaxed to a degree. It is no longer necessary for the French version to track the sentence structure and wording of the English version. In new legislation, the French version of a section or subsection is often more concise and significantly shorter than the English version.⁸⁰ On the English side, common law drafting has evolved toward a higher level of generality and abstraction, which has brought it more in line with civilist style. Since the introduction of co-drafting, English drafters have been free to follow the lead of their French co-drafter in including two sentences within a single section or subsection, in declining to paragraph and the like. The French-English text is the product of negotiation and compromise, or in some cases, agreement to disagree.⁸¹ In fact, it has become an exercise in dialogue.

During the 1980s, reform of the federal statute book focused on bilingualism. More recently, the federal government has turned its attention to bijuralism.⁸² This interest was sparked by a number of developments. One was the work done in several provinces and at the federal level to develop adequate French terminology for common law concepts, institutions and principles.⁸³ This work responded to Francophone populations outside Québec and their entitlement to access the law in their own language. A second, more important impetus was the enactment of the new Civil Code of Québec,⁸⁴ which came into force in 1994.⁸⁵

80. In fact, the French version may contain two sentences to the English version's one, and it may ignore the paragraphing of the English version.

81. See Sullivan Observations, *supra* note 58.

82. See Levert, *supra* note 61.

83. See, e.g., National Program for the Integration of Both Official Languages in the Administration of Justice, at <http://www.pajlo.org> (last visited Mar. 17, 2004).

84. The French spelling of Québec, with its *accent aigu*, is used in both the English and French versions of the title.

85. Civil Code of Québec, S.Q. ch. 64 (1991) proclaimed into force on Jan. 1, 1994 by order-in-council no. 712-93, 125 G.O. II, 3589.

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For Québec, this was a national event of great cultural significance. A Civil Code is the expression of the principles upon which members of a society live in harmony with one another and it embodies the fundamental values that make that society distinct. In keeping with Québec's so-called quiet revolution, which during the 1960s and 1970s repudiated many conservative values of the past, the new Code extensively changed Québec's private law.⁸⁶ This created considerable disharmony with existing federal legislation, which referred to concepts or institutions from the former code and used its discarded terminology.⁸⁷ To avoid confusion and uncertainty, a harmonization initiative was required.

In 1993, the federal government created a Civil Code section within the Department of Justice with a mandate to harmonize federal legislation with the new code.⁸⁸ In 1995, it announced a bijuralism policy.⁸⁹ In 1997, it launched an ambitious program to review all existing federal legislation dealing with property and civil rights to ensure its compatibility not only with Québec's new code, but with provincial law generally.⁹⁰

As explained by the Minister of Justice, the federal harmonization program has three goals:

- to reaffirm the unique bijural character of Canadian federalism by making the expression of that character explicit and visible in federal legislation in both languages[;]

86. As Mario Dion notes, the Civil Code of Québec led to the amendment of nearly 80% of the provisions of the Civil Code of Lower Canada. Mario Dion, *Civil Code of Lower Canada*, adopted pursuant to 29 Vict., ch. 41 (1865) (Can.), available at http://canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1c.html (last visited Mar. 19, 2004).

87. *Id.*

88. For an account of the institutional evolution of the federal harmonization initiative, see Louise Maguire Wellington, *Bijuralism in Canada: Harmonization Methodology and Terminology*, in 4 *THE HARMONIZATION OF FEDERAL LEGISLATION AND CANADIAN BIJURALISM* (2d publication 1999), available at http://www.justice.gc.ca/en/dept/pub/hfl/fasc4/fascicule_4_eng.pdf (last visited Mar. 17, 2004).

89. *Id.* at 22 app. III.

90. The relevant documents are set out as appendices in 1 *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* (2d publication 1999). For the mandate of the Civil Code Section, see Maguire Wellington, *supra* note 88, at 21.

- to strengthen civil law's rightful place beside common law in the statute books of Canada[; and]
- to ensure the terminology and concepts of federal legislation and the Québec civil law are compatible.⁹¹

This initiative is ambitious in scope and unusually well funded.⁹² The government has commissioned extensive research into a wide range of issues concerning bijuralism and the relationship between federal and provincial law.⁹³ It has also developed a range of drafting techniques suited to the drafting of bilingual, bijural legislation,⁹⁴ a method for harmonizing existing federal law with provincial law⁹⁵ and several new principles of interpretation.⁹⁶ Finally, and most ambitiously, it has under-

91. The Honourable Anne McLellan, Speech at the Conference on the Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism, (Nov. 24, 1997), at <http://canada.justice.gc.ca/en/news/sp/1997/bijur.html> (last visited Mar. 19, 2004). For a detailed account of the genesis and evolution of the program, see *Bijuralism and Harmonization: Genesis*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

92. See A. Anne McLellan, *A Word From the Minister*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM v (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

93. For a description of bijuralism and the relationship between federal and provincial law, see CAN. DEPT. OF JUSTICE, CONSULTATION PAPER, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC 4–8 (1999); CAN. DEPT. OF JUSTICE, CONSULTATIONS & OUTREACH, SECOND SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC 1 & n.2 (Jan. 2003), at <http://canada.justice.gc.ca/en/cons/harm/note.html> (last visited Mar. 19, 2004, 2004).

94. See CAN. DEPT. OF JUSTICE, REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE (Apr. 4, 1996) (unpublished) [hereinafter REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE]. See also Maguire Wellington, *supra* note 88, at 8.

95. See Maguire Wellington, *supra* note 88, at 15.

96. See Interpretation Act, R.S.C., ch. I-21, §§ 8.1, 8.2 (1985), amended by ch. 4, pt. 2, 2001 S.C. (Can.). For discussion, see Henry Molot, *Clause 8 of Bill S-4: Amending the Interpretation Act*, in 6 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 13–14 (2d publication 1999), available at <http://www.canada.justice.gc.ca/en/news/sp/1997/bijur.html>

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taken a comprehensive statute and regulation revision, focusing on the goal of harmonization.⁹⁷

While these changes to the Canadian statute book are technical and seem remote from the concerns of everyday life, they have symbolic significance and cultural symbolism, which are both important in multicultural societies.⁹⁸ The way in which the federal statute book is managed is an integral part of the federal government's response to the claims of linguistic minorities across Canada and its efforts to defeat the separatist ambitions of Québec.

III. INTERPRETING MULTILINGUAL LEGISLATION

A. *Legal Status*

In interpreting multilingual legislation, an essential first step is to establish the legal status of the several language texts. Some may be translations for convenience only, with no legal force.⁹⁹ Others may be official legal texts, enacted as such, but

ice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6(b)_eng.pdf (last visited Mar. 27, 2004).

97. See Marie-Noelle Pourbaix, *S-4: A First Harmonization Bill*, in 6 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 7 (2nd publication 1999), available at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6(a)_eng.pdf) (last visited Mar. 19, 2004); 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 Québec, Assumption of Complementarity and Methodological Issues*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 12 nn. 1–2 (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

98. See Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 724 (2001) (“To have one’s language officially affirmed is to be affirmed as a cultural group. This becomes especially important if one’s language is chosen out of many languages for official recognition and affirmation.”).

99. The Inuktitut version of Nunavut’s legislation is an example, discussed *infra* notes 314–20. For discussion in the context of the European Economic Union, see Susan Sarcevic, *Problems of Interpretation in an Enlarged European Union*, in RODOLFO SACCO, L’INTERPRÉTATION DES TEXTES JURIDIQUE RÉDIGÉS DANS PLUS D’UNE LANGUE [The Interpretation of Legal Texts Drafted in More than One Language] (2002) 239, 245–47 [hereinafter THE INTERPRETATION OF LEGAL TEXTS].

subject to an interpretation rule that gives paramountcy to one or more of the other language texts.¹⁰⁰ In the absence of such a rule, each language version enacted by the legislature is authentic.¹⁰¹ This means that none has the status of a translation; all are original and equally authoritative expressions of the law. This is so, it should be noted, regardless of the means in fact used to prepare the two language versions. The important point is not whether one text is a translation of the other but whether a given text has been enacted by the legislature.¹⁰²

In Canada, the French and English versions of bilingual legislation at the federal and provincial levels are enacted as law and both are equally authentic.¹⁰³ In the Yukon, Northwest Territories and Nunavut, the language situation is more complex.¹⁰⁴ The Official Languages Act of the Northwest Territories, for example, requires legislation to be enacted in English and French and declares that both versions are equally authoritative.¹⁰⁵ In addition, however, it declares a number of Aboriginal languages to be official languages of the territory — Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut and Slavey.¹⁰⁶ Any of these languages may be used in the legislature and simultaneous

100. Such a rule provides in effect (even if it is more subtle in form) that if there is a conflict between the two language versions of a provision, a particular language version prevails.

101. See THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 323–26; SULLIVAN & DRIEDGER, *supra* note 49, at 74–76.

102. See Reference *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 747. Of course, it would be possible for a non-enacted language version to be declared authentic, either through legislation or constitutional amendment. For a seminal account of equal authenticity between language versions, see R.M. BEAUPRÉ, INTERPRETING BILINGUAL LEGISLATION 5–13 (1986). See also THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 323–26; SULLIVAN & DRIEDGER, *supra* note 49, at 74–78.

103. See CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), sched. B, ch. 11, § 18; Official Languages Act, R.S.C., ch. 31, § 13 (1985) (Can.).

104. See Official Languages Act, R.S.Y., ch. 133 (2002) (Can.); Official Languages Act, R.S.N.W.T., ch. O-1 (1988) (Can.); Official Languages Act, R.S.N.W.T. 1988, ch. O-1, as duplicated for Nunavut by Nunavut Act, S.C., ch. 28, § 29 (1993) (Can.).

105. See Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 10(1) (1988) (N.W.T.).

106. See Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 4 (1988) (N.W.T.).

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translation (i.e., interpretation as opposed to translation on paper) is provided to ensure that all members of the legislature understand what is going on.¹⁰⁷ Copies of the sound recordings of legislative debates both in the original and interpreted versions must be provided to members of the public “on reasonable request.”¹⁰⁸ However, there is no obligation to enact legislation in these languages. There is merely authority to enact regulations to require publication of “a translation of any Act...made after enactment.”¹⁰⁹ Such translations have no legal status; a person relies on them at their peril.

B. Implications of Equal Authenticity

The first implication of the equal authenticity rule is that in every case both versions of the legislation must be read by official interpreters such as Ministers, tribunals and courts. An interpreter cannot know the substance of the law declared by Parliament until he or she has considered both versions and resolved any discrepancies between them.¹¹⁰ As a practical matter, if official interpreters must rely on both versions to determine the law, ordinary citizens (or the lawyers who advise them) are obliged to do so as well.

At first glance, this implication seems problematic, if not absurd. The Constitution requires legislation to be enacted in French and English, and the equal authenticity rule declares both language versions to be equally valid and authoritative. The purpose of these rules is obvious: the legislature is being made to function bilingually so that ordinary citizens can function unilingually.¹¹¹ If this is so, why should it be necessary to read both versions?

The reason both versions must be read, despite their equal authenticity, is that citizens can safely rely on a single version only if they can be sure that both say the same thing. And in

107. LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES, OPERATIONS OF THE LEGISLATIVE ASSEMBLY, at <http://www.assembly.gov.nt.ca/visitorinfo/NWTStyleOfGovernment/Operations.html> (last visited Mar. 17, 2004).

108. Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 10(3) (1988) (N.W.T.).

109. Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 10(2) (1988) (N.W.T.).

110. SULLIVAN & DRIEDGER, *supra* note 49, at 77–78.

111. See Reference *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

practice, this assurance can never be achieved. Drafting mistakes are inevitable; and even in the absence of mistake, different language versions can rarely be identical.¹¹² Most of the time the discrepancies between the two versions are minor and insignificant, but that is not always the case. To determine what discrepancies exist and whether they matter, the interpreter must read both versions.¹¹³

More fundamentally, however, it is arguable that the primary purpose of bilingual legislation is not to facilitate unilingual access to the law, but to build community. To focus on access leaves out of account the comprehensive body of language rights protected by the Constitution and by federal and provincial legislatures, of which bilingual enactment and publication is only one. These include the right to education and to government services in one's own language, as well as the right to speak and be heard in court in one's own language.¹¹⁴ These rights are best interpreted in light of one another as part of a comprehensive scheme. Further, the focus on access does not fully account for the facts. As Rod Macdonald points out,

...citizens have a legitimate expectation of being able to understand the law that is applicable to them. But this argument simply exhausts itself in multilingual societies such as Canada. Instrumental effectiveness and moral legitimacy apply just as much to aboriginal peoples and to immigrants who speak neither French nor English, yet apart from aboriginal peoples, few have claimed the need for multilingual legislation. The argument, that is, rests primarily on symbolic and not on instrumental grounds.¹¹⁵

Denise Réaume makes a similar point when she suggests that the primary purpose of official bilingualism is not to facilitate

112. See Jean Claude G mar, *L'interpr tation du texte juridique ou le dilemme du traducteur* [The Interpretation of Legal Texts or the Translator's Dilemma], in *THE INTERPRETATION OF LEGAL TEXTS*, *supra* note 99, at 103-04; Louis-Philippe Pigeon, *La traduction juridique - L' quivalence fonctionnelle* [Legal Translation: The Functional Equivalent], in JEAN CLAUDE G MAR, *LANGAGE DU DROIT ET TRADUCTION: ESSAIS DE JURILINGUISTIQUE* [The Language of the Law and Translation: Essays on Jurilinguistics] (1982).

113. SULLIVAN & DRIEDGER, *supra* note 49, at 77-78.

114. See generally CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 16-23. Note that the nature and extent of these rights vary among the provinces and territories.

115. *Legal Bilingualism*, *supra* note 7, at 138-39, n.71.

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access to law but to promote linguistic security.¹¹⁶ Réaume's analysis echoes the preamble of the Official Languages Act, which mentions the government's commitment to "enhancing the vitality and supporting the development of English and French linguistic minority communities...and to fostering full recognition and use of English and French in Canadian society."¹¹⁷ These sentiments are also found in numerous judgments of the courts.¹¹⁸

On this analysis, the primary purpose of bilingual and bijural legislation is to promote the viability of French and English cultural communities in Canada, to ensure that both groups feel at home in the country. Understood in this light, the obligation to read both language versions of federal legislation, even in places where little French is spoken, is consistent with the goals of official bilingualism. At home is a bilingual, bijural place, where two cultures do not just co-exist in equal but separate columns but interact with one another in a shared space. The ideal here is dialogue leading to integration.

116. Denise G. Réaume explains:

Linguistic security requires not only that the use of one's language not be made a ground of liability..., but also that the instrumental usefulness of the language be supported, not merely for the sake of other ends considered extrinsically [such as access to law], but out of respect for the intrinsic value of a life lived within a particular linguistic milieu....

...It is fitting that the constitution should seek to make the most important aspects of the country's political institutions accessible to minority official language communities. The ability to live one's life in one's own language is thereby importantly expanded to include interaction with government agencies and participation in political institutions.... More important, the operation of public institutions in a minority official language advances the intrinsic expressive interest in language use by making the state and its institutions full participants in the life of the community, and the members of the group full participants in public life.

The Demise of the Political Compromise Doctrine, *supra* note 36, at paras. 44–45.

117. Official Languages Act, R.S.C., ch. 31 (1985) (Can.).

118. See, e.g., Reference *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721, 744; Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712, 748–49; Mahe v. Alberta, [1990] 1 S.C.R. 342, 362; R. v. Beaulac, [1999] 1 S.C.R. 768, paras. 17, 25.

A second implication of the equal authenticity rule is that neither version of bilingual legislation can be favoured over the other simply on the basis of language.¹¹⁹ Conflicts between the versions must be resolved, for it would be an unacceptable violation of the rule of law if interpreters were to apply different rules to citizens depending on which version of the statute they invoked. However, under the equal authenticity rule, conflicts are resolved not through a paramountcy rule, but by determining the substance of the law that Parliament intended to enact.¹²⁰ In some cases this approach may favour the English version, in others the French version, in others neither version. But in all cases, if one version is preferred over the other, it is preferred only because it coheres with the court's interpretation of the text based on the entire range of interpretive techniques available to it, and not on the automatic preference for one language over the other.¹²¹ The two versions are equal in that both must be read and considered in comprehending the substance of the law. They are also equal in that either may be rejected if it fails to express accurately the substance of the law as determined by the court.¹²²

A third implication of equal authenticity is that the legislative text is comprised of both versions.¹²³ As Nicholas Kasirer puts it, each version aspires to be a complete and reliable expression of the law, but neither can manage on its own.¹²⁴ The two versions are "predicated, as vehicles for meaning, on the ongoing existence and availability of the [other]."¹²⁵ They are halves of a single whole, and to access the law properly both versions must be read and understood.

119. This point is conclusively established in Reference *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721, at 777–78.

120. *Food Machinery Corp v. Canada* (Registrar of Trade Marks), [1946] 5 C.P.R. 76.

121. See Reference *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721.

122. *R. v. Cie immobilière BCN*, [1979] 1 S.C.R. 865.

123. This point is repeatedly made by the courts. See, e.g., *R. v. Mac*, [2002] 1 S.C.R. 856.

124. Nicholas Kasirer, *Lex-icographie Mercatoria* [Lexicography Mercatoria], 47 AM. J. COMP. L. 653, 673 (1999). Kasirer is speaking of a bilingual lexicon of European contract law, but his point applies equally to bilingual legislation. *Id.*

125. *Id.* at 656.

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If both versions of a bilingual text must be read to determine the law, it follows that professional interpreters must be bilingual to do their job properly.¹²⁶ Ideally they must be fully bilingual, which entails not just fluency in both languages but fluency in both cultures as well. While many legal professionals in Québec are bilingual and a significant number are fully bilingual, that is not the case elsewhere in Canada.¹²⁷ Absence of linguistic capacity and cultural knowledge is a major barrier to achieving the ideal of dialogue and integration. As Rod Macdonald writes,

Numerous factors contribute to the apparently inexorable decay of legal bilingualism into legal dualism: intellectual laziness among legal professionals; rampant unilingualism among legal elites; a proliferation of mediocre translations of texts; an educational system that privileges information over understanding; and, not least, a plethora of secondary sources and computerized finding tools.¹²⁸

While the factors mentioned by Macdonald are of great importance, I do not agree that bilingualism is decaying into dualism. In truth, Canada has never experienced the legal bilingualism he describes — there is no golden age from which to decline. I see legal dualism as a necessary (although not a sufficient) condition for achieving legal bilingualism. To move from dualism toward bilingualism, the factors mentioned by Macdonald must be addressed — and are being addressed in modest ways. Although full bilingualism outside Montréal is relatively rare, the federal government has put significant resources into ensuring that its own lawyers are fluent in both official languages and are cognizant of both legal systems and cultures.¹²⁹ It has also sponsored and published a significant

126. See Tetley, *supra* note 7, at 727; *Legal Bilingualism*, *supra* note 7, at 165.

127. Pierre-André Côté, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, 29 *BROOK J. INT'L L.* 1067 (2004).

128. *Legal Bilingualism*, *supra* note 7, at para. 43.

129. The federal government sends its lawyers for language training on a regular basis. Promotion is contingent on linguistic as well as legal competence. Drafters in the Legislative Services Branch are encouraged to complete the program offered by the University of Ottawa that allows civilists to achieve a degree in Common Law (in English or French) and common law lawyers to achieve a degree in Civil Law (in English or French).

body of legal scholarship on bijuralism, through both government departments and institutions such as Royal Commissions and the Law Commission of Canada.¹³⁰ In recent years, opportunities for Francophones and civilists to learn common law and for Anglophones and common law lawyers to learn civil law have proliferated in Canadian law schools, at least in the East.¹³¹ Globalization has helped as well, by providing incentives for everyone to recognize the limits of their own small place in the world.

C. The Shared Meaning Rule

The basic rule that has come to govern the interpretation of bilingual legislation in Canada is known as the shared meaning rule. In cases where the two versions of a bilingual statute do not say the same thing, if one is ambiguous and the other is clear, the meaning that is shared by both is presumed to be the meaning intended by the legislature.¹³² This rule is based on the fundamental assumption that both versions of a legislative text must declare the same law.¹³³ To apply different rules to similarly situated persons, depending on some test of language identification, would violate formal equality and, in disputes

130. All publications of government and government sponsored legal scholarship are in both English and French.

131. Both the University of Ottawa and the University of Moncton offer a complete program of common law in French leading to a common law degree. *See generally* UNIVERSITY OF MONCTON WEBSITE, at <http://www.umoncton.ca/> (last visited Mar. 14, 2004). The University of Ottawa offers common law lawyers a year-long program in English leading to a degree in Civil Law and civilist lawyers a year-long program in French leading to a common law degree. *See generally* UNIVERSITY OF OTTAWA WEBSITE, at <http://www.uottawa.ca/welcome.html> (last visited Mar. 14, 2004). McGill University offers a three year bilingual program in which graduates simultaneously study both legal systems and graduate with degrees in both. Several Universities offer civilist lawyers a year-long program in English. *See generally* MCGILL UNIVERSITY WEBSITE, at <http://www.mcgill.ca/> (last visited Mar. 14, 2004).

132. The shared meaning rule is discussed at length in BEAUPRÉ, *supra* note 102, pt. 1, 1–194. *See also* THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 326–32; SULLIVAN & DRIEDGER, *supra* note 49, at 80–94.

133. This follows from the most basic premise underlying the rule of law, namely that law is the same for all subjects. *See* R. v. O'Donnell, [1979] 1 W.W.R. 385 (B.C.C.A.).

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between persons with different identifications, could lead to impasse rather than resolution.¹³⁴

The shared meaning rule also assumes a one-to-one relationship between the meaning of a legislative text and the law.¹³⁵ This assumption is much harder to justify. As in other rules that refer to “the meaning” of a text, it is difficult to know what kind of meaning the interpreter has in mind: the dictionary meaning? the literal meaning? the meaning in context? If the reference is to meaning in context, how much context? To determine whether the two versions of a contested provision say the same thing, must both versions be read in their entirety? And are the two versions to be compared before or after other interpretive efforts, such as scheme analysis or reliance on presumed intent?

The highly inconsistent practice of the courts suggests that little thought has been given to these questions. They are rarely addressed in any formal way.¹³⁶ However, in a recent case involving interpretation of the Criminal Code, the Supreme Court of Canada had this to say:

In his *Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327, Pierre-André Côté reminds us that statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions. Where the words of one version may raise an ambiguity, courts should first look to the other official language version to determine whether its meaning is plain and unequivocal.

In this case, any ambiguity arising from the English version is resolved by the clear and unambiguous language of the French version of [section] 369(b). *There is therefore no need to resort*

134. Consider the dilemma that would arise if a court were called on to adjudicate between a litigant who relied on the clear meaning of the French version of a provision and a litigant who relied on the clear meaning of the English version of the same provision. The facts would be the same for both, but the applicable rule would differ. To apply a different rule, depending on linguistic affiliation, would both violate rule of law and fail to resolve the dispute.

135. This assumption is discussed in *Legal Bilingualism*, *supra* note 7, at 159.

136. See Ruth Sullivan, *Statutory Interpretation in the Supreme Court of Canada*, 30 OTTAWA L. REV. 175, at 192, 195 & nn. 45–47 (1998-99) [hereinafter *Statutory Interpretation in the Supreme Court of Canada*].

*to further rules of statutory interpretation, such as those invoked by the Court of Appeal.*¹³⁷

This passage seems to suggest that the shared meaning rule occupies top spot in a hierarchy of interpretation rules. Interpretation is to begin with a search for the shared meaning and to end if such a meaning is found. In effect, this analysis adopts the rhetoric and method of textualism:¹³⁸ if one version is ambiguous and the other is plain, the plain meaning not only resolves the ambiguity but renders any further interpretive effort superfluous.

At first glance it might seem that such an analysis is justified by the equal authenticity rule. If as a matter of constitutional law the two versions are equal, how can an interpreter validly reject the meaning found in both in favour of a meaning that is found in only one of them? And if the shared meaning must be adopted as a matter of constitutional law, what is the point of looking at other evidence of legislative intent?

In my view, this analysis is grounded in the faulty assumption that the law enacted by a legislature can be equated with the meaning of the words used to declare and communicate the law. Let us suppose that the primary duty of interpreters is to give effect to the law that the legislature intended to enact in so far as that intention can be known. The legislature's intention is necessarily an inference drawn from reading the text (whether unilingual or bilingual) in context, having regard to the purpose of the legislation, the consequences of adopting a proposed interpretation and admissible extrinsic aids. In drawing inferences, interpreters are obliged to take both language versions into account. But that does not entail accepting a shared meaning if there are other more compelling grounds to infer that some other meaning was intended.¹³⁹ The language of a text may or may not be an apt expression of the legislature's intention. It may be apt in one language but not in the other. There is no necessary relation between the clarity of a text and

137. *R. v. Mac*, [2002] 1 S.C.R. 856, para. 5–6 (emphasis added).

138. For the seminal modern account of textualism, see William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STANFORD L. REV.* 321 (1990).

139. *R. v. Compagnie Immobilière Ltée.*, [1979] 1 S.C.R. 865, at 874–75, paras. 16–17.

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its fidelity to the law that it is meant to declare. In order to determine what law was intended, interpreters must have access to the full range of techniques used to interpret legislation.¹⁴⁰ As the court itself noted in an earlier case, if the shared meaning of the two versions of bilingual legislation could not be rejected when it turns out to be implausible, the effect would be to permit mistranslation or drafting error to trump legislative intent.¹⁴¹

The *Mac* case can be used to illustrate the problems that arise from making shared meaning the definitive basis for inferring intended law. The issue in the case was the proper interpretation of the word “adapted” in section 369(b) of the Criminal Code:

ENGLISH	FRENCH
<p>369. Every one who...</p> <p>(b) makes, offers or disposes of or knowingly has in his possession any plate, die, machinery, instrument or other writing or material <i>that is adapted</i> and intended to be used to commit forgery</p> <p>...</p> <p>is guilty of an offence....</p>	<p>369. <i>Quiconque...</i></p> <p>(b) fait, offer ou aliéner ou sciemment a en sa possession quelque plaque, matrice, appareil, instrument ou autre écrit ou matière adaptés et destinés à servir pour commettre un faux</p> <p>...</p> <p><i>est coupable d'un acte criminel....</i></p>

Counsel for the Crown argued that “adapted” here means “suitable for” rather than “physically modified or altered,” and the court accepted this interpretation.¹⁴² It found that although “adapted” in the English version was ambiguous, “*adapté*” in the French version was clear — not because “*adapté*” normally means “suitable for” but because the legislature is presumed to use the same words to express the same meaning and different

140. *Id.* at 871–72.

141. *See Johnson v. Laflamme*, [1916] 54 S.C.R. 496, at 504–05.

142. *R. v. Mac*, [2002] 1 S.C.R. 856, para. 5–6.

words to express different meanings.¹⁴³ The court noted that in section 342.01(1)(d) of the Code, which dealt with a similar offence, the English word “adapted” was rendered in French not by “*adapté*” but by “*modifié*”:

ENGLISH	FRENCH
<p>342.01 (1) Every person who... (d) possesses any instrument, device, apparatus, material or thing that the person knows has been used or knows is <i>adapted</i> or intended for use in forging or falsifying credit cards is guilty of an offence...</p>	<p>342.01 (1) <i>Quiconque...</i> d) a en sa possession, <i>un instrument, un appareil, une matière ou une chose qu'il sait utilisé pour falsifier des cartes de crédit ou en fabriquer des fausses, ou qu'il sait modifié ou destiné à cette fin est coupable...d'un acte criminel...</i></p>

The wording of section 342.01(1) suggests that when the legislature means “physically altered” it uses the word “*modifié*” in the French version.¹⁴⁴ Since it used the word “*adapté*” in section 369 it must mean something different, the only possibility being “suitable for.”¹⁴⁵ This, then, must be the shared meaning of “adapted / *adapté*” in section 369.¹⁴⁶

The first problem with this reasoning is the arbitrary choice of context. The court might equally have relied on the dictionary meanings of “adapted / *adapté*” or considered those words in the context of section 369 alone. Had it taken this approach it would have judged both versions ambiguous and would have required a full analysis. Alternatively, it might have enlarged the context to include other provisions of the Code and discovered that, far from using language consistently, the Criminal Code is full of inconsistent terminology, the inevitable result of multiple amendments over the years. The court offers no justification for examining the disputed language in light of section 342.01(1) while ignoring other contexts, the purpose of the provision and possible extrinsic aids.

143. *Id.* at para. 7.

144. *Id.*

145. *Id.*

146. *Id.*

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A second problem with the court's approach in *Mac* is its conclusion that in sections 369 and 342 of the Code, the French drafter correctly used different words to express an intended difference in meaning, while the English drafter's use of the same words in the two sections was a mistake.¹⁴⁷ Once again, no justification is offered for its conclusion. Perhaps it was the French drafter who erred by using different terminology to express the same meaning. To determine which version correctly reflects legislative intent, it is necessary to canvass the entire body of relevant evidence; focusing on a single feature of the text is not enough.

The better view, and certainly the more widespread view, is that the shared meaning rule does not occupy a special position in statutory interpretation. Despite its constitutional origins, like the other so-called "rules" of statutory interpretation, it operates as a principle or presumption. The presumptive character of the shared meaning rule is spelled out very clearly by Justice Stone in *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)*:

As the recent decision in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862 indicates...the shared meaning rule is not absolute. [Judge] Gonthier maintained, at paragraph 25 [page 879], that a court is free to reject a shared meaning if it appears contrary to the intention of the legislature. To illustrate this point, Judge Gonthier quoted the following key passage from *R. v. Compagnie Immobilière BCN Ltée*, [1979] 1 S.C.R. 865, at pages 871-872:

...

"[The shared meaning rule] is a guide; it is one of several aids to be used in the construction of a statute so as to arrive at the meaning which, 'according to the true spirit, intent and meaning of an enactment, best ensures the attainment of its objects'....The rule...should not be given such an absolute effect that it would necessarily override all other canons of construction."

Thus, the shared meaning principle is not always determinative of the interpretive exercise, and will be discarded if an alternative interpretation leads to a preferable or more acceptable result.

147. *Id.*

...

Indeed, the jurisprudence suggests that the courts must continue to employ ordinary principles of statutory interpretation when construing bilingual legislation. The object of the inquiry, therefore, is to search out and give expression to the legislature's intention in light of statute's purpose, the context in which it was enacted and other interpretive strategies.¹⁴⁸

In short, equal authenticity requires interpreters to give equal attention to both versions in their efforts to determine legislative intent. But it does not require them to accept a shared meaning if there are grounds to believe that some other meaning was intended. In order to determine whether some other meaning was intended, they must resort to the full range of interpretive techniques.

D. Applications of the Shared Meaning Rule

One would think that the shared meaning rule would be most heavily relied on when the two versions of a statute say the same thing. Redundancy in the two versions suggests that the drafters have correctly reproduced their instructions and that the legislature had a clear and consistent understanding of what it was enacting, regardless of the version on which it relied. A coincidence of meaning between the two versions is a strong indicator of legislative intent and is undoubtedly relied on in practice by conscientious bilingual interpreters. But the shared meaning rule itself is rarely invoked in these circumstances.¹⁴⁹ Rather, it is reserved for cases where there is a perceived conflict between the two versions of the legislative text.

In the case law, the shared meaning rule is invoked and relied on when one language version of legislation is thought to be ambiguous while the other appears to be clear, and the clear meaning offers a plausible interpretation of both versions.¹⁵⁰ Under these circumstances, the shared meaning offers cogent evidence of legislative intent and may carry considerable weight

148. *Flota Cubana de Pesca v. Canada*, [1998] 2 F.C. 303, paras. 20, 21.

149. For a rare exception, see *R. v. Barnier*, [1980] 1 S.C.R. 1124 at para. 11.

150. THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49; SULLIVAN & DRIEDGER, *supra* note 49, at 80–87.

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— depending, of course, on *how* clear and plausible it is and whether other relevant considerations support or contradict it.¹⁵¹

When the two versions of legislation say different things, there is no shared meaning and the courts must resort to other interpretive strategies to resolve the conflict.¹⁵² In such cases, there are three possibilities. The court may adopt one of the versions on the grounds that it accurately expresses the legislature's intent while the other is flawed by drafting error.¹⁵³ It may conclude that neither version accurately expresses the legislature's intent and both drafters erred.¹⁵⁴ Or it may attempt to construct an interpretation that is grounded in both versions.¹⁵⁵

This last approach is illustrated by *Aeric Inc. v. Canada Post Corp.*¹⁵⁶ Rather than choosing between the language versions or rejecting both for some third alternative, the court in *Aeric* attempts to integrate the two. The issue in the case was the meaning of the expression “the principal business/l'activité principale” used in regulations under the Canada Post Corporation Act.¹⁵⁷ The applicant argued, on the basis of the English wording, that only profit-making activities could be considered in determining the “principal business” of a person.¹⁵⁸ The respondent relied on the French version to urge a broader interpretation which would permit consideration of any activity carried on by a person.¹⁵⁹ Judge Ryan responded to these arguments by constructing a meaning based on both versions, concluding that the expression “principal business/l'activité principale” referred to non-profit-making activities, but only if these activities were related to a business carried on by the person.¹⁶⁰

151. SULLIVAN & DRIEDGER, *supra* note 49, at 81–82.

152. *Id.* at 90–93.

153. *Id.* at 90 n.59.

154. While this is a theoretical possibility, I am unaware of any examples.

155. SULLIVAN & DRIEDGER, *supra* note 49, at 86–87.

156. *Aeric Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127 at para 60.

157. Canada Post Corporation Act, R.S.C., ch. C-10 (1985) (Can.).

158. *Aeric Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127.

159. *Id.* at para. 37.

160. As the *Aeric* court explained:

...the use of the term “l'activité principale” in the French version of para. (h) gives support to a wide reading of “principal business.” On the other hand, the use of “principal business” in the English version suggests that “l'activité principale” should be read in a somewhat more restricted way than a literal reading might suggest.

When one version of the legislation is broader in scope than the other, it is sometimes said that the narrower meaning should be preferred since this meaning is shared by both versions.¹⁶¹ However, this analysis has been repeatedly rejected by the courts.¹⁶² Unless the broader version is ambiguous and the narrower version is clear, there is no basis for invoking the shared meaning rule under these circumstances.¹⁶³ The proper approach when the scope of the versions differs, and both are more or less clear, is to rely on other interpretive techniques.

Two conclusions result from this brief survey. First, the shared meaning rule is normally invoked only at points of pathology in the preferred language text. In practice, the equal-but-separate model dominates. Second, when the shared meaning rule is invoked, the interpreter is called on not just to apply the text, but to establish it — to redraft it in effect. This has

Id. at para. 62.

161. See, e.g., *R v. Hinchey*, [1996] 3 S.C.R. 1128, at 1157; *Schreiber v. Canada*, [2002] SCC 62, at para. 56; *R. v. Daoust*, [2004] SCC 6, at para. 26.

162. For a review of the relevant cases, see Paul Salembier, *Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule?*, OTTAWA L. REV. (forthcoming 2004) (on file with author). See also SULLIVAN & DRIEDGER, *supra* note 49, at 82–83.

163. Courts frequently rely on THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 327 to justify their claim that when one version is broader in scope than the other, the common meaning is the narrower one. However, Côté has repudiated this position. Côté writes:

Il y a lieu de faire observer que si la prévalence de la version claire sur la version ambiguë se justifie rationnellement, puisque l'on doit présumer que la meilleure expression de la volonté législative est celle qui est exempte d'ambiguïté, il en va autrement de la prévalence de la version restreinte: il n'y a, à notre avis, aucun motif rationnel de préférer le sens le plus restreint, car rien ne permet d'affirmer qu'il représente mieux l'intention législative que le sens large. [It is worth noting that while the primacy of the clear version over the ambiguous version is rationally justified, for one must presume that the better expression of the legislature's will is the one that is free of ambiguity, the same cannot be said of the primacy of the narrow version: in my opinion, there is no rational basis to prefer the narrow meaning, for there is no justification for saying that it is a better expression of the legislature's will than the broader meaning.]

Pierre-André Côté, *L'Interprétation des textes législatifs bilingue au Canada* [The Interpretation of Bilingual Legislative Texts in Canada], in THE INTERPRETATION OF LEGAL TEXTS, *supra* note 99, at 12 (2002), (emphasis added).

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implications for the way we understand legislative text and the role of the judge in interpretation.

E. What Bilingual Legislation Reveals About Law

Bilingual legislation draws attention to aspects of legislation that courts tend to ignore since they don't sit well with the official mythology of statutory interpretation. First, it focuses attention on the way legislation is prepared and whose intentions in fact govern the way a legislative scheme is struck and legislative rules are formulated. In Canada, in practice, the legislature has a relatively modest role to play. The more important players are the Cabinet, which initiates all government sponsored legislation,¹⁶⁴ the bureaucrats in the sponsoring department who prepare the proposal to the Cabinet and instruct the legislative drafters,¹⁶⁵ and the drafters themselves who not only help determine the scheme and wording that bests gives effect to the instructions they have received, but also administer departmental duties such as ensuring that proposed legislation accords with the rule of law and other constitutional norms.¹⁶⁶

This focus on the realities of legislative preparation invites courts to pierce the legislative veil, so to speak, and to receive evidence or take judicial notice of how a particular piece of legislation was made — the drafting process and conventions current at the time of enactment, the time frame in which the bill was drafted and the real possibility of mistake. Were courts to pierce the legislative veil, they would quickly encounter the problem of bureaucratic pre-interpretation that arises when legislation is prepared in one language and subsequently translated into another, or when legislation is redrafted in the context of a statute revision. In both situations a bureaucrat is effectively given the task of resolving ambiguity in the existing legislative text without the benefit of interaction with instructing officers or legislative committees. Equally disconcerting, in both situations the bureaucrat is well positioned to create inadvertent conflict between the two language versions by misunderstanding the original text or offering an infelicitous translation or revision.

164. *See supra* note 15.

165. *Id.*

166. *See Sullivan Observations, supra* note 58.

A second effect of bilingual legislation is that it forces interpreters to distinguish the law enacted by the legislature from the words of the legislative text, in other words, to acknowledge that the wording of a text does not embody or contain the law but is merely a basis for inferring the law.¹⁶⁷ Even though the two versions of a legislative text say different things, they are nonetheless taken to express the same rule of law.¹⁶⁸ This is possible only because the enacted law is not equivalent to the text, but is a construction inferred from reading the words of the text in context and relying as well on other evidence of legislative intent. This recognition is important because it undermines the basic assumption underlying textualism, namely that law is contained in the words of the legislative text.¹⁶⁹

IV. INTERPRETING MULTIJURAL LEGISLATION

Like the United States, Canada is a bijural federation in the sense that it contains internal jurisdictions most of which apply the common law but one that applies civil law, at least in private law matters.¹⁷⁰ In both countries as well, there are areas where Aboriginal law and institutions have a growing role to play.¹⁷¹ This creates challenges for legislatures, which must ensure that their enactments mesh in an appropriate way with the other legal systems within the federation.

Québec's first civil code came into force in 1866, a year before Confederation.¹⁷² At Confederation, under the federal - provincial division of powers established by the Constitution Act, 1867, the provinces retained jurisdiction over matters of property and civil rights in the Province, subject to Parliament's paramount jurisdiction over matters explicitly assigned to the

167. See THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 327; *Legal Bilingualism*, *supra* note 7, at para. 47.

168. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

169. See *Statutory Interpretation in the Supreme Court of Canada*, *supra* note 136, at 203 & n.245.

170. See generally LA. REV. STAT. ANN. vols. 16-17 (1972 & Supp. 2000); Civil Code of Québec, ch. 64, 1991 S.Q. (Can.).

171. See *supra* note 29 and authorities cited therein.

172. Civil Code of Lower Canada, adopted pursuant to 29 Vict., ch. 41 (1865) (Can.), available at http://www.canadiana.org/citm/specifique/lois_e.html (last visited Mar. 4, 2004).

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federal Parliament.¹⁷³ These include bankruptcy, marriage and maritime law — matters that would otherwise come within property and civil rights.¹⁷⁴ Parliament also has jurisdiction over matters such as criminal law, federal taxation and federal Crown liability, each of which necessarily interacts with provincial law governing property and civil rights.¹⁷⁵

In legislating about matters within its jurisdiction, Parliament can create its own concepts and institutions, declare its own doctrines and governing principles and devise its own rules.¹⁷⁶ Federal legislation is paramount over provincial law to the extent of any conflict.¹⁷⁷ However, even though Parliament, when acting within its jurisdiction, is legally entitled to disregard provincial law,¹⁷⁸ as a practical matter it could not and would not want to do so. In most cases the best way to achieve federal objectives in areas involving property and civil rights is to make use of existing provincial law concepts, institutions, and principles. Since these may be different in Québec and the common law provinces, federal legislation that draws on provincial law is bijural — and multijural to the extent law reform in the common law provinces proceeds along varying paths. Even when Parliament opts for unijuralism and creates a single federal regime that is meant to operate uniformly throughout the country, if the legislation deals with property or civil rights, at some point it must come in contact with provincial law.

Rod Macdonald has suggested that in a federal system legislatures have a duty to minimize conflict and incoherence between national and local law.¹⁷⁹ Arguably this is an aspect of the rule of law. However, when legislatures fail to discharge

173. See CAN. CONST. (The Constitution Act, 1867) pt. IX, § 129. Under section 129, pre-existing law was continued until altered by the appropriate legislature. *Id.*

174. See CAN. CONST. (Constitution Act, 1867), § 91 (setting out “matters” assigned to Parliament).

175. *Id.*

176. See HOGG, *supra* note 26, at 307–08.

177. CAN. CONST. (Constitution Act, 1867) § 91.

178. This follows from the doctrines of sovereignty and paramountcy.

179. Roderick A. Macdonald, *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Québec Civil Law*, in THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC AND CANADIAN BIJURALISM 29, 41–42 (1997) [hereinafter *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law*].

this duty, the task falls to the courts and must be managed through interpretation.

The challenge for courts is to identify the ways in which and the extent to which particular legislation is bijural and to factor that analysis into their interpretation. There is a range of possibilities here.

(1) Federal legislation may expressly incorporate by reference a clearly identified set of provincial rules. For example, the rules governing vehicular traffic on federal property are the rules of the province in which the property is situated.

(2) Federal legislation may create a scheme designed to work within provincial law. For example, the Bankruptcy and Insolvency Act presupposes that the legal relations between a bankrupt person and his or her creditors have been fixed by provincial law; it merely declares the consequences of those relations in situations of bankruptcy. The federal rules are superimposed on provincial law.

(3) Federal legislation may use terms of art from both common law and civil law — for example “real property and immovables / *biens réels et immeubles*” — with the intention of relying on the common law in the common law provinces and on civil law in Québec.

(4) Federal legislation may use a term of art from the common law — for example, exemplary damages — with the intention of relying on the common law in both common law provinces and Québec. The reverse is equally possible, although historically it rarely has occurred.

(5) Federal legislation may create a new concept or institution or declare a new principle that is intended to displace provincial law. Such a concept, institution or principle might draw on both common law and civil law sources, on international law or Aboriginal law, or it might be an original creation.¹⁸⁰

Possibilities 1-3 describe legislation that is bijural in a suppletive sense: the provincial law of both the common law provinces and Québec is relied on to supplement, that is, to explain or complete, federal legislation. The result is that federal law may have somewhat different effects in different provinces.

180. For other analyses of the range of possibilities, see Maguire Wellington, *supra* note 88, at 3 & n.7; REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE, *supra* note 94.

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Suppletive bijuralism is the chief focus of the federal harmonization program and it promotes an equal-but-separate model of bijuralism. By contrast, possibilities 4 and 5 refer to legislation that is unijural in the sense that the rule set out in the federal text is meant to have the same meaning and apply in the same way throughout Canada.¹⁸¹ Any concept, institution or principle referred to in a unijural rule must be given the same meaning in all the provinces. However, the meaning given to this uniform concept, institution or principle may itself be bijural (or multijural) in a derivative sense; that is, it may be derived from two (or more) legal sources. This form of bijuralism is based on the model of dialogue and integration.

Historically, the challenges of working with two legal systems in a federal state have been felt much more in Québec than elsewhere in Canada.¹⁸² The main factor here is the dominance of the common law at both the federal and provincial levels. Public law throughout the country is unijural common law.¹⁸³ Further, when Parliament wants to impose a uniform rule to govern a private law matter within its jurisdiction, it typically has relied on common law sources.¹⁸⁴ This allows for the easy harmonization of federal and provincial law in the common law provinces but creates major problems for Québec. Another factor was the modest attention paid to developing effective techniques for drafting bijural legislation.¹⁸⁵ This, combined with the poor quality of the French language version, often made it difficult for interpreters to discern Parliament's intent in relation to Québec.¹⁸⁶ Finally, there was the gradual but significant erosion of the Civil Code of Lower Canada as a complete and

181. My use of the term "unijural" differs from that of the Department of Justice, which uses it in a derivative sense to refer to terms or concepts derived from the common law alone or the civil law alone.

182. Most of the case law addressing harmonization problems comes from Québec. SULLIVAN & DRIEDGER, *supra* note 49, at 94.

183. *See supra* note 75.

184. At least that was the case in the past. It remains to be seen whether the harmonization program, along with other factors such as globalization, will work to produce a more balanced approach.

185. *See supra* note 7.

186. *See, e.g.*, Deputy Minister of Rev. (Que) v. Rainville, [1980] 1 S.C.R. 35, 41.

authentic embodiment of Québec's *jus commune*.¹⁸⁷ This erosion was caused in part by reliance on common law cases to interpret the Code, first by the Privy Council and later by the Supreme Court of Canada, whenever a concept or rule set out in the Code seemed to be more or less the same as a common law concept or rule.¹⁸⁸ Such reliance not only distorted the substantive law of the Code but also undermined civil law methodology by focusing on precedent instead of doctrine.¹⁸⁹ Another contributing factor was the Québec legislature's reliance on ordinary statute, rather than Code amendment, as a tool of law reform.¹⁹⁰ The absence of a fully functioning civil code made assimilation to the common law that much easier.¹⁹¹

On January 1, 1994, the Civil Code of Québec came into force and created an opportunity to address these historical problems.¹⁹² The federal government has responded to this opportunity in a serious and comprehensive way. While its response has many dimensions, this Article focuses on the creation of new scholarship with a civil law emphasis, the methodology of harmonization, the interpretation of harmonized legislation, derivative bijuralism and the independence of language and law.

A. New Scholarship

In 1993, in anticipation of the new code, a Civil Code Section was established within the Department of Justice.¹⁹³ It began its work by organizing a series of studies and reports.¹⁹⁴ The Section commissioned academic lawyers to write papers analyzing the constitutional framework within which harmonization occurs in Canada, exploring points of contact between federal

187. See Roderick A. Macdonald, *Encoding Canadian Civil Law*, in THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW AND CANADIAN BIJURALISM 164–70 [hereinafter *Encoding Canadian Civil Law*].

188. See Allard, *supra* note 45, at 3–7.

189. See *id.* at 8.

190. See *Encoding Canadian Civil Law*, *supra* note 187.

191. *Id.*

192. See Dion, *supra* note 86.

193. See Maguire Wellington, *supra* note 88, at 2, app. II.

194. These are described in CAN. DEPT. OF JUSTICE, CONSULTATIONS & OUTREACH, SECOND SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC, at <http://canada.justice.gc.ca/en/cons/harm/note.html> (last visited Mar. 19, 2004, 2004).

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and civil law and recommending policies to govern the work of harmonization and interpretation of the finished product.¹⁹⁵ Two important things emerge from these studies: first, a set of concepts and principles concerning harmonization within a federal system, including most notably the concepts of complementarity and dissociation, and second, a set of techniques for dealing with bijuralism in a bilingual jurisdiction.

1. Complementarity versus Dissociation: a Civilist Coup

A striking feature of the scholarship commissioned by the government is its nearly exclusive reliance, in the early stages at least, on civil law lawyers to develop the policies, methodologies and interpretation rules designed to govern the relationship between federal legislation and provincial law — not only the law of Québec, but the law of all the provinces and territories.¹⁹⁶ The harmonization of federal and provincial law in Canada is evolving as a largely civilist project, based on assumptions that are remote from common law thinking.¹⁹⁷ There is irony here, and more than a little poetic justice.¹⁹⁸ One can

195. The academic papers have been collected in a series of published collections. See CAN. DEPT. OF JUSTICE, *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE QUÉBEC CIVIL LAW AND CANADIAN BIJURALISM, COLLECTION OF STUDIES* 165–68 (1997); CAN. DEPT. OF JUSTICE, *HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* (2nd publication 2001), available at <http://canada.justice.gc.ca/en/dept/pub/hfl/table.htm> (last visited Mar. 20, 2004); Didier Lluellas, *Harmonization of the Bankruptcy and Insolvency Act with Québec Civil Law: Editor's Comment*, 37 *REVUE JURIDIQUE THEMIS* 1 & 2 (2003); Marc Cuerrier et al., *Canadian Bijuralism and Harmonization of Federal Tax Legislation*, 51 *CAN. TAX J.* 1 (2003) (special issue on the harmonization of the federal income tax with Québec civil law).

196. The Harmonization Program was initially a project of the Civil Code Section of the Department of Justice, even though it was designed not only to adapt federal legislation to the new Civil Code but also to ensure the French version of federal legislation operates appropriately in common law Canada. The contributors to the first collection of studies were all jurists from Québec. Yet the amendment to the Interpretation Act developed by the Section applies to the whole of Canada. This amendment is set out and discussed below.

197. For example, the notion of a pre-existing, self-contained and coherent *jus commune*, which lies at the heart of the Harmonization Program, is a civilist notion.

198. Since Confederation, Québec has had to adapt to a unilingual, common law based conception of federal law, with little appreciation by the rest of Canada of the difficulties involved. As a result of the Harmonization Pro-

readily appreciate the impulse of Québec scholars to do everything possible to secure the borders of the new civil code. Nonetheless, I believe that this exclusively civilist orientation in the federal harmonization project is a mistake. Ignoring the common law, or assuming that it is identical to civil law, is no less inappropriate than ignoring civil law and its significant differences. Furthermore, the civilist approach to harmonization has implications for the development and interpretation of federal legislation that in my view are unfortunate.

The assumptions underlying the federal harmonization project are well expressed by Jean-Maurice Brisson and André Morel in an influential paper prepared for the Department of Justice in 1995, in which they assert the following:

[T]he relationships between the civil law and federal legislation are fully analogous to those between Québec statutes and the Civil Code. The latter...establishes...the *jus commune*. As such, it is called on to complement "other laws, although other laws may complement the Code or make exceptions to it".¹⁹⁹ The same is true of federal legislation when it deals with some issues of private law; the civil law may add to it, in which case there is a relationship of *complementarity* between the two, or the federal statute may, on the contrary, derogate from the private law, in which case there is a *dissociation* between them.²⁰⁰

gram, common law Canada may now encounter some adaptation difficulties of its own.

199. Brisson and Morel here refer to the preliminary provision of the Civil Code of Québec, which provides in full:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

Civil Code of Québec, ch. 64, 1991 S.Q. (Can.) (preliminary provision).

200. Jean-Maurice Brisson & André Morel, *Federal Law and Civil Law: Complementarity and Dissociation*, in CAN. DEPT. OF JUSTICE, THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUÉBEC CIVIL LAW AND CANADIAN BIJURALISM, COLLECTION OF STUDIES 2, 217 (1995) (emphasis added).

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Brisson and Morel go on to point out that in all the provinces, because the private law of the province (whether civil law or common law) constitutes the *jus commune*, federal law is essentially dependent on provincial law. Whereas the *jus commune* is a coherent and autonomous system of law, statutes are essentially departures from the *jus commune*; they may alter or add to a particular rule or principle, but ultimately they operate within the established terms, principles and institutions of the *jus commune*. Brisson and Morel conclude:

Whenever a federal statutory provision uses a private law concept without defining it or otherwise assigning some specific meaning to it, and whenever a statute falls short of comprehensively governing a question of private law or lacks a formal incorporating provision, the omission must be remedied by referring to one of the two legal systems in force.²⁰¹

This analysis has become the major article of faith underlying the current harmonization program. In a recent consultation document concerning the second series of harmonization proposals, the Department declares:

The bijural status of Canada and its legislation, coupled with the fact that federal legislation, taken as a whole, does not constitute an autonomous legal system, means that when Parliament is silent on the meaning to be given to a private law expression to which reference is made, it is necessary to refer to the applicable provincial private law for interpretation. This is known as the principle of complementarity. Furthermore, a standard or rule of provincial law will supplement a federal statute that is silent on a question relating to property and civil rights. The provincial private law is then applied in a suppletive manner to the federal statute. For example, when reference is made in a federal statute to the concept of lease without any further qualification, it is the private law of the province that will provide, on a suppletive basis, a definition of this concept. Similarly, a federal statute that does not provide specific rules with respect to successions will be interpreted, on a suppletive basis, according to the rules of provincial private law.

201. *Id.* at 30. See also Jean-Maurice Brisson, *L'impact du Code civil du Québec sur le droit fédéral: une problématique* [The Impact of the Civil Code of Québec on federal law: an examination of the issues], 52 R. DU B. 345, 352–53 (1992).

However, federal law may derogate from private law and establish its own rules and the federal rule may then become or more or less autonomous. This is called a relationship of dissociation.²⁰²

While these analyses are not inaccurate, in my view they are inadequate. First, they leave out of account the ordinary role of judicial interpretation in completing legislation, not only in common law systems but in civil law systems as well. Second, they imply that derogations from private law are anomalous and exceptional. This verges on essentialism²⁰³ and supports a conservative approach to law.

The distinction between complementarity and dissociation developed by Brisson and Morel partly tracks an important distinction in common law between reform legislation and program legislation.²⁰⁴ While reform legislation is designed to operate within the context of the common law,²⁰⁵ program legislation relies on autonomous principles and original institutions to give effect to legislative policies.²⁰⁶ Progressive legislative initiatives often seek to displace the common law with legislative schemes that reflect new approaches to issues such as labour relations (union legislation) or automobile insurance (no-fault schemes).²⁰⁷ Not only is there nothing anomalous or exceptional about such legislation, but it is a standard tool of reform. In interpreting

202. CAN. DEPT. OF JUSTICE, INTRODUCTORY NOTE – PUBLIC CONSULTATIONS, SECOND SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, at <http://canada.justice.gc.ca/en/cons/harm/note.html> (last viewed Jan. 15, 2004).

203. Essentialism is the view that language and legal culture are intimately and inextricably linked such that it is impossible to produce an authentic common law in French or an authentic Civil Code in English. For discussion, see Elmer Smith, *Peut-on faire de la common law en français? [Is It Possible to Do Common Law in French?]*, 3 R.DE L'UNIVERSITÉ DE MONCTON 39 (1979); Jean-Claud Gémard, *L'interprétation du texte juridique ou le dilemme du traducteur [The Interpretation of Legal Texts or the Translator's Dilemma]*, in THE INTERPRETATION OF LEGAL TEXTS, *supra* note 99, at 103 (2002).

204. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Frank P. Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 DALHOUSIE L. J. 228, 251 (1985).

205. SULLIVAN & DRIEDGER, *supra* note 49, at 201.

206. *Id.* at 202.

207. See, e.g., Canada Labour Code, R.S.C., ch. L-2 (1985) (Can.); Statutory Accident Benefits Schedule – Accidents on or After Nov. 1, 1996, O. Reg. 403/96, enacted under the Insurance Act, R.S.O., ch. 18 (1990) (Can.).

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such legislation, before turning to the common law, the courts appropriately look to the principles and policies that are expressly set out or are implicit in the legislative scheme.²⁰⁸

The final (and most important) point is that there is no reason why the federal Parliament, acting within its jurisdiction, should favour reform legislation or seek to preserve the *jus commune* of the provinces. Obviously, a major reason for giving jurisdiction over a matter to Parliament in the first place was to displace variable provincial law with uniform federal law. This purpose must be taken into account when dealing with federal legislation. All this is ignored in the Brisson – Morel analysis.

2. Techniques for drafting bijural legislation²⁰⁹

As mentioned above, a key challenge in interpreting Canadian federal legislation is to determine whether Parliament intended a given provision to be bijural or unijural. The way in which a provision is drafted can be a good indicator of legislative intent. Consider the following:

DRAFT NO.	ENGLISH	FRENCH
1	an act of God	cas fortuit ou force majeure
2	an act of God	un acte de Dieu
3	a fortuitous or uncontrollable cause	cas fortuit ou force majeure
4	unforeseeable and uncontrollable circumstances.	des circonstances imprévisibles et irrésistibles.

In common law “an act of God” is a legal term of art;²¹⁰ in civil law “cas fortuit or force majeure” is similarly a legal term of art,²¹¹ but it differs from its common law analogue in recognizing the acts of third parties as a potential cause of non-liability.²¹²

208. See SULLIVAN & DRIEDGER, *supra* note 49, at 202.

209. The account which follows is based on REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE, *supra* note 94. See also Maguire Wellington, *supra* note 88, at 8–10.

210. See PHILIP OSBORNE, *THE LAW OF TORTS* 306 (2000).

211. See Civil Code of Québec, ch. 64, Art. 1470, para. 2, 1991 S.Q. (Can.).

212. See *Gulf Oil Canada Ltd. v. C.P.R.*, [1979] C.S. 72, 75 (Que.).

In Draft 1 above, the common law term of art is used in the English version and the civil law term of art is used in the French version. This drafting technique normally signals that the common law concept is to be applied in the common law provinces and the civil law concept is to be applied in Québec.²¹³ This was the primary method used to create bijural texts before 2001.²¹⁴

In Draft 2, the common law term of art is used in the English version and a translation of that term is used in the French version, ignoring the civil law analogue. This drafting technique signals that the common law concept is meant to be applied in Québec as well as the rest of Canada.²¹⁵ In Draft 3, we have the obverse: the civilist term is translated into English, ignoring the common law analogue. Again, this suggests that a single rule — in this case the civil law rule — is meant to apply across the country.²¹⁶

In Draft 4, existing terms of art from both systems are avoided. This drafting technique invites interpreters to devise an understanding of the language that is rooted in the purpose and context of the legislation in which the language appears.²¹⁷ This understanding might draw on both common and civil law, and other sources as well.

In its review of bijural drafting techniques, the harmonization program focused on developing alternatives to the technique used in Draft 1, in which common law terminology is used in the English text while civil law terminology is used in the French version. It was looking for alternative ways to create texts that are bijural in the suppletive sense explained above.²¹⁸ From a practical perspective, its purpose was to ensure that the

213. This understanding is codified in section 8.2 of the federal Interpretation Act. See Interpretation Act, R.S.C., ch. I-23, § 8.2 (1985) (Can.).

214. This drafting approach is reflected in section 8.2 of the original Official Languages Act. See Act of July 9, 1969, ch. O-2, §8(2)(c), 1970 S.C. (Can.)(repealed).

215. See, e.g., *Novotny Estate v. R.*, [1994] 2 C.T.C. 2274, para. 12.

216. I am unaware of any example of this in federal legislation.

217. This drafting approach might be adopted in legislation designed to implement international treaties or land claim agreements with Aboriginal peoples.

218. See REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE, *supra* note 94, at 3, 12; Wellington, *supra* note 88, at 8 & n.24. Suppletive bijuralism is explained *supra* at p. 41.

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text of federal legislation gives meaningful access to the law for Francophones in common law Canada and Anglophones in Québec.²¹⁹ At a symbolic level, its purpose was to tell readers of the statute book that Canada is a bilingual, bijural place.²²⁰ The following sets out the techniques canvassed by the project.

TECHNIQUE	ENGLISH	FRENCH
<i>Single Term Fits All</i>	contract “contract” is the English term both for civil law and for common law contracts. It should be understood to refer to civil law in Québec and common law elsewhere.	<i>contrat</i> “ <i>contrat</i> ” is the French term for both civil law and common law contracts. It should be understood to refer to civil law in Québec and common law elsewhere.
<i>Doublets</i>	real property or immovables “real property” is the English term for the common law concept while “immovables” is the English term for the analogous civil law concept. In the English version, the common law term comes first.	<i>immeubles ou biens réel</i> “ <i>immeubles</i> ” is the French term for the civil law concept while “ <i>biens réel</i> ” is the French term for the analogous common law concept. In the French version, the civil law term comes first.

219. “The policy on legislative bijuralism aims at providing Canadians with federal legislative texts that will reflect, in each linguistic version, the legal system in use in their province.” Maguire Wellington, *supra* note 88, at 22 (quoting the Canadian Department of Justice’s Policy on Legislative Bijuralism).

220. See McLellan, *supra* note 92, at v.

TECHNIQUE	ENGLISH	FRENCH
<i>Partial Doublet</i>	mortgage or hypothèque “mortgage” refers to a common law security interest in real property while “hypothèque” refers to an analogous civil law security interest in immovables.	hypothèque In French, a single expression “ <i>hypothèque</i> ” is used to refer to the civil law security interest in immovables and the analogous common law interest in real property.
<i>Paragraphed Doublet</i> ²²¹	“liability” means (a) in the Province of Quebec, extracontractual civil liability, and (b) in any other province, liability in tort.	"responsabilité ": (a) <i>dans la province de Québec, la responsabilité civile extracontractuelle;</i> (b) <i>dans les autres provinces, la responsabilité dilictuelle.</i>
<i>Generic Language</i>	accept security for payment ²²² This phrase applies to all forms of security available under any provincial law.	<i>accepter des garanties pour le paiement</i> This phrase applies to all forms of security available under any provincial law.

It will be noted that each of these techniques presupposes complementarity rather than dissociation. The project did not address methods for expressing the intention to create unilingual federal law.

221. A paragraphed doublet can be used to set out either definitions or rules.

222. This language is broad enough to encompass both common law and civil law ways of securing payment as these exist from time to time. This method is preferred by drafters because it is less cumbersome and eliminates the need to amend the federal text when provincial law changes.

2004] *MULTILINGUAL, MULTIJURAL LEGISLATION* 1035*B. The Methodology of Harmonization*²²³

The federal harmonization program applies to both new and existing legislation.²²⁴ To deal with new legislation, federal drafters have received training in the techniques of bijural drafting described above, and federal bills with a significant private law component are vetted by specialists in the Civil Law Section of the Department of Justice.²²⁵ To deal with existing legislation, the Civil Law Section has undertaken a revision of the federal statute book to ensure that its references to the law of property and civil rights are appropriately harmonized with Québec's new Civil Code. Close to half of federal statutes will have to be amended as a result of this initiative.²²⁶

The harmonization revision has the strengths and weaknesses of all revisions. On the plus side, it gives the government a chance to correct drafting mistakes and infelicities in its legislation and to implement new drafting policies.²²⁷ It is thus a way of adapting the statute book to evolving notions of law and the state's relation to those it governs. The current initiative tells Québeckers that the federal government recognizes the importance of the new Civil Code and will go to considerable trouble to ensure respect for its autonomy. It also tells the linguistic minorities in Québec and the rest of Canada that their interests matter. As mentioned above, these symbolic statements are important in multilingual, multicultural societies.²²⁸

The down side of a revision process is that it effectively hands the power to resolve interpretation issues to bureaucrats instead of courts. Under the federal harmonization program, the lawyers who staff the program must review federal legislation to determine the relationship between federal legislation and provincial law.²²⁹ They must consider whether this relationship is adequately expressed, having regard to the principles of com-

223. For a detailed account of the methodology of harmonization, see Maguire Wellington, *supra* note 88, at 3–8.

224. *Id.* at 8, 13.

225. See Gervais, *supra* note 97, at 12.

226. *Id.* at 12.

227. See SULLIVAN & DRIEDGER, *supra* note 49, at 533–34.

228. For discussion of the symbolic dimension of the statute book, see *Some Implications of Plain Language Drafting*, *supra* note 48, at 182–87.

229. See Maguire Wellington, *supra* note 88, at 6; Gervais, *supra* note 98, at 12.

plementarity and dissociation, the terminology of the new Civil Code, and the terminology of the common law in French.²³⁰ Finally, they must propose amendments to existing federal law when, in their view, the existing text of federal legislation fails to express what they take to be the correct relationship between federal and provincial law.

The practice of allowing bureaucrats to resolve interpretation issues before they come to the attention of the courts is troubling for a number of reasons. First, bureaucrats generally lack the experience and expertise of judges. Historically, in Canada most revision work has been carried out by non-lawyers. Second, revision work goes on in private, without explanation or meaningful review. Although modern revisions are subject to legislative scrutiny, this scrutiny is minimal at best. Legislatures lack the time and incentive to second guess the sort of work carried out in a revision, especially on the vast scale of a general revision. In principle, this should not matter since the changes proposed by revisors are purely technical; although the form of the law may change, the substance remains the same. In practice, however, revision work often involves substantive change. Revisors are called on to resolve ambiguities, correct drafting errors and modernize legislative style. To carry out these tasks, they must interpret the existing legislative text, and in doing so they inevitably rely on their own linguistic intuitions, which may or may not be informed by appropriate legal and social knowledge.

These concerns are addressed to some extent in the current harmonization program. The program's staff consists of lawyers with expertise in civil law and comparative law and the Department consults widely with scholars and the general public.²³¹ In addition, the Department publishes what it calls biju-

230. See Maguire Wellington, *supra* note 88, at 4–7; Gervais, *supra* note 98, at 16.

231. For a description of the consultation, see CAN. DEPT. OF JUSTICE, CONSULTATION PAPER, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, 6–8 (1999). See generally PUBLIC CONSULTATIONS DOCUMENT, SECOND SERIES OF PROPOSALS, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, 4–6 (2003).

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ral terminology records.²³² These describe the bijuralism problems that have been detected in a federal statute, summarize the research carried out in response, and explain the reasoning behind each solution adopted.

While reassuring to a degree, these measures do not address the most disturbing feature of the current harmonization program. This is its strong preference for supplementary bijuralism as reflected in the principle of complementarity — as opposed to derivative bijuralism (or multijuralism) reflected in the principle of dissociation. The terminology records do not refer to factors such as legislative purpose and scheme, avoiding absurd outcomes or the conventions on which analysis of legislative text is normally based. Instead of attempting to establish the intended relationship between federal and provincial law by referring to the range of relevant factors, they assume a relationship of complementarity. This narrow, single-dimensional approach to the interpretation of federal legislation departs quite significantly from the standard, multi-dimensional approach practiced by the courts.²³³

C. Rules for Interpreting Bijural Legislation

The most significant work of the harmonization program to date has been the addition of the following provisions to the federal Interpretation Act:²³⁴

232. These records are found at CAN. DEPT. OF JUSTICE, BIJURAL TERMINOLOGY RECORDS, CIVIL LAW AND COMPARATIVE LAW SECTION LEGISLATIVE SERVICES BRANCH, *available at* <http://Canada.justice.gc.ca/en/ps/bj/harm/> (last visited Mar. 19, 2004).

233. The leading case is *Re Rizzo v. Rizzo Shoes*, [1998] 1 S.C.R. 27.

234. Interpretation Act, R.S.C., ch. I-21, §§ 8.1, 8.2 (1985), as amended by Harmonization Act, No. 1, ch. 4, 2001 S.C. (Can.).

ENGLISH	FRENCH
<p>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 or concepts in force in the province at the time the enactment is being applied.</p>	<p>8.1. <i>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.</i></p>
<p>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 Québec and the common law terminology or meaning is to be adopted in other provinces.</p>	<p>8.2. <i>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 de ces systèmes.</i></p>

Sections 8.1 and 8.2 each contain three distinct provisions. The first is contained in the opening words of section 8.1, which assert that the common law and civil law are equally authoritative sources of law in Canada.²³⁵ Thus, when courts encounter original federal terminology — i.e., terminology that does not obviously belong to either the common or civil law — they must not presume that Parliament intended to adopt a common law

235. See Molot, *supra* note 96, at 13.

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concept, institution or principle.²³⁶ Rather, they must presume that Parliament gave as much consideration to civil law as it did to common law in devising its own concept, institution or principle. One system is not favoured over the other.

However, the opening words of section 8.1 do not make common law and civil law the only sources of federal law. Parliament may draw on the concepts, institutions or principles of other systems of law, including not only international law, but also Aboriginal law and the law of foreign jurisdictions.²³⁷ Parliament may also create concepts, institutions or principles that do not derive from any existing system of law, or that begin in but go beyond their source in an existing system of law.

The second provision in section 8.1 establishes that federal references to provincial law are ambulatory rather than static. When a federal law refers to a provincial rule, principle or concept, it refers to that rule, principle or concept as it exists in the province of application “at the time the enactment is being applied [*au moment de l’application du texte*].”²³⁸ I find this language difficult to understand. Presumably it refers to the time when the legally relevant facts occurred. Presumably there is no intention to alter existing temporal application rules, but merely to ensure that references to concepts, institutions or rules of provincial law are understood to refer to provincial law as it exists from time to time.

I must acknowledge, however, that my reading of the second part of section 8.1 is much narrower than that of other commentators. It is widely assumed that that the second part of the provision (along with section 8.2) effectively enacts into law the principle of complementarity.²³⁹ I reject this assumption. In my

236. *Id.* at 14.

237. *Id.*

238. See Marie-Noelle Pourbaix, *S-4: A First Harmonization Bill*, in 6 *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* 7, (2nd publication 2001), available at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6(a)_eng.pdf) (last visited Mar. 19, 2004); Molot, *supra*, note 96, at 15.

239. In the consultation paper on harmonization published by the Department of Justice in 1999, the following appears:

These rules [§§ 8.1 and 8.2 of the Interpretation Act] are designed to recognize the suppletive role of civil law and the common law in federal law and to entrench bijuralism....The first provision is designed

view, properly understood, section 8.1 does not codify the principle of complementarity.

The first thing to notice is that section 8.1 does not state that provincial law applies unless it is expressly excluded by federal legislation. Rather, the provision states that provincial law applies if (1) “in interpreting an enactment *it is necessary/ il est nécessaire* to refer to a province’s rules, principles or concepts....”²⁴⁰ and (2) the law does not provide otherwise. The first task then is to decide if a reference to provincial law is necessary in order to make sense of the enactment and to apply it to particular facts. In a paper prepared for the federal government on the harmonization of federal tax legislation with provincial law, David Duff writes:

...[T]he first condition, that it must be “necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights” to interpret the enactment,...would seem to be satisfied where the enactment relies on or employs a concept with an established private law meaning that is not defined in federal legislation, relies on private law rules or principles to define the legal relationship to which it applies, or is silent on a matter that is governed by a specific provincial rule forming part of the law of property and civil rights. Since the enactment cannot be applied without relying on the private law rules, principles or concepts, it follows that it is “necessary to refer to [them].”²⁴¹

to expressly recognize Canadian bijuralism and to *expressly recognize the complementarity of federal law and the provincial law of property and civil rights*.

CAN. DEPT. OF JUSTICE, CONSULTATION PAPER, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, PROPOSED LEGISLATIVE AMENDMENTS, at 10 (emphasis added). This understanding is supported by the preamble to the *Federal Law – Civil Law Harmonization Act, No. 1* and in particular the fourth recital which states: “Whereas the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law...” Federal Law—Civil Law Harmonization Act, No. 1, ch. 4, preamble, 2001 S.C. (Can.).

240. Interpretation Act, R.S.C., ch. I-21, § 8.1 (1985), amended by ch. 4, pt. 2, 2001 S.C. (Can.).

241. David Duff, *The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation and Canadian Bijuralism*, 51 CAN. TAX. J. 1, 48 (2003).

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The unstated assumption here is that in interpreting a federal enactment, judges have no jurisdiction to develop and apply distinctly federal concepts or principles based on their reading of the federal text in the context of Canadian law generally (both federal and provincial) as well as in the context of other sources. In other words, the only legitimate legal context for interpreting federal legislation that deals with property or civil rights is provincial law and more particularly the *jus commune* embodied in the Civil Code in Québec or scattered through case law and legislation in the common law provinces. With this approach, as pointed out by Brisson and Morel, the relation between federal law and provincial law is the same as the relation between ordinary Québec legislation and the Civil Code of Québec.²⁴² The *jus commune* is established at the provincial level, while federal legislation is a *loi d'exception*.

There are several threads of thought here. First, there is the undeniable fact that legislative texts are always incomplete and require interpretation.²⁴³ As Rod Macdonald writes, "No statute, not even a civil code...is self-sufficient. There will always be some body of unenacted law that provides the normative support for the terms, concepts and institutions enacted by legislation."²⁴⁴ The job of the interpreter can be seen as bringing support to the text in order to complete it. The challenge is identifying the relevant support.

A second thread is the notion of a *jus commune* comprising a coherent, complete and self-contained legal system. This obviously reflects a civilist conception of law. Macdonald helps us understand the significance of the notion by distinguishing among the following overlapping, but distinct categories: (1) *Common Law*: the legal tradition including equity that originated in England and was introduced into most British colonies; (2) *common law*: a method of making new law through court judgments; (3) *unenacted law*: principles, policies and concepts derived by interpreters from constitutional texts, international conventions, legislation, doctrine, case law, custom and

242. Brisson & Morel, *supra* note 200, at 217.

243. For discussion, see *Statutory Interpretation in the Supreme Court of Canada*, *supra* note 136, at 208–10, (1998–99).

244. *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law*, *supra* note 179, at 44.

shared public values; (4) *jus commune*: the body of rules, principles and concepts that constitute the foundation of a jurisdiction's private law; and (5) *suppletive law*: the law relied on to complete an incomplete legislative text.²⁴⁵

There is no doubt that interpreting federal legislation requires reference to suppletive law, and that the suppletive law should not automatically be *Common Law* as defined above. It is also clear that in the absence of federal legislation there is no jurisdiction in federal court judges to create *common law* in areas of federal jurisdiction.²⁴⁶ The key issue raised by the harmonization project is whether judges can create *unenacted law* in the course of interpreting federal legislation.²⁴⁷ In my view, the answer to the question must be yes. However, the principle of complementarity (as explained by Brisson, Morel, Duff and others) answers no. It asserts that the *suppletive law* must be the *jus commune* of the province. Although there is room for unenacted law at the provincial level in interpreting the *Civil Code*, it is precluded at the federal level.

This approach protects the integrity of Québec's new code, and one can readily appreciate its attractiveness to Québec jurists. In my view, however, it is unacceptable. First and foremost, it rules out the possibility of unenacted law at the federal level. In both practice and principle, the creation of unenacted law is a normal by-product of proper interpretive practice, not only in common law jurisdictions but in civil law jurisdictions as well. It can be eliminated only by imposing inappropriate and probably impossible constraints on interpreters. Second, this approach to the interpretation of bijural legislation is rooted in a conception of bijuralism in which complementarity is seen as the default position and dissociation (notice the negative connotations of the term) as the sole alternative. This conception is

245. *Encoding Canadian Civil Law*, *supra* note 187, at 145.

246. The cases cited for this proposition are *Canadian Pacific Ltd. v. Québec North Shore Paper Co.*, [1977] 2 S.C.R. 1054; *R. v. McNamara Construction (Western) Ltd.*, [1977] 2 S.C.R. 654; *Canada v. Foundation Co. of Canada*, [1980] 1 S.C.R. 695. In my view, these cases address the narrow issue of the jurisdiction of the Federal Court under § 101 of the Constitution Act, 1867 and do not in fact rule out the possibility of federal common law, still less federal unenacted law.

247. The point is addressed by Allard, *supra* note 45, at 21–25.

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inadequate because it ignores the possibility of derivative bijuralism. This possibility is explored in the next section.

D. Derivative Bijuralism

While the federal harmonization program has focused primarily on suppletive bijuralism, a number of recent papers explore the potential of derivative bijuralism. France Allard has written persuasively on this subject. She points out that in a number of areas (for example, family law, labour law and human rights legislation), the Supreme Court of Canada has sought to develop a uniform approach to legal problems that is grounded in both civil and common law. She characterizes this approach as a dialogue:

In family law, and more particularly with regard to child custody, the Court has seen fit to consider common law decisions in its civil judgments and vice versa, while recognizing the conceptual differences of the concepts in both traditions....

Furthermore, when the issue before the Court concerns universal values, there is a more pronounced tendency to mention the rules and solutions of either tradition....

The dialogue between the traditions in the Supreme Court's decisions is consistent with the idea that the Supreme Court is more than a court of appeal for each of the provinces....In its decisions and particularly the most recent ones, the Court appears to be motivated by a desire to consider the effect of its decisions in all jurisdictions, both civil and common law, while respecting the characteristics particular to each of them.

In these new directions taken by the Court, there appears to be a more pronounced reciprocal influence between traditions as comparative analysis becomes increasingly prominent in its judgments. There is also a more marked tendency toward universalism in the basis for solutions and in the solutions themselves....This kind of unification through persuasion is very different from the unification of the law as it was exercised at the turn of the twentieth century, when unification generally meant assimilation of civil law by common law.²⁴⁸

Daniel Jutras points out that there are various ways in which common law and civil law interact in the judgments of Cana-

248. *Id.* at 20–21.

dian courts.²⁴⁹ First, there is the “comparative reference,” in which the court surveys other jurisdictional approaches to the problem before the court.²⁵⁰ Such references are largely academic; they do not affect the way the court analyses the case. Second, there are judgments in which the court explores the way an issue is handled in civil and common law with a view to seeking the best solution to the problem at hand.²⁵¹ Finally, there are judgments in which “the duality of sources is inherent in the very issue under consideration.”²⁵² A good example is case law interpreting the Canada Shipping Act, which draws on both legal traditions.²⁵³

These and other surveys of Canadian case law reveal the real possibility and potential benefits of a derivative bijuralism or multijuralism in which federal legislation is routinely interpreted in light of all relevant legal systems (e.g., common law, civil law, Aboriginal law, Islamic law, international law). As Patrick Glenn writes:

[The] tradition of comparative law is simply an attempt to find a better solution, the discovery of which can never stop the further search for an even better solution. In this search, no source can be ruled out, as the Supreme Court did to a certain extent in the first half-century of its existence. And since sources cannot be excluded in creating a new law, they cannot be excluded any more in the continuation of one's own law. Sources must be judged on their merits.²⁵⁴

249. See Daniel Jutras, *Emerging Issues in Private Law: A Case of Cross-Fertilization*, paper presented to the National Judicial Institute Conference on Bijuralism, (Apr. 4, 2003). For a survey of recent case law in which the Supreme Court of Canada has addressed both legal systems in resolving private law disputes, see generally Louise Lavallée, *Bijuralism in Supreme Court of Canada Judgments Since the Enactment of the Civil Code of Québec*, in 3 *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* (2d publication 1999), available at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3(a)_eng.pdf) (last visited Mar. 19, 2004).

250. Jutras, *supra* note 249, at 3.

251. See, e.g., *Transamerica Life Ins. Co. of Can. v. Goulet*, [2002] 1 S.C.R. 719; *Transamerica Life Ins. Co. of Can. v. Oldfield*, [2002] 1 S.C.R. 742.

252. Jutras, *supra* note 249, at 3.

253. See, e.g., *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

254. H. Patrick Glenn, *Le droit comparé et la Cour suprême du Canada* [Comparative Law and The Supreme Court of Canada], in *MELANGES LOUIS-*

2004] *MULTILINGUAL, MULTIJURAL LEGISLATION* 1045*E. The Independence of Language and Law*

In interpreting legislation enacted in more than one language, the goal is to establish a uniform rule that applies to everyone. People belonging to different language groups cannot, because of discrepancies in the several language versions, claim to be governed by different rules.²⁵⁵ However, when interpreting legislation that applies to multiple territorial units within a federation, the goal is different. In Canada at least, Parliament is able to make different rules for different provinces, and it may often have good reason to do so.²⁵⁶ In interpreting bijural (or multilingual) legislation, therefore, the goal is not to establish a uniform rule but rather to determine legislative intent, specifically to determine whether Parliament intends its rule to operate in the same way throughout the country, to operate differently from one province to the next, or to operate differently in Québec than in the rest of the country. If there is reason to believe that Parliament intended a uniform rule, the next task is to establish the content of that rule, having regard for all possible sources of law — civil, common, Aboriginal, international and foreign.

In interpreting legislation that is bilingual and bijural (or multilingual / multijural), it can be difficult to distinguish the issues relating to language from those relating to law. The complexity involved in interpreting such legislation is well illustrated by the judgment of the Supreme Court of Canada in *Schreiber v. Canada (Attorney General)*,²⁵⁷ which is the court's first pronouncement on bijuralism since the enactment of the Federal Law - Civil Law Harmonization Act, No. 1.²⁵⁸ In *Schreiber*, the court appropriately explores both the common law and civil law concepts referred to in the legislation to be inter-

PHILIPPE PIGEON, *OUVRAGES COLLECTIFS* [Collective Works] 211 (1989) [original quote in French].

255. This would violate the rule of law. See SULLIVAN & DRIEDGER, *supra* note 49, at 80–81.

256. See *id.* at 95.

257. *Schreiber v. Can.*, [2002] 3 S.C.R. 269.

258. “The Court of Appeal for Ontario did not have the benefit of a clarifying amendment to s. 6(a) of the Act by the Harmonization Act, which came into force on June 1, 2001, a few months after the decision of the Court of Appeal for Ontario was rendered.” *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at para. 66; Federal Law-Civil Law Harmonization Act, No. 1, ch. 4, 2001 S.C. (Can.).

preted;²⁵⁹ however, its decision to apply the civil law concept rests on dubious reasoning.

In 1999, in accordance with the extradition treaty between Canada and the Federal Republic of Germany, Germany asked Canada to arrest and detain Karl Heinz Schreiber, a Canadian citizen, for the purpose of extradition.²⁶⁰ Acting under a warrant issued by an Ontario court, Schreiber was arrested in Toronto and held for eight days before being released on bail.²⁶¹ Schreiber subsequently brought an action in the Ontario courts against Germany and Canada seeking damages for the loss of liberty and loss of reputation suffered as a result of his arrest and detention.²⁶² Germany moved for dismissal of this action on the ground of sovereign immunity.²⁶³ Section 3 of the State Immunity Act provides that a foreign state is immune from the jurisdiction of any Canadian court, subject however to certain exceptions.²⁶⁴ Schreiber maintained that his action was within the exception for proceedings relating to personal injury set out in section 6 of the Act in the following terms:

ENGLISH	FRENCH
<p>6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to</p> <p>(a) any death or personal injury, or</p> <p>(b) any damage to or loss of property that occurs in Canada.</p>	<p>6. <i>L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant</i></p> <p>(a) <i>des décès ou dommages corporels survenus au Canada;</i></p> <p>(b) <i>des dommages matériels survenus au Canada.</i>²⁶⁵</p>

The issue for the court was whether the distress, humiliation and loss of freedom experienced by Schreiber as a result of his arrest constituted “personal injury — *dommages corporels*”

259. Schreiber v. Can., [2002] 3 S.C.R. 269, at paras. 38–46, 58–65.

260. *Id.* at para. 2–3.

261. *Id.* at para. 3.

262. *Id.* at para. 4.

263. *Id.* at para. 5.

264. State Immunity Act, R.S.C., 1980-81-82-83, c.95 s.1 § 3 (1985)(Can.).

265. *Id.*

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within the meaning of the Act.²⁶⁶ In the analysis below, I am critical of how the Supreme Court of Canada addressed this issue and I suggest an approach to interpreting federal legislation that would avoid the serious problems in the judgment.

When interpreting bijural federal legislation, the first task is to decide whether the language to be interpreted is ordinary — i.e. draws on the conventions of language shared by the general community — or is legal — i.e. refers to specialized legal concepts, institutions or principles.²⁶⁷

(1) If the language is ordinary, in the absence of a provision to the contrary, the interpreter must establish the single rule that is meant to apply uniformly across the country.

(2) If the language is legal, the interpreter must determine whether the concept, institution or principle referred to is bijural (in the suppletive sense) or unijural. In making this determination, the interpreter must have regard to section 8.2 of the Interpretation Act, which provides that a text that contains both civil law and common law terminology or terminology that has a different meaning in common and civil law is to be considered bijural, unless the law provides otherwise.²⁶⁸

(3) If the reference is bijural, the interpreter must adopt the common law meaning in the common law provinces and the civil law meaning in Québec, as provided by section 8.2 of the Interpretation Act.

(4) If the reference is unijural, the courts must determine whether the legal concept, institution or principle derives from the common law, the civil law, both common and civil law, international law or some other source or combination of sources. Having determined the source of the reference, the courts must apply it uniformly — as much as possible — throughout the provinces and territories. As noted above, the adoption of a unijural solution to a particular problem does not effectively avoid bijuralism. First of all, the unijural solution may itself rely on bijural sources, and second, in most cases

266. *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at paras. 12, 38.

267. This step is necessary because the problem of bijuralism arises only with legal language.

268. Section 8.2 of the Interpretation Act was not in force when *Schreiber* was decided. It will be interesting to see how, if at all, it affects judicial analysis.

the unijural solution merely postpones the interaction between federal and provincial law.

In the *Schreiber* case, it might have been possible to regard the language at issue as ordinary rather than legal. The expression “personal injury” could be understood outside a legal context as referring to any harm suffered by an individual, while “*dommages corporels*” could be understood (perhaps) as a reference to bodily harm. Moreover, from a legal perspective, both terms are problematic: “personal injury” is ambiguous and “*dommages corporels*” is eccentric.²⁶⁹ Nonetheless, neither term is likely to be used outside a legal context.

Once a court is satisfied that it is dealing with legal terms, the next step is to determine whether the legal terminology in question is bijural or unijural. In the *Schreiber* case, given the purpose of the State Immunity Act, the presumption of compliance with international law and the wording of section 6, there is a strong basis for concluding that the terms “personal injury / *dommages corporels*” are unijural, grounded in international law.

The purpose of the State Immunity Act is to implement, to the extent judged appropriate by Parliament, Canada’s international law obligations concerning the conduct of foreign states and their representatives in Canada. These obligations are the same regardless of the province in which the activities of a foreign state or its representatives occur. Furthermore, the wording of section 6 significantly tracks the relevant international law materials. Article 11 of the European Convention on State Immunity refers to loss of immunity “in proceedings which relate to redress for *injury to the person* or damage to tangible property/ *lorsque la procédure a trait à la réparation d’un prejudice corporel ou matériel.*”²⁷⁰ Article 12 of the Draft Articles on Jurisdictional Immunities of States and their Property excludes immunity in proceedings to compensate “for death or *injury to the person* or damage to or loss of tangible property /

269. It is eccentric in that references to injury or harm to the person normally use the term “*préjudice*” and references to damages for injury or harm to the person normally use the term “*dommages-intérêts*.”

270. *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at para. 34.

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en cas de décès ou d'atteinte à l'intégrité physique d'une personne, ou en cas de dommage ou de perte d'un bien corporel."²⁷¹

Relevant secondary sources use similar language. For example, the Explanatory Reports on the European Convention on State Immunity state:

ENGLISH	FRENCH
Where there has been <i>injury to the person</i> or damage to property, the rule of non-immunity applies equally to any concomitant claims for non-material damage resulting from the same acts....Where there has been no <i>physical injury</i> and no damage to tangible property, the article does not apply.	<i>En cas de dommage corporel ou materiel, le règle de la non-immunité s'applique également aux demandes en réparation du préjudice moral résultant du même fait....Lorsque aucune lésion corporelle ou autre atteinte à l'intégrité physique d'une personne, ni aucun dégât à une chose n'ont été causés [sic], l'article est inapplicable.</i> ²⁷²

The International Law Commission's commentaries on article 12 of the Draft Articles state that loss of immunity does not occur if "there is no *physical damage*. Damage to reputation or defamation is not *personal injury* in the physical sense / *il n'y a pas de dommage corporel* ou physique. *Ni la diffamation ni l'atteinte à la réputation ne sont une atteinte à la personne au sens physique du terme.*"²⁷³

The language used in these international materials corresponds closely to the language used in section 6, particularly in the English version.²⁷⁴ Given the purpose of the Act, the language used and the presumption of compliance with international law, it is plausible to conclude that "personal injury / *dommages corporels*" is intended to have its international law meaning, namely physical injury.

A second unijural way of reading section 6 is to treat "personal injury" as a common law concept and "*dommages cor-*

271. *Id.* at para. 35.

272. *Id.* at para. 47.

273. *Id.*

274. The English language sources consistently refer to "personal injury" or "injury to the person" while some the French language sources refer to "*dommage corporel*."

porels” as a French rendering of the common law concept. Whereas the expression “personal injury” is widely used in common law, the expression “*dommages corporels*” is not widely used in civil law. In civil law, injury is referred to as “*préjudice*”, and the civil law analogue to “personal injury” is not “*dommages corporels*” but rather “*préjudice corporel*” or “*lésions et blessures corporelles*.”²⁷⁵ “*Dommmages corporels*” could therefore be regarded as an attempt (albeit an awkward attempt²⁷⁶) to render the common law concept in French. The problem with this analysis is that “*dommages corporels*” does not correspond accurately with the broader and vaguer notion of “personal injury” in common law.

A third unijural way of reading section 6 is to treat “*dommages corporels*” as a civil law concept and “personal injury” as an English rendering of the civil law concept. One problem with this analysis is that the concept of “*dommages corporels*” is not an established term of art in civil law. As noted above, references to personal injury generally use the term “*prejudice*,” while references to heads of damage generally use the term “*dommages-intérêts*.” Moreover, even supposing that “*dommages corporels*” was a civil law term of art, and the drafter’s task was to render that concept in English, he or she would have chosen a term like “physical damage” or “bodily harm.” The term “personal injury” would be avoided because its ordinary meaning is too broad and its legal meaning unclear.

In my view, an analysis of the sort set out above must be carried out *before* section 8.2 of the Interpretation Act is applied. That is, before concluding that the language used contains civil law and common law terminology or that the terminology used has a different meaning in the civil law and the common law, the court must carry out an interpretive exercise where an effort is made to determine the appropriate legal context(s). In this case, applying this approach, I would conclude that the terms “personal injury / *dommages corporels*” should be given their meaning at international law, namely bodily injury.

275. See, e.g., Civil Code of Québec, ch. 64, art. 1457, 1991 S.Q. (Can.).

276. “Personal injury” (like “*préjudice corporel*” and “*atteinte à la personne*”) refers to a cause of action whereas “*dommages corporels*” refers to a head of damage. For some reason, this issue was not addressed when § 6 was revised under the harmonization program.

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The Supreme Court of Canada reached this very conclusion, but on different grounds, and its reasoning is problematic in my view. One problem is that the court does not expressly address the issues of whether the language to be interpreted is legal or ordinary and whether it is unijural or bijural. A second, more serious problem is that the court confounds the principles governing interpretation of bilingual legislation with the principles governing the interpretation of bijural legislation.²⁷⁷

In its analysis of the term “personal injury / *dommages corporels*,” the court notes that the expression “personal injury” is potentially broader than “*dommages corporels*” and could be taken to include injury to dignity, autonomy or reputation as well as physical injury.²⁷⁸ Given this ambiguity, the court decides to base its conclusion on the rules governing the interpretation of the bilingual legislation. It writes:

A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred...Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning...

In the case at bar, the French version, which states that the exception to state immunity is “*déces*” or “*dommages corporels*” is, as we shall see, the clearer and more restrictive version compared to the English “death” or “personal injury.”²⁷⁹

In order to see the problem with this analysis, it may be helpful to reproduce the text of section 6(a):

277. This problem was brought to my attention by Anne-Marie Hébert, Senior Counsel, Department of Justice, Canada.

278. *Id.* at para. 39.

279. *Id.* at para. 56.

ENGLISH	FRENCH
<p>6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to</p> <p>(a) any death or <i>personal injury</i>, or</p> <p>(b) any damage to or loss of property that occurs in Canada.</p>	<p>6. <i>L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant</i></p> <p>(a) <i>des décès ou dommages corporels survenus au Canada;</i></p> <p>(b) <i>des dommages matériels survenus au Canada.</i></p>

Let us assume, as the court does, that “personal injury” and “*dommages corporels*” are legal terms of art from common law and civil law respectively. Under the conventions for drafting bijural legislation that prevailed when the State Immunity Act was last revised, the English term “personal injury” expresses the relevant common law concept and the French term “*dommages corporels*” expresses the relevant civil law concept.²⁸⁰ This would also be the result under section 8.2 of the Interpretation Act. These concepts could be identical, but they need not be. If they are different, the common law meaning properly governs in common law provinces and the civil law meaning governs in Québec. That is the point of bijuralism. The court is mistaken in applying the same meaning rule to this sort of problem. In doing so, it effectively imposes unijuralism on what is a bijural, or a potentially bijural, text.

The court’s confusion is clearly revealed when it suggests that the interpretation of bijural legislation entails a search for a common meaning:

Under the principles governing the interpretation of bilingual and bijural legislation, where there is a difference between the English and French versions, the court must search for the common legislative intent which seeks to reconcile them. The gist of this intellectual operation is the discovery of the essential concepts which appear to underlie the provision being interpreted and which will best reflect its purpose, when viewed in its proper context.

280. See State Immunity Act, R.S.C., ch. S-18, § 6(a) (1985) (Can.).

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In this case, the French version is the clearer and more restrictive of the two versions. A failure to consider the key ideas underpinning the French version might lead to a serious misapprehension as to the scope of s[ection] 6(a). It would broaden its scope of application to such an extent that the doctrine of state immunity could be said to have been largely abrogated, whenever a claim for personal injury is made.²⁸¹

When interpreting legal terminology, it is appropriate to search for a common legislative intent or a common underlying concept only if the terminology to be interpreted is unijural. In the case of a bijural text (bijural in the suppletive sense), the court must not search for a common intent or a shared concept, but rather must interpret the legal terminology in question with reference to the legal system to which it belongs. In the *Schreiber* case, the scope of the common law concept of “personal injury” should have been established relying exclusively on common law sources; the meaning and scope of “*dommages corporels*” in the civil law is irrelevant to the significance of the term at common law. If it turned out that the concept of “personal injury” at common law was significantly broader than the concept of “*dommages corporels*” at civil law, the broader concept should have prevailed. Because the facts occurred in Ontario and the law suit originated there, Ontario law (not Québec law) is called upon to supplement federal legislation to the extent needed. Alternatively, had the facts occurred in Québec, Québec law would be relied on.

The court’s mistake in *Schreiber* is to confound language with legal system. The rule set out in the two language versions has to be the same, but the content of the rule, if it is bijural in the suppletive sense, may allow for a different legal result in different provinces.²⁸² The advantage of using doublets as a drafting technique is that it highlights the independence of language and legal system: the common law and civil law terminology appears in both language versions, indicating clearly to both French and English readers that the rule may be different in the common law provinces and Québec. When generic terminology is used, although it is less obvious, the same analysis applies: the rule enacted by Parliament is the same in both lan-

281. *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at paras. 78–79.

282. *See e.g.*, *Furfaro-Siconolfi v. M.N.R.*, [1990] 2 F.C. 3.

guage versions, but it allows for the application of civil law concepts, institutions and principles in Québec and common law concepts, institutions and principles in the rest of Canada.

V. INTERPRETING HISTORICAL TREATIES

Interpreting legislation enacted in French and English to reflect both the civil law and the common law is challenging, but manageable for most interpreters. With relatively modest effort, an Anglophone or Francophone interpreter can attain a functional knowledge of the other language and legal system, and having reached that plateau can work toward full biculturalism. The differences between French and English language, law and culture are significant, but there is much common ground.²⁸³ The same cannot be said when it comes to Aboriginal languages, law and culture. The treaties between First Nations and the British Crown are a point of intersection between very different cultural traditions, each with its own way of making and recording law.²⁸⁴

Like the enactments of a legislature, treaties are speech acts — acts in which language is used as a means to achieve an end. The speech act itself occurs at a particular place and at a moment that is ephemeral; however, because the speech act is recorded in a text, it becomes portable and more or less permanent.²⁸⁵ Historically, Canadian courts have responded to trea-

283. Both languages and cultures are grounded in European intellectual history.

284. For discussion of Aboriginal ways of making and recording law, see James Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997); John Borrows, *Wampum in Niagara; The Royal Proclamation, Canadian Legal History and Self-Government*, in ABORIGINAL AND TREATY RIGHTS IN CANADA (Michael Asch ed. 1997) [hereinafter *Wampum in Niagara*]; Sharon Venne, *Understanding Treaty 6: An Indigenous Perspective*, in ABORIGINAL AND TREATY RIGHTS IN CANADA 173–207 (Michael Asch ed. 1997); Leonard Rotman, *Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence*, 46 U.N.B.L.J. 12 (1997); *With or Without*, *supra* note 44; James (Sakej) Youngblood Henderson, *First Nations Legal Inheritances in Canada: The Mikmaq Model*, 23 MANITOBA L. J. 1 (1996); Maria Teresa Sierra, *Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla*, 29 L. & SOCIETY REV. 227 (1995); INDIGENOUS LAW AND THE STATE Parts I & II (Bradford Morse & Gordon Woodman, eds. 1998).

285. Speech act analysis was introduced by John Austin. JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975). It was developed by John Searle,

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ties between First Nations and the Crown as if they were unilingual, unijural acts, recorded in unilingual, unijural documents.²⁸⁶ However, the written English text (with its ceremony of signature) is only the European version of the treaty; it tells only half the story of what is in essence a bilingual, bijural agreement and record of agreement. The other half of the story is told by the ceremonies and texts of the First Nations involved, including generally an exchange of presents, and in every case, the account of the treaty told by the elders and passed from one generation to the next.²⁸⁷

At the Treaty of Niagara, for example, the primary ceremony was the exchange of wampum.²⁸⁸ Wampum consists of beads sewn onto hide in patterns. It was used by eastern First Nations to record agreements, laws and events.²⁸⁹ The wampum exchanged at Niagara was a two-row wampum belt, signifying that the treaty was a peace and friendship treaty as opposed to a land surrender.²⁹⁰ The way in which the beads were arranged

most notably in, JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969). For an introduction to speech acts as they relate to legislation, see FREDERICK BOWERS, *LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION* 17–48 (1989).

286. In no case, to my knowledge, has a superior court considered a treaty to be a bilingual or bijural text. For discussion of the need to treat treaties as a bicultural text, see James Tully, *Reconsidering the B.C. Treaty Process*, in LAW COMMISSION OF CANADA, *SPEAKING TRUTH TO POWER: A TREATY FORUM* 11–12 (2001) [hereinafter *SPEAKING TRUTH TO POWER*].

287. See John Borrows, *Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests*, 12 WINDSOR Y.B. ACCESS JUST. 179, 192 (1992).

First Nations sovereignty was exercised through the spoken word and Wampum belts, and not through written statements. The reception of presents was also a part of the traditional ceremonial and oral nature of treaties. The gathering for presents provided an opportunity to meet in council and exchange words and material goods to reaffirm or modify previous long agreements according to changing conditions. This explains why First Nation leaders would travel such long distances to receive a few trinkets that were monetarily of trivial value.

Id. See also Delia Opekokew & Alan Pratt, *The Treaty Right to Education in Saskatchewan*, 12 WINDSOR Y.B. ACCESS JUST. 3, 28 (1992).

288. See *Wampum in Niagara*, *supra* note 284, at 163–65.

289. Rotman, *supra* note 284, at 17–18, nn. 23–24.

290. *Wampum in Niagara*, *supra* note 284, at 163. Robert Williams interprets the two-row wampum as follows:

in the wampum constitutes an Aboriginal text that supports the group's memory of and repeated telling of the treaty through its elders.²⁹¹

Sharon Venne describes the process by which Treaty 6 between the Plains Cree Peoples and the British Crown was concluded. At the treaty signing, the ceremonies included the smoking of the pipe and the whittling of ten sticks, representing the promises exchanged by the parties.²⁹² These sticks were preserved in a bundle, along with other objects associated with the treaty process. The Elder picked up each object in the bun-

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purpose, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonization Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 291 (1986), quoted in *Wampum in Niagara*, supra note 284, at 164. See also Rotman, supra note 284, at 17–19.

291. *Wampum in Niagara*, supra note 284, at 165.

292. Venne, supra note 284, at 203–04. Venne writes:

At the treaty signing, the white man made ten promises stating that they would never be broken as long as the sun shines and the waters flow. The commissioner said that ... no two-legged person could ever break those promises. An Elder by the name of Pakan (who was one of the signatories of Treaty 6, and a Chief of the Whitefish Lake Reserve) expressed concern about how Indigenous peoples could preserve the same information. He stated that the white man had a way in which he could preserve his knowledge about the treaties by writing them on paper.

He pointed to the land, which was full of buffalo, and at the animals. He stated, "Our Father gave all that to us. Are you sure that you will fulfil your promises? I will make ten sticks....We will keep the sticks to signify your promises."

Id.

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dle as he told the story of the treaty to Venne, ending with the promises signified by the sticks.

Venne also offers an account of the means by which history is preserved in the Cree oral tradition.

The Elders have within their memories a collective history. No one Elder has all the information about a particular event; each has a personal memory which embraces their parents' or grandparents' memory of the details and circumstances of events that took place.²⁹³

Keeping the stories through a number of memory lines ensures accuracy,²⁹⁴ as does the wealth of detail included in the stories.²⁹⁵

The Aboriginal record of historical treaties is embedded in the relevant Aboriginal literacy and draws on the knowledge, categories and norms of the relevant Aboriginal culture.²⁹⁶ This record is no less authentic, or legitimate, and arguably no less accurate than the texts produced by the English-speaking representatives of the Crown. It follows that the treaties between First Nations and the British Crown, like the statutes enacted by the Canadian Parliament, are bilingual, bijural "enactments" — recorded speech acts — from which a shared set of terms must be constructed. This creates a serious challenge for Canadian courts, staffed by judges with little to no knowledge of Aboriginal language or culture.

In recent years, the response to this challenge has been well-intentioned but timid. The reality of cultural differences has been acknowledged by the courts:

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the

293. *Id.* at 177.

294. *Id.* at 176.

295. *Id.* at 174–76. See also H. Patrick Glenn, *A Chthonic Legal Tradition: To Recycle the World*, in *LEGAL TRADITIONS OF THE WORLD* (Oxford University Press 2000); LEON SHELEFF, *THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM* (2000); WALTER ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* (1982).

296. See David Barton & Mary Hamilton, *Literacy Practices*, in *SITUATED LITERACIES: READING AND WRITING IN CONTEXT* 7–15 (David Barton et al. eds. 2000).

time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.²⁹⁷

The necessary historical context is established through contemporaneous journals, letters and reports (filtered through the European sensibility of the author) as well as more recent historical and anthropological study (some of it by Aboriginal historians).²⁹⁸ The oral histories of Aboriginal peoples have also been accepted as evidence of historical practices, customs and traditions.²⁹⁹ In *Mitchell v. MNR*, Chief Justice McLachlin emphasized the importance of such evidence. At the same time, however, she issued a caveat suggesting that the Aboriginal record would have to give way to common law rules of evidence and European-based notions of common sense:

The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s[ection] 35(1) rights. As [Chief Justice] Lamer observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight....Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts."

Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense."³⁰⁰

Although the courts accept various forms of extrinsic evidence, including oral history, they have not relied on it as a ba-

297. *R. v. Horseman*, [1990] 1 S.C.R. 901, 907.

298. See Rotman, *supra* note 288, at 35–41.

299. See SULLIVAN & DRIEDGER, *supra* note 49, at 419–20.

300. *Mitchell v. MNR*, [2001] S.C.R. 911, paras. 37–39.

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sis for establishing the text of the treaty. It is regarded rather as supplying historical context for the English language, common law-based text.³⁰¹ The assimilationist imbalance created by this approach is then compensated for first by emphasizing the honour of the Crown and its fiduciary duty to Aboriginal peoples and second by adopting special rules for interpreting the English text.³⁰² The honour of the Crown means that “it must always be assumed that the Crown intends to fulfil its promises. No appearance of ‘sharp dealing’ will be sanctioned.”³⁰³ The special rules require the text of the treaty to be interpreted liberally, avoiding legal technicalities and resolving any ambiguity in favour of the First Nation.³⁰⁴ The language of the treaty must be interpreted as it would have been understood by the Aboriginal signatories at the time the treaty was signed.³⁰⁵

While this recognition of difference and the need for an appropriate response to difference is a significant advance, the court stops short of addressing the fundamental point. No less than a federal enactment, a treaty between a First Nation and the Crown is a bilingual, bijural speech act that is recorded in separate versions, both of which must be regarded as equally authentic constituents of the treaty text.³⁰⁶ Because non-Aboriginal Canadians (including lawyers and judges) are ignorant of Aboriginal law and culture, the courts cannot take judicial notice of the Aboriginal version of the text as they do of the English and French versions of federal legislation. However, they can establish the Aboriginal text as a fact through the re-

301. See, e.g., *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; *R. v. Marshall*, [1999] 3 S.C.R. 456. See generally SULLIVAN & DRIEDGER, *supra* note 49, at 420.

302. For a general account of the principles governing the interpretation of treaties, see SULLIVAN & DRIEDGER, *supra* note 49, at 416–20. See also James Youngblood Henderson, *Interpreting Sui Generis Treaties*, 36 ALBERTA L. REV. 46 (1997); Rotman, *supra* note 284; *Empowering Treaty Federalism*, *supra* note 30.

303. *R. v. Badger*, [1996] 1 S.C.R. 771, para. 41. See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1107–1108, 1114; *R. v. Taylor*, [1981] 34 O.R.2d 360, 367.

304. The leading cases are *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 36 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1107.

305. *R. v. Horseman*, [1990] 1 S.C.R. 901, 907; *R. v. Badger*, [1996] S.C.R. 771, 798–800.

306. See J. Edward Chamberlin, *Culture and Anarchy in Indian Country*, in 3 ABORIGINAL AND TREATY RIGHTS IN CANADA 18–19, 36–37 (Michael Asch, ed. 1997).

ception of appropriate evidence and through the development of appropriate principles for assessing the value of that evidence. Obviously, reliance on European common sense, which is said to underlie Canadian evidence law, will not serve for that purpose. Rather, the courts must rely on people with expertise in the relevant Aboriginal languages and literacies; they must master the rhetoric of Aboriginal artefacts and the oral tradition. This is not an easy thing to do, but it is possible; and it is made easier by the resurgence of oral culture in the Twentieth Century (through radio, telephone, television) and by the integration of oral and print culture that is achieved in much electronic communication and in modern document design.³⁰⁷

Having established the treaty text, the court must then reconcile the Aboriginal and European versions. Given that treaties derive their legitimacy from the voluntary consent of both parties to a shared understanding,³⁰⁸ dialogue and integration must be the preferred approach to treaty interpretation. The terms of the treaty must be constructed out of both versions with due regard to the context of both. What courts may discover through such dialogue is that whereas the oral tradition is less uncertain than imagined, the certainties of the written text are in many respects illusory. Certainly there is no reason to treat the European version of the text as a more reliable or apt expression of the original speech act. British and Canadian archival material shows the extent to which the formal record of at least some historical treaties differs from the account of the treaties set out in contemporaneous diaries and reports of Europeans who negotiated them.³⁰⁹ Quite apart from such discrepancies, however, the courts must acknowledge the inherent

307. See, e.g., JAMES O'DONNELL, *AVATARS OF THE WORD: FROM PYPYRUS TO CYBERSPACE* (1998); CHRISTIAN VANDENDORPE, *DU PYPYRUS A L'HYPERTEXTE: ESSAI SUR LES MUTATIONS DUE TEXTE ET DE LA LECTURE [FROM PYPYRUS TO HYPERTEXT: AN ESSAY ON THE EVOLUTION OF TEXT AND READING]* (1999); David Howes, *E-Legislation: Law-Making in the Digital Age*, 47 *MCGILL L. J.* 39 (2001). However, empirical studies show, breaking out of one's own cultural prison is harder than one might think. See MICHAEL CLYNE, *INTERCULTURAL COMMUNICATION AT WORK: CULTURAL VALUES IN DISCOURSE* (1994).

308. For discussion of what gives legitimacy to treaties, see Roderick A. Macdonald, *By Any Other Name ...*, in *SPEAKING TRUTH TO POWER*, *supra* note 286, at 77 & n.2.

309. See *Wampum in Niagara*, *supra* note 284, at 164–65; Rotman, *supra* note 284 at 35–40.

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limitation of all texts. The language of an English record of a treaty, no less than the language of a wampum belt, requires interpretation with all that interpretation entails — inference, assumption, guesswork. There is no justification for grounding that interpretation in a single version of the text and a single cultural tradition.

VI. THE LEGISLATION OF NUNAVUT

Legislation in Nunavut is prepared in English, French, Inuktituk and Innunnaqtun (a dialect of Inuktitut).³¹⁰ However, it is enacted in English and French only; the Inuktitut versions merely have the status of translations.³¹¹ This situation is unlikely to prevail for long.³¹² Inuktitut is the language spoken by a majority of the population of Nunavut, and it is the working language of the legislature.³¹³ A good deal of work has already been done to standardize the language and to develop legal vocabulary.³¹⁴ Under its constitution, the Legislative Assembly has the authority to enact laws for the preservation, use and promotion of the Inuktitut language;³¹⁵ proposals to require enactment in Inuktitut have already come before the legislative committee responsible for language matters.³¹⁶

310. See LEGISLATIVE ASSEMBLY OF NUNAVUT, BILLS & LEGISLATION, at <http://www.assembly.nu.ca/english/bills/aboutbills.html>. (last visited Mar. 18, 2004).

311. *Id.*

312. See Special Committee to Review the Official Languages Act, Final Report, Sixth Session First Legislative Assembly, Legislative Assembly of Nunavut 16–17 (Dec. 2003), available at http://www.assembly.nu.ca/english/committees/languages/final_eng.pdf. For a contrary view, see Charles Marecic, *Nunavut Territory: Aboriginal Governing the Canadian Regime of Governance*, 24 AM. INDIAN L. REV. 275, 292 (1999-2000).

313. See Legislative Assembly of Nunavut, *supra* note 312, at 5 app. III.

314. See, e.g., Table of Inuktitut and Innunnaqtun terminology for English terms used in collecting government statistics. GOVERNMENT OF NUNAVUT, RECOMMENDED TERMS, at <http://www.gov.nu.ca/Nunavut/stw.html> (last visited Mar. 18, 2004). See generally Nunavut Living Dictionary available at <http://livingdictionary.com> (last visited Mar. 18, 2004).

315. Nunavut Act, S.C., ch. 28, § 23(1)(n) (1993) (Can.).

316. See Recommendations regarding changes to the Official Languages Act, submitted to the Special Committee of the Legislative Assembly Reviewing the Official Languages Act (Jan. 18, 2002) available at <http://www.lang-com.nu.ca/english/pressreleases/ChangesOLAJan30.pdf>.

The impetus to enhance the status and expand the use of Inuktitut is closely tied to the goal of preserving and enhancing Inuit Qaujimajatuqangit — “I.Q.” for the benefit of southerners, as residents of Canadian provinces are called by those who live in the Territories. I.Q. is usually translated as “traditional Inuit knowledge.” A more telling translation, I suspect, would be “the knowledge and norms of the Inuit tradition.”³¹⁷

An essential component in preserving and promoting I.Q. is promoting the role of Elders in Nunavut institutions, including the legislature, government, schools and courts. Elders are consulted by the government in the preparation of legislation,³¹⁸ and the Legislative Assembly sets aside twelve seats for Elders inside its chambers.³¹⁹ Their role is to facilitate the integration of I.Q. into Nunavut’s legislation and to ensure compatibility between new legislative initiatives and Inuit tradition. Their participation in the legislative process establishes the legal relevance and legitimacy of Inuit cultural norms. The “wisdom of the Elders” thus becomes part of the legislative history of particular enactments and Inuit knowledge and culture becomes a necessary legal context for the interpretation of Nunavut legislation.

An example of this is the research into I.Q. carried out in developing conflict of interest legislation for the Territory. A researcher was asked to produce an overview of any Inuit norms and procedures relevant to the proposed legislation.³²⁰ She re-

317. “IQ is a set of practical truisms about the interrelationships between nature and society that have been passed orally from one generation to the next. It is a holistic, dynamic and cumulative approach to knowledge, teaching and learning.” Honourable Paul Okalik, Speech to the Conference on Governance, Self Government and Legal Pluralism 3 (Apr. 23, 2003), available at <http://www.gov.nu.ca/Nunavut/English/premier/press/cgsglp/shtml>.

318. See Inuit Qaujimajatuqangit Katimajit Established, available at <http://www.gov.nu.ca/Nunavut/English/news/2003/sept/sept8a.shtml> (last visited Mar. 4, 2004) (announcing the establishment of the Inuit Qaujimajatuqangit Katimajit, a council consisting of eleven community representatives who will advise the government on how to reflect IQ in policy development, delivery of programs and services, and day to day operations).

319. The Legislative Assembly of Nunavut operates on a consensus model. This means that there is no party affiliation and consequently no party discipline. The prime minister is elected by majority vote.

320. Patricia File, *Inuit Traditional Knowledge and Conflict of Interest: Review of Conflict of Interest Legislation Applicable to Members of the Legislative Assembly of Nunavut*, in REPORTS AND DECISIONS OF THE INTEGRITY

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lied on written accounts of past interviews with Elders as well as her own personal interviews.³²¹ The names of the Elders she interviewed are appended to the report, which sets out in list form relevant Inuit values, principles and processes.³²² The statement of purpose in the resulting legislation declares that the purpose of the Act is to affirm commitment to the common good in keeping with traditional Nunamummiut values and democratic ideals.³²³ At the least, this report forms part of the legislative history of the enactment; arguably that history extends to the views of the Elders interviewed by the researcher.³²⁴

I.Q. plays a more prominent and direct role in Nunavut's proposed Wildlife Act.³²⁵ Section 1(1) announces the purpose of the Act: to establish a comprehensive regime for managing wildlife and habitat in the Territory.³²⁶ Section 1(2) sets out a list of values which the Act is intended to uphold in fulfilling its purpose, including various principles of I.Q.³²⁷

In the definition section, Inuit Qaujimagatugangit is defined as "traditional Inuit values, knowledge, behaviour, perceptions and expectations."³²⁸ Section 8 then sets out thirteen principles

COMMISSIONER FOR CULTURE OF INTEGRITY, *available at* <http://www.integritycom.nu.ca/English/Reports/culture-integrity-4-IQ.html> (last visited Mar. 18, 2004).

321. *Id.*

322. *Id.*

323. *Id.* See MODEL ACT § I(8).

324. For discussion of the admissibility and use of legislative history in Canada, see SULLIVAN & DRIEDGER, *supra* note 49, at 481.

325. Wildlife Act, S.Nu., ch. 26 (2003) (Can.), *available at* http://www.Nunavut-parks.com/bulletin_board/pdf/Wildlife%20Act%20%2D%20Chapter%2026%20%2D%20English%2Epdf [hereinafter Wildlife Act] (last visited Mar. 18, 2004).

326. *Id.*

327. Section 1.(2) of the Wildlife Act states:

1.(2) To fulfill its purpose, this Act is intended to uphold the following values:

(a) wildlife and habitat should be managed comprehensively since humans, animals and plants in Nunavut are all interconnected;...

(f) the guiding principles and concepts of Inuit Qaujimagatugangit are important to the management of wildlife and habitat and should be described and made an integral part of this Act;

Wildlife Act, S.Nu., ch. 26, § 1.(2) (2003) (Can.).

328. *Id.*

and concepts intended to guide the interpretation and application of the Act. Section 9 further indicates how seven of these principles are to be understood by official interpreters in administering and applying the Act. For example:

9(1) The Government of Nunavut, the NWMB...and every conservation officer and wildlife guardian must follow the principle of *Pijitsirniq* when performing their functions under this Act.

(2) Although the principle of *Papattiniq* traditionally applied to objects rather than living things, because the Government of Nunavut and the NWMB have responsibilities to conserve wildlife, they must endeavour to apply the principle of *Papattiniq* to wildlife and habitat and conserve these resources for future generations of Nunvummiut.

...

(7) Because of the unique challenges facing Nunavut, this Act must be interpreted and applied in a way that respects the principle of *Qanuqtuurunnarniq*.

Finally, section 3(3) declares that "Inuktitut, or the appropriate dialect of Inuktitut, may be used to interpret the meaning of any guiding principle or concept of Inuit *Qaujimaqatungit* used in this Act."³²⁹

In effect, sections 8 and 9 of the Wildlife Act incorporate by reference a body of knowledge that is contained within an Inuktitut-based oral tradition, as opposed to a written set of standards. At first glance, this seems extraordinary. But it can also be understood as part of the ordinary evolution of the instruments of governance in western democracies. It is increasingly common for Western legislatures to incorporate by reference technical standards developed by independent national or international bodies.³³⁰ The effect is to make the incorporated set of standards legally binding on the persons to which the Act applies. This drafting technique creates access problems, particularly if the incorporated standards are subject to copyright (as they often are) and if they are drafted in only one language (as is often the case). The Supreme Court of Canada has toler-

329. *Id.*

330. See Sullivan Observations, *supra* note 58. For discussion, see JOHN MARK KEYES, EXECUTIVE LEGISLATION 269–70 (1992).

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ated these access problems, presumably because the benefits of mandating shared technical standards outweighs the cost of access problems and the disregard of community.³³¹ A similar cost-benefit analysis should apply to the incorporation of an Inuktitut-based, oral tradition into Nunavut law.

At present, the government of Nunavut appears to have decided that the benefits of a legal regime that relies on oral tradition outweighs the costs of sustaining and providing access to that tradition. These costs could be considerable. Incorporation of knowledge grounded in an oral tradition is feasible only if there is reason to believe in the ongoing viability of that tradition. Ironically, the creation of Nunavut (designed to reflect and sustain Inuit culture and the Inuit way of life) exposes the Inuit people to the pressures of the south and to globalization generally.³³² If Nunavut is to have a Wildlife Act that depends on the knowledge embodied in its oral tradition, the government must provide support to ensure the continued viability of the tradition — such as elders participating in the education system.

The Wildlife Act has not been enacted but it is likely to be re-introduced in the next session of the Legislative Assembly. What remains to be seen is how the courts, which are likely to be staffed by English-speaking, non-Aboriginals for many years to come, will respond to the discursive form of drafting and to the obligation to consult elders to determine the content of the law. When the occasion to respond arises, it will not be business as usual. Even though the Act is authentic in English and French only, it tells interpreters that it is to be treated as a multilingual, multijural text with special emphasis on the languages and norms of the Nunamummiut. It imposes a *legal obligation* on interpreters to educate themselves, and to receive evidence about the culture of the other. Further, by departing from the drafting conventions observed by most Canadian (and Commonwealth) legislatures, it invites interpreters to develop new canons of interpretation.

331. See *supra* notes 5–6 and accompanying text.

332. To become self-governing within the Canadian federation, the Inuit must master the governance structures used by the other governments of the federation.

VII. CONCLUSION

The Wildlife Act is extraordinary in its explicit attempt to incorporate Inuit language, knowledge and norms into European-style positive law. It not only permits, but requires dialogue between the oral tradition of the Inuit and the print-based tradition of European language and law. To rise to the challenges posed by this legislation, an official interpreter must be a multilingual, multicultural superhero. Alternatively, he or she must rely on help from appropriate experts. In the case of legislation such as Nunavut's Wildlife Act, the most important experts are the Elders who are the repositories of the incorporated traditional knowledge. Eliciting what they know in this context is comparable to reading standards incorporated by a Railway Safety Act, and relying on expert testimony to explain the terminology and underlying science.

The need to rely on experts is obvious when a court staffed by white judges, operating in a European-based tradition, is called on to interpret legislation that expressly requires knowledge of Aboriginal culture and traditions. However, the need is not confined to such cases. Arguably, any time a court that is not itself fully multilingual or multijural interprets a multilingual text or deals with a multijural matter, it is obliged to seek expert assistance from those who are able to compare and bridge the relevant legal and cultural traditions. Ideally such assistance would be part of the ongoing professional training offered to judges and would also be solicited through *amicus curiae* briefs. At the least, expert testimony by linguists, anthropologists, historians, Elders and the like should be routinely admissible in statutory interpretation cases. Testimony of this sort is invaluable in drawing attention to the complexities of interpretation and in particular to the ways in which language and law interact with cultural context. Most importantly, such testimony helps the court to recognize difference, to engage in dialogue, and in the end, perhaps to achieve a measure of integration.