

**CLAUSE 8 OF BILL S-4:
AMENDING THE *INTERPRETATION ACT***

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Ruth Sullivan summed up the challenge of bijuralism in Canada:

“Federal legislation in Canada is not only bilingual, but also bijuridical in the sense that it is applicable to persons, places and relations that are subject to the civil law in Quebec and to the common law in the rest of Canada... Although Quebec is the only province with a civil law system, the French version of federal legislation is meant to operate in all the provinces. This makes it impossible simply to reserve the English version of legislation for application in the common law provinces and the French version for application in Quebec”.¹

As that text noted in reflecting upon this constitutional and drafting challenge,

“This wealth of possibility creates a difficult challenge for federal drafters, and for interpreters of federal legislation”.

One theoretical drafting response to this challenge would be to ensure that the French and English versions of every federal enactment are capable of operating equally in every province and territory throughout Canada statutory provisions. New legislation would be drafted accordingly. Existing legislation would be assessed against this standard and amended if found wanting. In support of, but not as an alternative, to this first approach, a second strategy might be a more general or universal one of proceeding by way of amendment to the federal *Interpretation Act*.

1. Constitutional Foundations

Federal law is not “an island unto itself”. Some federal enactments are fully comprehensive and self-contained. Others, however, can only be fully understood and comprehended if reference is made to extrinsic legal sources. In most instances, those external sources are composed of provincial law. While the content of provincial law may vary from province to province, the validity of any such provincial law, in large measure, depends of s. 92 of the *Constitution Act 1867*.²

The principal source of provincial jurisdiction under s. 92 is the power conferred by head 13 to legislate in relation to “Property and Civil Rights in the Province”. “Property and civil rights” has a colonial lineage that, in Canada at least, begins with s. 8 of the *Quebec Act 1774*³ which provided in part:

¹ R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (London: Butterworths, 1994) at 235.

² (U.K.) 30 & 31 Victoria, c. 3.

³ (U.K.) 14 George III, c. 83/R.S.C. 1985 (Appendices) No. 2.

“... in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada...”

In contrast, “the Criminal Law of England” was to continue to be “administered, and shall be observed as Law in the Province of Quebec”.⁴ A clear division was therefore drawn between civil law and criminal law.

However, that division was not directly imported into the *Constitution Act 1791*,⁵ dividing Quebec into the separate provinces of Lower and Upper Canada. Under the 1791 Act, each province was given comprehensive legislative power “to make Laws for the Peace, Welfare, and good Government thereof”,⁶ but in the meantime all current laws were to remain in force in each province unless repealed or varied by the 1791 Act or by an enactment of the provincial legislature.⁷ The civil/criminal law division was preserved by virtue of colonial legislation enacted pursuant to the 1791 Act. For example, Upper Canada immediately enacted a law that:

“... in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule of the decision of the same”.⁸

Eight years later, the province enacted a similar statute constituting English criminal law as of 1792 as the law of the province.⁹ This dual “property and civil rights”/“criminal law” regime was preserved by ss. 3 and 46 of the *Act of Union 1840*.¹⁰ Little pre-Confederation legislation limited the scope and meaning of the phrase “property and civil rights”. As a result, the province retained wide legislative jurisdiction to regulate private law, including the establishment of administrative schemes to regulate private law matters.¹¹

However, in the new *Constitution Act 1867*, “property and civil rights” appeared in simply one paragraph amongst many.¹² First, within s. 92 itself, head 13 was one of sixteen paragraphs cataloguing a wide range of subject-matter. Secondly, “the phrase now appeared in the context of a federal system in which extensive powers had been accorded to a new central Parliament” under s. 91 of the 1867 Act.¹³ As Hogg noted,

⁴ Ibid. s.11.

⁵ (U.K.) 31 Geo. III, c. 31/R.S.C. 1985 (Appendices) No. 3.

⁶ Ibid. s. 2.

⁷ Ibid. s. 33.

⁸ Statutes of Upper Canada 1792, 32 Geo. III, c. 1, s. 1.

⁹ Statutes of Upper Canada 1800, 40 Geo. III, c. 1, s. 1.

¹⁰ (U.K.) 3-4 Victoria, c. 35/R.S.C. 1985 (Appendices) No. 4.

¹¹ E.g. the Heir and Devisee Commission established by 37 Geo.III (1797), c. 3 (U.C.).

¹² *Constitution Act 1867*, subs. 92(13).

¹³ P.W. Hogg, *Constitutional Law of Canada*, loose-leaf ed., par. 21.2.

“The enumerated list of federal heads of legislative power in s. 91 included a number of matters which would otherwise have come within property and civil rights in the province, for example, trade and commerce (subs. 91(2)), banking (subs. 91(15)), bills of exchange and promissory notes (subs. 91(18)), interest (subs. 91(19)), bankruptcy and insolvency (subs. 91(21)), patents of invention and discovery (subs. 91(22)), copyrights (subs. 91(23)), and marriage and divorce (subs. 91(28)). These federal classes of subjects were withdrawn from property and civil rights by their exclusive vesting in the federal Parliament”.¹⁴

In view of the breadth and importance of “property and civil rights” as a provincial head of power, it is not surprising that most of the important constitutional cases “have turned on the competition between one or more of the federal heads of power, on the one hand, and property and civil rights, on the other”.¹⁵

Two important conclusions flow from the following. First, outside of the context of the *Constitution Act 1867*, the phrase “property and civil rights” has a very broad and comprehensive meaning that may well extend to all non-criminal matters. Secondly, in the context of the *Constitution Act 1867*, while many federal heads of jurisdiction under s. 91 have been “withdrawn” or subtracted from the field of property and civil rights, the provisions of federal legislation enacted pursuant to any such jurisdictional head may not be completely impervious to and sealed off from provincial law. The exclusive nature of Parliament's jurisdiction to make laws in relation to matters falling within s. 91 of the *Constitution Act 1867* means that it is entirely within the hands of Parliament to determine the relationship, if any, between a federal enactment and provincial law. At one end of the spectrum, federal legislation may rely heavily on provincial law; at the other end of the spectrum, a federal law may be entirely self-contained, that is, reliant for its scope and meaning only on the enactment itself and other federal legislation.

2. Federal Legislation: Role of Provincial Law

What then is the relationship between federal legislation and provincial law?

Federal legislation, by avoiding any reference to or reliance on rules, principles, terminology or concepts having their source in provincial law, may be independent of and unaffected by provincial law for its scope and meaning. For example, to the extent that federal legislation governing bills of exchange, patents and copyright were to establish complete, comprehensive and self-contained regimes for these s. 91 matters, no room would be left for the operation of provincial law. But these federal enactments are not sealed off entirely from provincial law. Promissory notes and bills of exchange depend on contract as an essential conceptual underpinning; and a patent is not only a form of property but a patent licence is based on contract.

Then again, a term or concept may be a special term of art having no special association with subs. 92(13) or with other heads of provincial legislative jurisdiction. For example, a term like “ecological integrity”/“*intégrité écologique*”¹⁶ appears to be constitutionally neutral and independent of provincial law.

But even if federal legislation is clear that a statutory definition is meant to be comprehensive and self-contained (x “means”), it does not follow that provincial law is excluded. For example, under

¹⁴ Ibid.

¹⁵ Ibid. s. 21.2.

¹⁶ *Canada National Parks Act*, S.C. 2000, c. 32, subs. 2(1).

s. 3(1) of the *Canada Labour Code*,¹⁷ paragraph (a) of the definition of “dependent contractor” provides that that term “means the owner, purchaser or lessee of a vehicle... who is a party to a contract, oral or in writing...” In the French version, “entrepreneur dépendant” is defined as “le propriétaire, l’acheteur ou le locataire d’un véhicule... qui est partie à un contrat, verbal ou écrit...”. The Code does not clothe any of these words with special meaning. Where then does one discover what is meant by “owner, purchaser or lessee of a vehicle”/“*le propriétaire, l’acheteur ou le locataire d’un véhicule*” and “party to a contract, oral or in writing”/“*partie à un contrat, verbal ou écrit*”? The sale, lease and ownership of property and contracts are an integral part of property and civil rights and hence governed by provincial law. To assess whether someone is a “dependent contractor” under paragraph (a) of the definition therefore requires an application of provincial law to the circumstances in question. In principle, therefore, the actual legal principle or law governing whether someone is the “owner, purchaser or lessee of a vehicle”/“*le propriétaire, l’acheteur ou le locataire d’un véhicule*” may be identical in all of the provinces or vary from province to province.

Proceeding further along the spectrum, the dispositive provisions of federal legislation may refer to, but leave undefined, principles and terminology that ordinarily fall within property and civil rights. For example, s. 189(1) of the *Canada Labour Code* regulates successor employers, where a federal work, undertaking or business is “by sale, lease, merger or otherwise, transferred from one employer to another employer”/“*en cas de cession d’un employeur à un autre — notamment par vente, bail ou fusion...*” The sale, lease and other forms of transfer/“*vente, bail ou fusion*” of a business are matters that, generally speaking, are governed by provincial laws based on property and civil rights. It is to such laws that one must turn in order to understand and apply this federal provision.

Beyond the implicit application of provincial law to federal legislation, a clearer intention may be expressed to apply provincial law to the interpretation and application of a federal enactment. For example, under s. 3 of the *Crown Liability and Proceedings Act*,¹⁸ the Crown “is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable” for the torts of employees of the Crown¹⁹ and for the breach of a duty relating to ownership, occupation, possession or control of property.²⁰ The French version of s. 3 provides:

En matière de responsabilité civile délictuelle, l’État est assimilé à une personne physique, majeure et capable, pour :

- a) les délits civils commis par ses préposés;
- b) les manquements aux obligations liées à la propriété, à l’occupation, à la possession ou à la garde de biens.

Liability in tort of a private person of full age and capacity for the torts of that person's employees is a matter intended to be entirely governed by provincial law. There is no federal law of torts. Consequently, while the reference in s. 3 to provincial law is not explicit, there can be no doubt of its necessarily implicit intention that the Crown's liability in tort or “responsabilité civile délictuelle” is to be found in the tort/“délits” regime of each province.

Of course, the incorporation of provincial law by a federal statute may be framed in more express language. For example, under subs. 31(1) of the *Crown Liability and Proceedings Act*,

¹⁷ R.S.C. 1985, c. L-2, as am. by S.C. 1998, c. 26.

¹⁸ R.S.C. 1985, c. C-50.

¹⁹ *Ibid.*, par. 3(a).

²⁰ *Ibid.*, par. 3(b).

generally speaking, “the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown”/“*les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance visant l'État*”. In the case of proceedings against the Crown, therefore, not only does subs. 31(1) make the Crown liable for prejudgment interest but it explicitly makes the applicable law that of the relevant province.

3. Applying Provincial Law Elements of Federal Law

How is provincial law incorporated into or made to apply to the interpretation of federal legislation? In a sense, in applying or interpreting federal legislation a common law or civil law lawyer or judge may be required to “think outside” his or her normal professional range of experience. As illustrated by some of the examples described above, that cerebral process depends principally on legal concepts and language. For example, to find the relevant provincial law governing the transfer or cession of a business for purposes of the application of s. 189(1) of the *Canada Labour Code* may seem quite straightforward. A common law lawyer may feel quite confident of finding the applicable law of a particular common law province. But would that lawyer be equally assured if the province in question were the civil law jurisdiction of Quebec? Are civil law concepts the same as common law ones? How are those concepts expressed in French? in English? Where should that lawyer look for the applicable law? Is the matter governed by the *Civil Code* or by special legislation? These are only some of the issues that our common law lawyer may have to confront. And, of course, a civil law lawyer researching this s. 189(1) question in relation to a common law province would be faced with comparable problems.

But law does not stand still. The descriptive label and the content or substance of a legal concept can change. Federal legislation that, when enacted, contained English and French provisions accurately referring to or describing a particular concept may years later no longer do so. For example, as noted above, s. 3 of the *Crown Liability and Proceedings Act* refers to the legal concepts of “tort” and “les délits civils”. Since that Act was enacted, the concept of “tort” remains an accurate way of referring to the civil wrongs in question for which liability may be imposed at common law. The French version’s “délit civil” and “délictuelle” were certainly appropriate when the Act was first enacted. Under the former *Civil Code*, chapter III of Title Third had the heading “Des délits et quasi-délits”.

However, under Quebec's new *Civil Code*, that terminology is nowhere to be found; it has been replaced by “De la responsabilité civile”.²¹ Consequently, a contemporary application of s. 3 to a situation in Quebec would turn on the application of art. 1457 to 1481 of the new *Civil Code*. It would be quickly discovered, however, that certain critical elements of s. 3—“tort” (English version) and “délits civils” (French version)—are nowhere to be found in the new Code. It is true that s. 3, like the new Code, does refer to “responsabilité civile”, but it qualifies this with the now obsolescent “délictuelle”. Moreover, the transitional provisions applicable to the new Code²² also have to be factored into the analysis. In the end, the question remains: how is a provision like s. 3 of the federal legislation to be properly interpreted and applied?

First, in the absence of any new or amending legislation, it may be necessary to interpret and reconcile the current applicable provisions of the federal Act and of the Code on the basis of

²¹ Heading of chapter III of Title One in Book Five.

²² *Loi sur l'application de la réforme du Code civil*, S.Q. 1992, c. 57, especially s. 85

principles of statutory interpretation, including the “shared or common meaning rule” applicable to bilingual legislation.²³

A second approach would be to restore the congruence between the language of s. 3 and the terminology of Quebec's new *Civil Code* by amending s. 3 of the *Crown Liability and Proceedings Act*. This has indeed been proposed: cl. 34 of Bill S-4²⁴ would, in effect, replace “délit ou quasi-délit” with “la responsabilité civile extracontractuelle”.

Thirdly, in the absence of specific legislation, the more general provisions of the *Interpretation Act* provide a possible means by which to clarify matters. It was with that objective in mind that cl. 8 was included in Bill S-4.

4. *Interpretation Act: Scope And Purposes*

The provisions of cl. 8 raise a number of issues relating to the role of a general statute like the *Interpretation Act* in integrating into federal legislation the terminology and concepts of Quebec civil law, on the one hand, and of the common law of the other provinces, on the other. Before considering cl. 8 in detail, however, it may be useful to examine some of the purposes which a general enactment like the federal *Interpretation Act* is intended to serve.

The last general revision of the federal *Interpretation Act* in 1967²⁵ was initiated by Bill S-9. When the Bill was before the Standing Committee on Justice and Legal Affairs, it was introduced by D.S. Thorson, Associate Deputy Minister of Justice, as follows:

“...The fact that an *Interpretation Act* was the very first act passed by the new Parliament of Canada after Confederation is perhaps some indication of the importance that the first Parliament attached to this kind of statute. The importance of the act over the years has not diminished and, if anything, the extent and scope of today's statute law makes a measure of this kind significantly more important today than in 1867.

The purpose of an interpretation act is to facilitate the drafting and understanding of statutes and other legal instruments. By establishing uniform definitions and expressions, and thereby eliminating the need for their constant repetition in the law, the drafting of statutes is simplified and their interpretation is facilitated. An interpretation act also serves the purpose of consolidating in one place rules of construction and interpretation that have been developed over the years both by the courts and by Parliament itself.

[...]

Finally, I should like to point out that this legislation is intended to be of benefit not only to parliamentarians but also to the courts and, indeed, to all persons who must be concerned with the understanding and interpreting of statutes and regulations made by or under the authority of Parliament...”²⁶

The purposes of an *Interpretation Act*, according to Mr. Thorson, may be summed up as follows:

²³ See Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000) at 323-328; Sullivan, *supra* at 215-231.

²⁴ 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., 37th Parl., 2001.

²⁵ S.C. 1967-68, c. 7.

²⁶ Standing Committee (House of Commons) on Justice and Legal Affairs, *Minutes of Proceedings and Evidence* (1966-1967) at 1003-1004.

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

These purposes or rationales are not, however, as limited as they seem. The Act is more than just an extended definition or “short form” provision. Provisions dealing with such matters as the territorial operation of legislation,²⁷ the form of the enacting clause of an Act,²⁸ the general form of an Act,²⁹ Royal assent and an Act’s commencement date,³⁰ quorums³¹ and the admissibility of certain documentary evidence³² are not strictly limited to the interpretation of legislative language. Moreover, some provisions of the Act, whether or not couched in language of interpretation, appear to have a constitutional flavour: for example, enactments that apply “to the whole of Canada”,³³ “no enactment is binding on Her Majesty...”,³⁴ authorization to issue a proclamation, whether conferred at large or on the Governor General, means a proclamation issued by the Governor in Council,³⁵ and effect of demise of the Crown.³⁶

The *Interpretation Act* also contains power-granting provisions. Some of these may be thought analogous to what in Canadian constitutional law is labelled as the “double aspect doctrine”. For example, in the case of subs. 24(1), it is provided that “**words** authorizing the appointment of a public officer to hold office during pleasure **include**... the power to (a) terminate the appointment or remove or suspend the public officer...”³⁷ This provision is framed in definitional language: language that authorizes an at pleasure appointment is extended in meaning to include the power to remove or suspend. Therefore, the first aspect of the provision is that it simply defines the authority to appoint to include the power to remove or suspend. The second way of characterizing the provision is that it is the source of additional powers which, but for par. 24(1)(a), would not have been available to the appointing authority.

A more interesting illustration of this phenomenon is to be found in par. 24(2)(d) of the Act which provides:

²⁷ *Interpretation Act*, s. 8.

²⁸ *Ibid.* subs. 4(1).

²⁹ *Ibid.* subs. 4(2).

³⁰ *Ibid.* s. 5.

³¹ *Ibid.* s. 22.

³² *Ibid.* s. 25.

³³ *Ibid.* subs. 8(1).

³⁴ *Ibid.* s. 17.

³⁵ *Ibid.* s. 18.

³⁶ *Ibid.* s. 46.

³⁷ Emphasis added.

Words directing or empowering a minister of the Crown to do an act or thing... include...

(d) ... a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

Par. (d) is intended to overcome some judicial limitations imposed on the application in Canada of the so-called *Carltona* doctrine.³⁸ Inasmuch as this doctrine is no more than a special exception to the application of the *delegatus non potest delegare* principle where administrative powers are conferred on a Minister of the Crown, a provision like par. (d), that expands the range of persons who are authorized to exercise a Minister's discretionary authority, confers power on persons who would not otherwise have it.

These two examples may be considered rather exceptional. They are, however, far from unique. Some provisions, as has already been noted, employ definitional language to confer powers,³⁹ whereas others do not even attempt to camouflage that they are conferring authority that would not otherwise exist.⁴⁰

The *Interpretation Act* generally eschews enunciating the more general principles of statutory interpretation, preferring instead to prescribe relatively narrow rules to govern specific situations. One exception is to be found in s. 12 under which

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

That legislation should be given a "liberal... interpretation as best ensures the attainment of its objects" reflects the more current purposive approach to statutory interpretation. This approach is neither new nor novel. As Canadian texts explain,⁴¹ the "purposive" approach is associated with the so-called "mischief rule" and the judgment of Lord Coke in *Heydon's Case*.⁴² The present analytical framework for interpreting legislation was very recently described as follows in *Re Rizzo & Rizzo Shoes Ltd.*:

"Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"; Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".⁴³

The current resurrection of a purposive approach to statutory interpretation may itself qualify as an example of the benefits derived by Canada from its mixed system of common and civil law. Both Driedger and Côté point to

³⁸ *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.).

³⁹ See e.g. *Interpretation Act*, s. 21, subss. 24(4) and 31(4).

⁴⁰ See e.g. *Interpretation Act*, ss. 7, 19 and subs. 23(4).

⁴¹ See e.g. Sullivan, *supra* at 36; Côté, *supra* at 376-381.

⁴² (1584), 76 E.R. 637 at 638.

⁴³ [1998] 1 S.C.R. 27 at 40, 41.

“the influence of civil law training in Quebec. The civilian approach to interpretation tends to be functional and purposive, emphasizing the spirit over the letter. This approach has been used in interpreting Quebec’s Codes. Generally speaking, the civilian judges on the Supreme Court of Canada have played an important role in developing the court’s current approach to interpretation”.⁴⁴

That Driedger can also refer to the “influence of American case law, in which purposive analysis is a well established practice”⁴⁵ indicates that this approach is not unique to civil law systems.

If the provisions of an Act are to be “read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”, it is particularly important to uncover and locate the “object of the Act” and “the intention of Parliament”. While ordinarily that object and intention will be disclosed by the words of the enactment, further assistance in resolving and clarifying uncertainty about the meaning of statutory language and its application to a particular set of circumstances may be forthcoming if those construing the legislation are made aware of its purposes and why it was enacted.

The primary source of legislative intention is usually to be found in the enactment itself. It is no longer uncommon for federal legislation to be introduced by a preamble or a “purpose clause” which may identify the “mischief” or problem which the Act seeks to remedy or set out the object and purpose of the legislation. A perhaps extreme example of this is the recently enacted *Canadian Environmental Protection Act*,⁴⁶ which contains a “declaration” of “primary purpose”, a preamble setting forth a long list of general goals and duties, and a provision that details the general “administrative duties” of the Government of Canada in the administration of the Act.⁴⁷ More modest examples, but having the same overall general objective of identifying the rationales and goals of the legislation, are to be found in the recently enacted *Canadian Institutes of Health Research Act*,⁴⁸ and *Nisga’a Final Agreement Act*.⁴⁹

However, the purpose or object expressed in an Act may not be limited in scope to that particular statute but may be intended to apply to other legislation. For example, the purpose clause contained in s. 2 of the *Canadian Human Rights Act*,⁵⁰ is not limited to the operation of that Act but “is to extend the laws in Canada to give effect” to the principles of the Act. Moreover, in the case of the *Canadian Bill of Rights*,⁵¹ the opening provisions of s. 2 require as a general matter that “every law of Canada... be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared...”

Consequently, on the basis of statutory provisions that, in one way or another, require all or a specified class of enactments to be construed in accordance with those provisions or to be subject to the principles or purposes of those provisions, the principles, norms and requirements of one statute may be imported into and be made to apply to another enactment. This technique, as has

⁴⁴ Sullivan, *supra* at 40, 41.

⁴⁵ *Ibid.* at 40.

⁴⁶ S.C. 1999, c. 33 [hereinafter CEPA].

⁴⁷ CEPA, subs. 2(1).

⁴⁸ S.C. 2000, c. 6.

⁴⁹ S.C. 2000, c. 7.

⁵⁰ R.S.C. 1985, c. H-6.

⁵¹ S.C. 1960, c. 44.

already been noted, is a common one in the *Interpretation Act*. Moreover, as will be discussed below, that technique is available to facilitate the integration of civil and common law concepts and terminology into federal law.

5. *Interpretation Act: Applying Provincial Law Elements*

As a matter of principle, therefore, in order to ensure the proper interpretation and application of federal law throughout the length and breadth of Canada, there should be integrated and incorporated into that law, where applicable, the terminology and concepts of Quebec civil law and of the common law of the other provinces. The second, more practical, issue relates to how this substantive goal can be achieved. It is this latter question that will occupy the remainder of this paper.

The first possible technique is to do nothing legislatively, but to leave the matter to be determined in the usual manner on the basis of principles of statutory interpretation. That this approach has worked well and without significant problems or difficulties since Confederation is a strong argument for maintaining the *statu quo*. Moreover, since 1867, the courts have become increasingly sensitive to the interpretation and application of bilingual federal legislation in Quebec and the common law provinces. This is reflected in such principles as the “shared or common meaning rule” and the Supreme Court of Canada’s flexible, purposive approach, that

“... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.

All of this strongly suggests that Canadian courts would experience little or no difficulty in interpreting and applying the private law aspects of federal legislation in an appropriate and proper manner in Quebec and the common law provinces.

Whether to adopt this more evolutionary manner of tackling the issue would not, strictly speaking, imply a choice between a common law tradition of judge-made law and a civil law one of codification and general legislation. For example, common law jurisdictions judges were unprepared to liberate the law of sovereign or state immunity from the shackles of the absolute immunity doctrine until well into the 1970s when international legal developments and conventions adopting the principle of restrictive immunity finally led to statutory reforms adopting principles which the courts of some of the civil law jurisdictions of Western Europe had accepted before World War II or, in some cases, in the last century. As was noted by Molot and Jewett:

“A long time before these major common law jurisdictions changed direction by legislative means, their civil law counterparts in Western Europe had already done so by means of the judicial process. It surely must be counted an ironical twist that jurisdictions priding themselves on codes of law, on the one hand, and judge-made common law, on the other, should have adopted the other’s technique for incorporating restrictive immunity into their law”.⁵²

The principal alternative to reliance on judge-made law would be clarifying legislation intended to establish or fashion a bridge between private law references in federal legislation and the applicable civil law and common law of the provinces. But what form would such legislation take? Such a clarifying provision might be included in every federal statute in which it was considered applicable. As has already been noted, it is not uncommon for a federal statute to include a special

⁵² Molot and Jewett, *The State Immunity Act of Canada* (1982), 2 C.Y.I.L. 79 at 81, 82.

purpose clause or to prescribe special rules of interpretation for that Act. For example, s. 2 of the *Pension Act*⁵³ provides:

“The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled”.

However, adopting this approach would be impractical. In what Acts would such a provision be included? To proceed in this way assumes a reasonable degree of certainty and predictability in identifying federal enactments that require the application of the principles contained in such a provision. And yet, even the *Criminal Code* contains provisions that cannot be interpreted and applied without reference to provincial law. For example, although s. 202(1)(b) makes it an offence to “buy, sell, rent, lease, hire... any device or apparatus” for gambling or betting purposes, one must turn to provincial law to determine if there has been a lawful transaction to “buy, sell, rent, lease, hire... any device or apparatus”. Again, under s. 290, while it is an element of the offence of bigamy that a person go “through a form of marriage with another person”, the element of “form of marriage” is governed by provincial law. This would seem to suggest that few federal statutes would not, explicitly or implicitly, incorporate or reference provincial law.

A more sensible technique may therefore be to treat any such clarifying provision as one of general, if not universal, application. But should it then be included in a special enactment that regulated, for example, the harmonization and integration of federal and provincial laws? That would require the provision be included in the substantive provisions of Part I of Bill S-4 instead of in the *Interpretation Act*. The difficulty is that the provision would be inconsistent with the current title of Bill S-4 and with Part I which is the only part that does not simply amend other enactments and is intended to remain as a stand-alone Act. The Bill's short title is “the *Federal Law-Civil Law Harmonization Act, No. 1*” and Part I is entitled “Federal Law and Civil Law of the Province of Quebec”. Both describe a limited purpose that “aims to integrate Quebec civil law terminology, notions and concepts in federal legislation”. And yet, the proposed *Interpretation Act* amendment goes beyond this limited one-province objective to encompass integrating the terminology, notions and concepts of both Quebec civil law and the common law of the other provinces into federal legislation.

Another problem with this approach is the more practical one. In a few years and with the passage of time, only those very familiar with federal legislation would likely remain aware of the provision. Any such special statute would not have the continuing notoriety of quasi-constitutional legislation, like the *Canadian Bill of Rights* and the *Canadian Human Rights Act*. Moreover, the wide application of the provision to the whole range of federal legislation makes it a particularly well-suited candidate for inclusion in a statute of general application that is as familiar and well-known as the *Interpretation Act*.

6. *Interpretation Act*: Amendment Proposals

The proposal to amend the *Interpretation Act*⁵⁴ is composed of clauses 8.1 and 8.2.

Duality of legal traditions and application	Tradition bijuridique et application du
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⁵³ R.S.C. 1985, c. R-6.

⁵⁴ Bill S-4, *supra* cl. 8.

<p>of provincial law</p> <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 and concepts in force in the province at the time the enactment is being applied.</p> <p>Terminology</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 Quebec and the common law terminology or meaning is to be adopted in the other provinces.</p>	<p>droit provincial</p> <p>8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.</p> <p>Terminologie</p> <p>8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.</p>
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Cl. 8.1 opens with a statement of fundamental principle:

<p>Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada . . .</p>	<p>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 ...</p>
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In contrast with the remainder of that provision and with cl. 8.2, both of which are framed as principles or rules of interpretation, this introductory clause is more principled and less instrumental in nature and addresses the more general issue: where does one find “the law of property and civil rights in Canada”?

To what is the general principle or purpose proclaimed in these introductory words intended to apply? This opening clause is not expressly limited to federal law and federal enactments. On its face, for example, it seems to be making the common law and civil law “equally authoritative”/“*pareillement autorité*” throughout Canada. Would this apply to the provinces? Is civil law equally authoritative in Saskatchewan; and is the common law equally authoritative in Quebec? What is left unstated in this opening clause, however, is the implicit limitation imposed by the division of legislative powers contained in ss. 91 and 92 of the *Constitution Act 1867*. Parliament has no jurisdiction to legislate in relation to provincial areas of jurisdiction nor does it have any power to legislate in relation to provincial laws. A federal enactment cannot clothe provincial laws with a specified nature, character or source. It follows that the principle that “Both the common law and the civil law are equally authoritative... in Canada”/“*Le droit civil et la common law font pareillement autorité... au Canada*” has application to federal laws only. This constitutional limitation is recognized by subs. 3(1) of the *Interpretation Act* which limits the application of provisions of that Act to federal legislation.

Moreover, included among the purposes of Bill S-4 are the following recitals contained in the Bill's preamble:

"Whereas the harmonious interaction of federal and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

Whereas the objective of the Government of Canada is to facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions ..."

The object of the Bill is therefore expressly intended to be limited to "federal legislation". Recalling the words of the late Mr. Driedger, adopted in *Re Rizzo & Rizzo Shoes Ltd.*:

Today there is only one principle or approach, namely, **the words of an Act are to be read** in their entire context and in their grammatical and ordinary sense **harmoniously with** the scheme of the Act, **the object of the Act, and the intention of Parliament**".⁵⁵

Equally, "Both the common law and the civil law are... recognized sources of the law of property and civil rights in Canada"/"*Le droit civil et la common law... sont tous deux sources de droit en matière de propriété et de droits civils au Canada*" reflects a principle that is applicable to federal laws. Implicit in this conclusion is that Parliament has constitutional jurisdiction to make laws that relate to property and civil rights. But does not such a conclusion fly in the face of ss. 91 and 92 of the *Constitution Act 1867* which expressly confer on the provinces exclusive jurisdiction to make laws in relation to property and civil rights in the province?

This takes one back to the discussion above of the older and much wider scope and meaning in Canadian constitutional law of the phrase "property and civil rights", as a formula for describing private law matters. As noted above, private law is broad enough to include laws regulating property or relationships between private persons, as well as laws that establish regulatory or administrative schemes in relation to such matters. Moreover, private law concepts may appear interstitially and as elements or components of legislation that is unquestionably public law in nature such as in the area of criminal law.

The opening words of cl. 8.1 therefore give statutory imprimatur to the principle that both the common law and the civil law are "equally authoritative"/"*font pareillement autorité*" and are "recognized sources of the law of property and civil rights in Canada"/"*sont tous deux sources de droit en matière de propriété et de droits civils au Canada*". Being equally authoritative, neither the civil law nor the common law is superior to, or more authoritative than, the other as regards "the law of property and civil rights in Canada"/"*en matière de propriété et de droits civils au Canada*". At the same time, both "are recognized sources of the law..."/"*sont tous deux sources de droit...*" Federal legislation depends on specific concepts and principles and on particular terminology to express itself. The opening clause of cl. 8.1 therefore enunciates two principles: (1) the common law and the civil law represent two, but not necessarily the only, sources of concepts, principles and terminology employed by federal law to describe elements relating to property and civil rights; and (2) those two sources are equally authoritative. Because concepts, principles and terminology cannot usually be fully understood and applied without an appreciation of how they are expressed and what they mean according to the system of law with which they are associated, this aspect of cl. 8.1 therefore provides a sort of road map indicating the common law and the civil law as routes to fully understanding and applying federal law.

⁵⁵ *Re Rizzo & Rizzo Shoes Ltd.*, *supra* at 41 [emphasis added].

The common law and the civil law are “recognized sources”/“*tous deux sources*” of federal private law. “Sources” here, in both the English and French versions, is unqualified by any definite article. Cl. 8.1 does not state that the common and civil law are “**the** recognized sources”/“*tous les deux sources...*”, but only “recognized sources”/“*tous deux sources*”. That implicitly leaves room for the operation of, and recognizes there to be, other sources of the law of property and civil rights in Canada. In other words, while the common law and the civil law are equally authoritative sources of concepts, principles and terminology employed by federal law to describe elements relating to property and civil rights in Canada, those two sources are not necessarily the only sources the private law elements of Canada's federal law. The purpose of the first part of cl. 8.1 therefore goes no further than to ratify the equal standing and authoritativeness of the common law and the civil law *inter se*. Nothing in the provision confers on either or both of the two systems of law any sort of exclusive character as a source of the private law elements of federal legislation.

The second half of cl. 8.1 expressly characterizes itself as an aid to statutory interpretation:

“... if in interpreting an enactment...”/“... *en vue d'assurer l'application d'un texte...*” As a comparison of the English and French texts reveals, whereas the former speaks of “interpreting an enactment”, the French text refers to “l'application d'un texte”. In other words, on the basis that the English version reflects a common law approach and the French version reflects the approach of the civil law, the former uses general rules of statutory construction as aids to “interpretation” of the language of the enactment in question; however, the civil law uses such rules to assist in “l'application” of the enactment under consideration. Cl. 8.1 is therefore an illustration of these two techniques of applying a principle of interpretation to a particular situation and of how this conceptual contrast is mirrored in terminological differences between the English and French versions of the clause.

The applicability of the latter part of cl. 8.1 turns on whether “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”. First, there must be an “enactment”, a term defined in subs. 2(1) of the Act to mean an Act of Parliament or “regulation”. The interpretation provisions of subs. 2(1) proceed to define “regulation” very broadly to include all manner of authority exercised pursuant to an Act of Parliament or the prerogative.

The second condition is that it is “necessary to refer to” provincial rules, principles or concepts. In the context of “interpreting an enactment”, it is implicit that recourse to provincial rules, principles or concepts is “necessary” for the purpose of interpreting and applying the federal enactment. If a federal enactment, expressly or impliedly, relies on a provincial rule, concept or principle that relates to “property and civil rights”, it may not be possible to fully understand and apply the federal enactment without recourse to that provincial rule, concept or principle. Reference to the latter is therefore “necessary” in order to accurately interpret and apply the federal enactment. On the other hand, if a federal enactment contains an element that is private law in nature, i.e., that relates to “property and civil rights”, but that private law element in no way relies on or refers to a provincial rule, concept or principle relating to “property and civil rights”, then recourse or reference to any such provincial norm would not be “necessary” to the comprehension or application of that element of the enactment. In such a case, this part of cl. 8.1 would have no application. For example, under s. 21.1 of the *Divorce Act*,⁵⁶ the court has the power to refuse an application for divorce if the petitioner refuses to remove “barriers to the remarriage of the [respondent] within the [respondent's] religion” which are within the petitioner's control. The provision therefore has in mind “barriers to remarriage” that find their source in the respondent's religion. In other words, neither civil law nor common law is the source of the private law element of this particular federal legislative provision.

The latter part of cl. 8.1 therefore makes express what has heretofore been an implicit constitutional principle, namely, that provincial common law and civil law underlie and offer interstitial support for many of the private law elements of federal enactments. For example, the *Federal Real Property Act*⁵⁷ and many of the offence provisions of the *Criminal Code* cannot be understood without an appreciation of the concept of ownership of property and the rules and principles governing it. In the absence of federal provisions that comprehensively regulate this particular matter, it is necessary to turn to the appropriate provincial private law to fully understand this matter for purposes of the operation of these federal enactments.

But which province's rules, principles and concepts are referred to? According to the French version, it is the rules, etc. "en vue d'assurer l'application d'une texte dans une province". After all, legislation is not construed in the abstract but in order to apply it to a particular set of circumstances. One such material circumstance is the province in which the enactment will apply. The English version is less clear, leaving to necessary implication that "province" in the phrase "if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts" is meant to refer to the province in which the enactment is being applied. Why, it may be asked, would it be "necessary to refer" to a particular province's rules, principles or concepts other than for purposes of the operation and application of the federal enactment in that province.

While the duty of reference applies to "the rules, principles and concepts in force in the province" without the earlier qualification of "forming part of the law of property and civil rights", there is no doubt that the object of the duty here, namely, "the rule, principles and concepts", is intended to be "a province's rules, principles (and) concepts forming part of the law of property and civil rights".

Of course, rules, principles and concepts evolve and change over time. As of what date would the cl. 8.1 duty of reference be triggered? Since, as noted above, the principal purpose of the *Interpretation Act* is as an aid to the interpretation, and hence application, of federal legislation, the critical moment in time is when the legislation is being applied. That is why cl. 8.1 expressly provides that reference is to be made to the rules, principles and concepts "in force.. at the time the enactment is being applied"/"*en vigueur... au moment de l'application de texte*". This provision therefore would have an ambulatory effect in relation to any such referenced rules, principles or concepts.

In contrast with this concern of cl. 8.1 with a reliance on or reference to "a province's rules, principles or concepts", cl. 8.2 focuses on the "terminology" or "texte" actually used by a federal enactment. But would not even the most veiled reference to a rule, principle or concept have to be adverted to in some way by means of "terminology" or "texte"? What then is the special purpose of cl. 8.2?

This provision would only have application

<p>...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...</p>	<p>... 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</p>
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⁵⁶ R.S.C. 1985, c. 3 (2nd Supp.).

⁵⁷ S.C. 1991, c. 50.

	l'un et l'autre de ces systèmes.
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Cl. 8.2 would therefore only operate where a federal enactment expressly employs a limited class of legal terminology. That terminology is limited to civil law and common law terminology. Based on the constitutional discussion above, any such civil and common law terminology would be limited to matters relating to “property and civil rights”, that is, to rules, principles and concepts of a private law nature. The apparent overlap or duplication between the latter part of cl. 8.1 and cl. 8.2 can be explained by the different purpose that each provision is intended to serve.

Cl. 8.1 only operates “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”. When such a condition would obtain was discussed above. Although the condition for the operation of cl. 8.2 is where common law and/or civil law terminology is used in a federal enactment, the use of such terminology may signify that the federal enactment is referring to a provincial rule, principle or concept relating to property and civil rights. On the other hand, it is not strictly necessary for the operation of this aspect of cl. 8.1 that a federal enactment contain either or both civil law and common law terminology. All that cl. 8.1 requires is that for purposes of interpreting or applying that enactment “it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights”/“*il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils*”. That “necessity” may therefore be generated by an express reference, or by an implicit gap or reference in that federal enactment

However, while that single federal enactment may trigger the application of both cl. 8.1 and cl. 8.2, the results of applying both are not the same. The duty imposed by cl. 8.1 is to refer to the appropriate province's rules, principles and concepts forming part of the law of property and civil rights. This aspect of cl. 8.1 is silent on the civil law/common law dichotomy. It is true that an implicit recognition of that dichotomy can be discerned in the prescription at the end of the provision that reference must be made to “the rules, principles and concepts [forming part of the laws of property and civil rights] in force in the province...” In Quebec, those “rules, principles and concepts” would usually have their source in the civil law, whereas in the other provinces that source would be the common law.

Nevertheless, the latter part of cl. 8.1 appears to be framed with a broader purpose in mind. In requiring that reference be made to the rules, principles and concepts “in force in the province” where the federal enactment is being applied, cl. 8.1 makes no distinction among the provinces. Implicit in this aspect of the clause is the recognition that, even among common law provinces, the rules, etc. may well differ from one province to another. Consequently, cl. 8.1 is prescribing a general principle that if for purposes of interpreting or applying a federal enactment it is necessary to refer to provincial rules, principles or concepts of forming part of property and civil rights, then reference must be made to the rules, etc. in force in the province, whatever province it may be and whether that province is Quebec or one of the common law provinces, where and when the enactment is being applied.

Moreover, cl. 8.1 is silent on the interpretive significance of a federal enactment using language that is peculiar to the common law or civil law. For example, a federal enactment's reference to the death of an individual may, for purposes of its interpretation and application, require recourse to rules, principles or concepts of provincial private law. At the same time, “death” cannot be characterized as civil law or common law terminology. Therefore, cl. 8.2 would have no application to this element of the enactment. However, if the enactment went on to provide for “inheritance” and “succession” as one of the consequences of death, cl. 8.1 and cl. 8.2 both would likely apply: cl. 8.2,

because “inheritance” and “succession” are common law and civil law terms; and cl. 8.1, because both are “concepts forming part of the law of property and civil rights” and because in interpreting and applying the enactment, it is “necessary to refer to those provincial concepts forming part of the law of property and civil rights”.

The centre of attention of cl. 8.2 is, therefore, the use of civil law and common law terminology in describing a particular element of a federal enactment. The two alternative scenarios described in the clause are: (1) where both civil law and common law terminology are used; and (2) where the terminology that is used has a different meaning in the civil law and in the common law.

Scenario (1) is illustrated by federal legislation that refers to “real and personal property” and to “un bien meuble ou immeuble”.⁵⁸ “Real and personal property” are exclusively common law concepts which are nowhere to be found in either the former or the new *Civil Code*. However, the French version of subs. 419(2) refers to “un bien meuble ou immeuble”, which is civil law terminology used to identify property concepts and found in both the old and the new Codes. Consequently, it may be concluded that subs. 419(2) “contains both civil law and common law terminology”/“*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*”.

The commonly used “lease”/“*bail*” in federal enactments illustrates scenario (2). It is doubtful that the civil law and common law of leases or landlord-tenant law is the same. In other words, where these terms are used in federal legislation, that terminology can be said to have “a different meaning in the civil law and the common law”. So, for example, a federal enactment like s. 189(1) of the *Canada Labour Code* would contain “terminology that has a different meaning in the civil law and the common law”/“*le texte... qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes*”.

The foregoing examples underscore an essential feature of both cl. 8.1 and cl. 8.2, namely, that they are language-neutral. Neither refers to the two official languages. Nor is any link made in those two provisions between civil law and French, on the one hand, or the common law and English, on the other. And yet, as commentators have pointed out, language has played a crucial role in the character of bijuralism in Canada and in the almost 400-year old evolution of Canada's two legal systems. It could hardly have been otherwise where neither system is entirely home-grown but has been borrowed and adapted from French civil law and English common law. It is not surprising, then, that it is sometimes difficult to translate French civil law terminology into English and English common law terminology into French. Moreover, translated statutes may be misleading. Simply because identical words are used in the French and English language versions of the Quebec *Civil Code* and of Manitoba and New Brunswick statutes does not mean that those words have the same meaning in Quebec and the two common law provinces. Conversely, the presence of different terminology in the Code and in the statutes of the common law provinces does not necessarily signify that the words do not have the same meaning.

As many of the consequential amendments contained in Bill S-4 indicate, much effort has been dedicated to reducing the language-centred nature of each system. So, for example, the proposed amendments to the *Federal Real Property Act* would, in the English version, supplement “real property” with “immovables”; and in the French version, supplement “immeubles” with “biens réels”. In other words, each language version would employ both civil law and common law terminology to describe this particular concept.

⁵⁸ *Trust and Loan Companies Act*, S.C. 1991, c. 45, subs. 419(2).

In any event, if either condition specified in cl. 8.2 is met, the consequence is the unsurprising one that

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.	est entendu dans un sens compatible avec le système juridique de la province d'application
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Again, as in the case of art. 8.1, the French version of cl. 8.2 is more precise. It is not simply that “the common law terminology or meaning is to be adopted in the other provinces”, but it is the common law terminology or meaning “compatible avec le système juridique de la province d'application”. The French version recognizes that common law terminology or meaning may vary among the common law provinces. However, the only terminology or meaning that matters in any particular circumstances is that associated or compatible with the laws of the province in which the federal enactment is being applied.

Finally, the interpretive principles prescribed by the latter part of cl. 8.1 and by cl. 8.2 are both subject to an express general exception: “unless otherwise provided by law”/“*sauf règle de droit s’y opposant*”. In the case of cl. 8.1, there appear to be two point in the interpretive process where such a federal enactment could “otherwise provide”. Federal legislation may make it “unnecessary to refer” to provincial private law principles, or may express an intention that reference not be made to rules, etc. of the province concerned. For example, such legislation could so comprehensively define its terms as to implicitly exclude any reference to provincial private law as the external source of interpretation and application. Federal legislation could also expressly refer to some other external source of interpretation thereby demonstrating a contrary intent as regards it being “necessary to refer to a province's rules...”

In the case of cl. 8.2, federal legislation relying on this general exception would be directed at modifying the consequences there prescribed: “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”/“*est entendu dans un sens compatible avec le système juridique de la province d'application*”. So, notwithstanding that federal legislation uses both civil law and common law terminology, that legislation could, for example and contrary to the interpretive consequences of cl. 8.2, expressly provide that the civil law terminology is to be adopted in the common law provinces, that the common law terminology is to be adopted in Quebec, or that a third, quite different, meaning is to be adopted.

It may be asked why this general exception appears at all in these two clauses. After all, subs. 3(1) of the Act already provides that “every provision of this Act applies, unless a contrary intention appears”. This subsection would apply to cl. 8.1 and cl. 8.2 with the result that those provisions apply, subject “a contrary intention”. What additional purpose is therefore served by the special exception provided for in cl. 8.1 and cl. 8.2?

Within the *Interpretation Act*, those two clauses would not be unique in that regard: comparable exceptions are to be found in subss. 8(1), 8(2.1), 8(2.2) and 15(2). Nevertheless, whereas subs. 3(1) of the Act is framed in general language and is directed at “every provision” of the Act, the general “exception” in question employs much more precise language. In the case of subs. 3(1), it is whether “a contrary intention appears”/“*sauf indication contraire*”. This is rather weaker language than cl. 8.1 and cl. 8.2 that speak of “otherwise provided by law”/“*règle de droit opposant*”. It is not enough that the contrary intention “appear” or be simply an “indication”. It must be in the form of “law”/“*règle de*

droit”; and that “law”/“*règle de droit*” must be “otherwise provided”/“*opposant*”. To trigger the general exception in cl. 8.1 and cl. 8.2 therefore requires a “law” to the contrary, that is, a legislative provision to the contrary or “*règle de droit opposant*”.

Now subs. 3(1) is itself a “provision of this Act” to which subs. 3(1) applies. Consequently, it is subject to the principle of “contrary intention” in that subsection. Based on the foregoing analysis, any such contrary intention is probably weaker than that provided for in cl. 8.1 and cl. 8.2 and therefore more easily triggered and pushed aside by a “contrary intention”. The effect of the general exceptions in cl. 8.1 and cl. 8.2 may therefore be to oust the application of subs. 3(1).