Civil Law and Common Law Balanced on the Scales of Thémis: The Example of the Bankruptcy and Insolvency Act

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This special edition of the Revue juridique Thémis is devoted to issues related to the harmonization of the Bankruptcy and Insolvency Act with Quebec civil law. The purpose of this introduction is to provide a context for the texts collected in this special edition by looking at the harmonization program run by the Department of Canada.

Canadian bijuralism

Bijuralism refers to the coexistence of two legal traditions in a single country. Canada is bijural because both the common law and the civil law exist in our country.

The origins of this coexistence date back a little more than two centuries. Along with the royal edicts and the governors’ ordinances, the Coutume de Paris was the main source of law in New France until the British Conquest. It will be recalled that, after the Conquest of 1760, the Royal Proclamation of 1763 introduced common law and equity but local attachment to French private law constituted a factor sufficiently important to lead the British Parliament to the compromise of the Quebec Act of 1774. With a few minor restrictions, this Act restored the absolute authority of

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1 By Mᵉ Alain Vauclair, General Counsel, and Mᵉ Lyne Tassé, Senior Counsel.
French laws prior to the Conquest, except in criminal and penal matters.³

The distribution of legislative powers in the Canadian constitution has maintained this legal duality to a large extent: it is the provinces that have the power to legislate in relation to property and civil rights under subsection 92(13) of the Constitution Act, 1867⁴. In other words, they can legislate on the main aspects of private law.

At the same time, the constitution gives the federal Parliament exclusive jurisdiction over various fields that would have fallen under provincial private law jurisdiction if they had not been so assigned to Parliament. Examples include marriage and divorce (91(26)), bills of exchange and promissory notes (91(18)) and, of course, bankruptcy and insolvency (91(21)), which concern the relationships of individuals with each other. It goes without saying that federal statutes passed in those fields interact with the private law of the provinces. Even legislation enacted in the field of public law assigned to Parliament (legislation dealing with taxation, criminal law or unemployment insurance, for example) often makes use of private law concepts.

It is generally recognized that the set of statutes enacted pursuant to the powers assigned to the federal Parliament, however many statutes there are and however important they may be, does not constitute an autonomous legal system, that is to say, a body of rules that is self-sufficient. Where Parliament is silent about the meaning to be given to a private law expression used in federal legislation, as is generally the case, the applicable provincial private law must be used to interpret or even to understand the concept. In such a case, a situation called complementarity exists. For example, when the B.I.A. refers to the concepts of hypothec, mortgage, bonds and suretyship, it is private law that provides them with legal content.

In the same way, only the private law norms adopted by the provincial legislatures can supplement federal enactments that are silent on an aspect that falls under property and civil rights and that is essential to their application. It is in this context that we can say that provincial private law is applied to federal legislation on a suppletive basis and forms its backdrop or legal infrastructure. The rules relating to prescription and limitation periods when they are not provided for in a given federal enactment are one example of this.\(^5\)

Moreover, federal law can dissociate itself from private law and establish its own legal rules. This is what is meant by a relationship of dissociation. The federal rule then becomes an autonomous rule.

This will be the case when, for example, a term is defined in a federal statute or Parliament has expressed its intention to have the term incorporate a concept or institution from the law of a foreign jurisdiction. An example is provided by section 9 of the Bills of Exchange Act,\(^6\) which states that “[t]he rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, apply to bills, notes and cheques.”

Maritime law is another example of dissociation. Since *ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*,\(^7\) the Supreme Court of Canada has clearly established and repeated that Canadian maritime law is a body of law that is uniform throughout the country and separate from provincial law. Essentially, maritime law includes the law applied in England in maritime matters by both the admiralty courts and the ordinary courts, as that law was incorporated in 1934 by what became the current section 2 of the *Federal Court Act*.\(^8\) That provision defines

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5. The Federal Court of Appeal’s decision in *St. Hilaire v. Canada (Attorney General)*, [2001] 4 F.C. 289, is a good example of the civil law’s suppletive application as regards unworthiness to inherit (*indignité successorale*) in the context of the *Public Service Superannuation Act*. In that decision, the Honourable Décary J.A. also analysed the basis for this suppletive relationship in detail.


Canadian maritime law for the purposes of the description of the scope of the Federal Court’s jurisdiction in this area.

It is important to keep these matters in mind when considering harmonization of federal legislation with civil law.

Canada’s bijural nature is all the more significant given the fact that nearly a hundred countries around the world are governed by a combination of two or even more legal systems. Bijuralism usually results from the juxtaposition of one legal system, typically the civil law or the common law, with a pre-existing law such as customary law, Muslim law or Talmudic law. According to a 1998 study by the Faculty of Law of the University of Ottawa, 72 percent of the world’s jurisdictions share one of our two legal systems either in whole or in part, with the civil law being present in 44 percent of those jurisdictions. In terms of population, 66 percent of the planet is governed by civil law, while 40 percent of the planet is governed by common law. The civil law / common law combination is much rarer, as it is found in only about fifteen countries.⁹

The juxtaposition of these two systems in one federal national legal order, such as Canada’s, is even rarer.

**The Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec**

Despite its great value, Canadian bijuralism presents a major challenge in Canada when combined with official bilingualism. That challenge is to address four legal audiences (civil law Francophone, common law Francophone, civil law Anglophone and common law Anglophone) in legislation. When Parliament has to use private law concepts (hypothec, mortgage, ownership, trust, etc.), it must therefore take into account the civil law and common law in each linguistic version by using terminology that can be understood in or is specific to both.

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Current federal legislation only partially addresses the four Canadian audiences. Moreover, the civil law terminology used in federal statutes is obsolete in some cases because of the coming into force of the Civil Code of Québec in 1994.

It was the enactment and then the coming into force of the Civil Code of Québec that set in motion the process for systematically harmonizing all federal statutes and regulations with Quebec civil law, especially the new Civil Code.

As early as June 1993, the Department of Justice Canada adopted a Policy for Applying the Civil Code of Québec to Federal Government Activities, the objective of which was to take the transitional measures needed to adapt to the new Civil Code so that the specificity of Quebec civil law could be taken into account within the federal government.

In June 1995, the Department of Justice Canada adopted the Policy on Legislative Bilingualism, recognizing that it is imperative that the four Canadian legal audiences be able to read federal statutes and regulations and find terminology and wording that respect of the concepts, notions and institutions proper to the legal system of their respective province or territory in the official language of their choice.

It was at that time that the Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec took off. In general terms, harmonization involves reviewing all federal statutes and regulations whose application requires reliance on provincial private law and then harmonizing the content of those statutes and regulations so that they incorporate the concepts, notions and vocabulary of Quebec civil law. Special attention is also devoted to the language of common law in French. Harmonization can occur through omnibus acts on the initiative of the Department of Justice Canada or through specific acts on the initiative of the responsible departments in co-operation with the Department of Justice.

A first omnibus harmonization bill

Between 1995 and 1997, preliminary work and studies were done with professors and experts to determine the extent of the work involved and identify a first series of harmonization problems
and their solutions. Different fields of law were focused on and pilot projects established for each of them. It was at this time that the B.I.A. was highlighted in relation to security mechanisms given the significant changes made to the Civil Code in that regard.

On the basis of that work, and after obtaining the approval of the responsible departments, proposals for legislative amendments were developed and then submitted for public consultation. The Quebec Ministère de la Justice, various committees created by the Barreau du Québec, the Chambre des notaires du Québec as well committees set up by the Canadian Bar Association were among those who provided comments and recommendations.

After two unsuccessful attempts, the Federal Law-Civil Law Harmonization Act, No. 1 came into force on June 1, 2001 and, partially, harmonized nearly 50 statutes at once.

**Guiding principles for the interpreter**

Along with the first harmonization amendments to the B.I.A., it is important to take note of the additions to the Interpretation Act that also resulted from Harmonization Act, No. 1. The new

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11 Bill C-50, A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law, 1st Sess., 36th Parl., 1998 (1st reading 12 June 1998) and Bill S-22, A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law, 2d Sess., 36th Parl., 2000 (1st reading 11 May 2000), both of which died on the Order Paper.

12 S.C. 2001, c. 4 [hereinafter Harmonization Act, No. 1].

sections 8.1 and 8.2, which formally enshrine the principle of the complementarity of provincial private law to federal law, read as follows:

**Section 8.1**

*Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.*

**Section 8.2:**

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

These provisions provide a foundation for the interpretation of bijural Canadian legislation. Thus, section 8.1 sets out the principle of the equality of civil law and common law as regards property and civil rights in Canada, which is a premise of Canadian bijuralism, and also states that the civil law must be used as the suppletive law for federal legislation in Quebec. As well, section 8.1 indicates that the provincial private law rules that are referred to in federal statutes are those in force at the time. Section 8.2 provides invaluable guiding principles for interpreting bijural provisions.

Following the enactment and coming into force of the *Harmonization Act, No. 1*, bijural records were published on the Website of the Department of Justice Canada. These records make possible a better understanding of the changes made to federal statutes.

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We should note that, in a recent decision, the Supreme Court of Canada did not hesitate to use bijural records to interpret a provision of the *State Immunity Act* to which harmonization amendments had been made by the *Harmonization Act, No. 1*. The facts of the case received some media attention. In 1999, a court in the Federal Republic of Germany issued a warrant for the arrest of Karlheinz Schreiber so that he could be extradited for tax evasion and other offences. Later, Germany requested that Canada provisionally arrest Schreiber for the purpose of extradition. Canada granted the request, and Schreiber was arrested. He was imprisoned for a week before being released on bail.

Following those events, Schreiber brought an action against Germany seeking damages for “personal injury” suffered at the time of his arrest and detention. He based his argument on paragraph 6(a) of the *Immunity Act*, which provided that a state was not immune from the jurisdiction of a court in any proceedings relating to any death or personal injury. Germany moved to dismiss the action on the basis of its sovereign immunity. Both the Ontario Superior Court of Justice and the Court of Appeal confirmed that Germany was entitled to sovereign immunity.

Before the case was heard by the Supreme Court, *Harmonization Act, No. 1* came into force, amending the section at issue. The amended provision of the *Immunity Act* reads as follows:

6. *L’État étranger ne bénéficie pas de l’immunité de juridiction dans les actions découlant :*
   a) *des décès ou dommages corporels survenus au Canada;*

6. *A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to*
   a) *any death or personal bodily injury, or*

In addition to certain arguments that we will not discuss here, Schreiber made the argument that the new expression “bodily injury” had to mean something different than “personal injury”.

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17 The amendment is underlined.
since otherwise it would be redundant. He submitted that “bodily injury” referred to injury to the human body, whereas “personal injury” meant injury to such interests as mental integrity, reputation and dignity.

The Court, per the Honourable Lebel J., unanimously rejected Schreiber’s interpretation. The issue of the redundancy of certain terms was dealt with first:

The publication of the Civil Law and Comparative Law Section of the federal Department of Justice, Bijural Terminology Records (2001), published around the time the Harmonization Act was assented to in 2001, further emphasizes the redundancy inherent in the harmonization of the common law and civil law terminology in both official languages. In particular, it makes specific reference to the problem that the expression “personal injury” has a potentially broader meaning in common law than in the civil law meaning. The harmonization solution it identifies to avoid this potential problem (at p. 95) is, in fact, adopted by the s. 6(a) amendment set out in the Harmonization Act:

Solution: The words “or bodily” are added to the English version to better reflect the scope of this provision for civil law. No change is required to the French version as the concept of dommages corporels has a similar meaning in common law and civil law.  

The Court stressed that redundancies need not be avoided; they can be useful to dispel doubts or avoid controversy.

A little further on, the Court charted the course to follow in interpreting bijural provisions:

Taking into consideration the interpretation given in Quebec civil law to the concept of “préjudice corporel” and its classifications of damages, one understands better the difficulties and constraints faced by the drafters of the Harmonization Act which require that the federal statute reflect the vocabulary and the methods of the two Canadian legal systems. Given that the purpose of the Harmonization Act is to highlight bijural terminology used by common law and civil law systems, and does not substantively change the law as set out in the statute, we are left interpreting s. 6(a) of the State Immunity Act using the usual techniques of interpretation.

The State Immunity Act creates exceptions to the classical and broad ranging principles of state immunity. Section 6(a) lifts the immunity in respect of proceedings for “death or personal or bodily injury” or, in the French version of the Act, “les actions découlant ... des décès ou

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18 Schreiber v. Canada (Attorney General), supra note 15 at para. 72.
dommages corporels survenus au Canada**. 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.**

All of these guiding principles and tools, along with the statements of the Supreme Court are of definite importance at a time when federal legislation is destined to change through harmonization and those who interpret statutes and regulations will have to deal with bijuralism.

### A team effort

Federal legislation could not be harmonized without the contribution and co-operation of our partners, the departments responsible for reviewing and applying the statutes being studied. They provide us with invaluable assistance in developing harmonization proposals. The harmonization of the **B.I.A.** would have been difficult if not impossible without the co-operation of Industry Canada – both the Corporate and Insolvency Law Policy Directorate and the Office of the Superintendent of Bankruptcy – as well as our colleagues from Legal Services. Other statutes for which that department is responsible are now being examined, such as the **Canada Business Corporations Act** and certain legislation regarding intellectual property.

In addition to taking an interest in statutes that are already in force, the Bijuralism and Drafting Support Services Group ensures that all new statutes and regulations are examined with bijuralism in mind and that recommendations are made. The same is true in the field of tax legislation, where harmonization amendments are regularly drafted by the Department of Justice and passed by Parliament.**

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19 Ibid. at paras. 77-78.
20 An Act to amend the Income Tax Act, the Income Tax Application Rules, certain Acts related to the Income Tax Act, the Canada Pension Plan, the Customs Act, the Excise Tax Act, the Modernization of Benefits and Obligations Act and another Act related to the Excise Tax Act, S.C. 2001, c.17; An Act to amend the Customs
The various paths to harmonization

The harmonization of federal statutes with Quebec civil law is much more than a simple matter of updating legal terminology. Harmonization sometimes calls into question the legislative policy underlying the statute being harmonized. This is the case with the *B.I.A.*, as can be seen by reading the text by professors Albert Bohémier and Jacques Auger, *The Status of the Trustee in Bankruptcy*, in this special edition. The fiduciary ownership that a trustee holds over a bankrupt’s property comes to us from English law. The trustee becomes the owner of the property, but for a very specific purpose: liquidating it in the interest of the creditors. There is no similar concept in civil law. Since the concept of fiduciary ownership is the cornerstone of the bankruptcy system in Canada, caution is necessary. This study enables us to begin discussions to determine whether continuing along this road is desirable.

Another topic that raises many issues is the bankruptcy of a trust patrimony. Creditors who contract with a trustee have no remedy against him, since their rights must be exercised against the trust patrimony itself. It is therefore possible for the patrimony to go in deficit, especially when the trust is operating an enterprise or a business. In such a case, should the *B.I.A.* apply and, if so, how? Professor Bohémier’s study entitled *Application of the Bankruptcy and Insolvency Act to the Trust of the Civil Code of Québec* provides some potential solutions in this regard. Other questions related to legislative policy are grouped together in the text entitled *Some Legislative Policy Issues*. That text does not make any recommendations; rather, it considers how best to express Parliament’s intention in a civil law setting. This is no easy matter, especially given the entirely British origins of the *B.I.A.* It therefore becomes necessary either to juggle skilfully with civil law concepts to find rules equivalent to those in the *B.I.A.* or to simply

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allow the civil law to play its complementary or suppletive role in bankruptcy and insolvency matters. As appealing as the latter option may seem, it would mean that a given situation might be dealt with differently depending on whether it arises in Ontario or Quebec. Moreover, the application of a uniform standard across Canada might have the effect of introducing a common law rule into Quebec civil law. It seems to us that these kinds of questions are specific to the harmonization program.

The proposals made in a text entitled *Proposals for Harmonizing the Bankruptcy and Insolvency Act with Quebec Civil Law* present updated terminology and discuss certain issues related to procedure, security mechanisms, property, obligations and the notion of business, which affects the very application of the Act.

This special edition of the *Revue juridique Thémis* is the result of several months of research and reflection, but it is not the end of the harmonization process. The comments we receive during public consultations to be held in the winter of 2003 will be indispensable to us in determining whether the harmonization proposals made in *Proposals for Harmonizing the Bankruptcy and Insolvency Act with Quebec Civil Law* respect civil law in a bankruptcy and insolvency context. Moreover, the answers to and comments on the questions asked in *Some Legislative Policy Issues* will guide us throughout the thinking process that we could conduct out with Industry Canada.

We would like to thank the *Revue juridique Thémis* for devoting an entire issue to the *B.I.A.* harmonization work. We offer our sincere thanks to professors Bohémier and Auger for their invaluable contribution and to our colleagues at Industry Canada for their excellent collaboration, especially Annie Drzymala, co-author of the text on legislative policy issues. We would also like to thank our colleagues in the Bijuralism and Drafting Support Services Group who helped us to put the finishing touches on the various texts.

In conjunction with this special edition, it is important to mention that the goal of the Department of Justice is to complete the harmonization of the *B.I.A.* in time for a second harmonization bill and that, as mentioned, the Department will be holding public consultations on all of the proposals related to the *B.I.A.* and other
statutes in the winter of 2003. We would be pleased to receive your
comments and to send you all relevant documents on request as
soon as they are available.

We hope that you enjoy reading this issue, and we encourage
you to send your comments to either of us, at the following address:
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