

BIJURALISM IN CANADA: HARMONIZATION METHODOLOGY AND TERMINOLOGY

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SUMMARY

This paper provides an overview of the methodology and drafting techniques used in the harmonization of federal legislation with Quebec civil law, and describes new terminology developed in the fields of bijuralism and harmonization.

I. Introduction

Canada benefits from the co-existence of two legal traditions: the common law and the civil law. These two legal systems combined prevail in nearly 80% of the world's countries. Canada's bijural tradition gives the country a unique advantage internationally. In this regard, Senator Gérald-A. Beaudoin recently observed: "In this era of the globalization of markets and the internationalization of individual rights and freedoms, our two legal traditions of common law and civil law lend weight to us on the international scene."¹

The methodology and drafting techniques used in harmonizing federal legislation with the new concepts and terminology contained in the reformed *Civil Code of Quebec* are innovative and indeed unique worldwide. The objective of harmonization is not to merge the common law and the civil law into one legislative norm, but rather to reflect the specificity of each system in federal law. On January 31, 2001, Bill S-4, *Federal Law—Civil Law Harmonization Act, No. 1*, was tabled in the Senate.

This article provides an overview of the methodology and drafting techniques used in Bill S-4. In addition, a number of neologisms and new notions which resulted from the harmonization process are discussed.

II. Historical background

In a presentation entitled "Bijuralism in Canada", the Honourable Mr. Justice Michel Bastarache of the Supreme Court of Canada had the following to say: [Translation] "There are relatively few countries where two fundamentally different legal systems co-exist. Canada is one of these countries. "Canadian bijuralism" refers to the co-existence of English common law and French civil law traditions, within a federal state."²

¹ *Debates of the Senate (Hansard)*, Volume 138, Issue 58, 36th Parliament, 2nd Session, Thursday, May 18, 2000, debate on Bill S-22, *Federal Law—Civil Law Harmonization Act, No. 1*: http://www.parl.gc.ca/36/2/parlbus/chambus/senate/deb-e/58db_2000-05-18-E.htm?Language=E&Parl=36&Ses=2 Bill S-22 died on the Order Paper when Parliament was dissolved on October 22, 1999 for the federal elections. A new bill, Bill S-4, *Federal Law—Civil Law Harmonization Act, No. 1* (reiterating the content of former Bill S-22), was tabled in the Senate on January 31, 2001: http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/S-4/S-4_1/S-4TOCE.html.

² Address given at a luncheon presentation on bijuralism and the judiciary, Justice Canada, Ottawa, February 4, 2000.

Canada's dual legal system was sanctioned in 1774 by the passage of the *Quebec Act*, and later by the distribution of powers under Canada's Constitution. Under subsection 92(13) of the *Constitution Act, 1867*, the provincial legislatures have legislative authority in private law matters, that is, matters having to do with property and civil law in each province. While in Quebec private law is derived from the civil law tradition, in Canada's other provinces and territories private law is derived from the common law tradition. As Senator Beaudoin state:

On June 10, 1857, under the Union, the legislation put forward by Attorney General Georges Étienne Cartier to codify the civil law of Lower Canada took effect. The Commission members were selected on February 4, 1859. They were Justices René-Édouard Caron and Charles-Dewey Day from Quebec City, and Justice Augustin-Norbert Morin from Montreal. Eight reports were produced between October 12, 1861 and November 25, 1864. The result was turned over to the legislature on January 31, 1865. A proclamation was issued on May 26, 1866 and the *Civil Code of Lower Canada* took effect on August 1, 1866, eleven months before Confederation.

In 1867, Westminster recognized the right of Canadian provinces to legislate property and civil rights. This was the most important power to be given provincial legislatures and it later formed the foundation for provincial autonomy. The original four provinces were joined by six others. Only the Province of Quebec is governed by a private law regime of French origin. The other provinces are governed by the common law system. Eugene Forsey was quite right when he wrote:

Quebec is not, has never been, and will never be a province like the others; it is the citadel of French Canada.³

Harmonization of federal legislation with the civil law of Quebec has long been an issue. Federal legislation and regulations used to be drafted essentially on the basis of common law. In 1978, the federal government began drafting its bills and regulations using a team of two drafters, generally a Francophone jurist (usually a civil law drafter) and an Anglophone jurist (usually a common law drafter). In this way, co-drafting produces a final product that better reflects Canada's two legal systems.

However, the coming into force of the new *Civil Code of Quebec* on January 1, 1994 resulted in significant changes to the substance and terminology of the civil law, and thus a significant increase in the harmonization work already under way. In anticipation of this reform, in 1993 Justice Canada adopted a *Policy for Applying the Civil Code of Quebec to Federal Government Activities*, the objective of which was to "ensure that we take into account the specificity of Quebec civil law within federal law".⁴ The same year, it created the Civil Code Section and gave it the mandate of implementing this policy in co-operation with the Legislative Services Branch. The Civil Code Section not only has a harmonization mandate, but will also serve as the centre of civil law expertise within the federal government, and assume the task of preparing bijural terminology records to which the legal profession as a whole, and other interested parties internationally, will have access.⁵

In 1995, Justice Canada approved its *Policy on Legislative Bijuralism*,⁶ implementation of which is the responsibility of the Legislative Services Branch working in conjunction with the Civil Code Section. The policy is designed to ensure that each language version of legislation and regulations reflects the system of law in force in each province and territory. This policy led to Justice Canada's

³ *Supra*, note 2.

⁴ See Appendix I.

⁵ The mandate of the Civil Code Section can be found in Appendix II.

⁶ See Appendix III.

establishment in 1997 of the Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec.

The advent of the global economy and the growing interdependence of national legal systems has generated interest in Justice Canada's work in the field of bijuralism and harmonization, particularly among international bodies and organizations that use both the common law and the civil law. Canada is recognized internationally as a living laboratory for harmonizing two legal systems.

As far back as 1984, there was reference to bijuralism in *Terminology Update*, as evidenced by the following comments: [Translation] "It is to be hoped that the effects of the development of Canadian jurilinguism will be felt in Europe and will result in productive exchanges, given that the European Economic Community's legal translators are also looking for language solutions to the problem of the co-existence of French, the language of the civil law, and English, the language of the common law."⁷

In order to carry out its harmonization mandate successfully, the Civil Code Section developed a process and methodology for harmonizing federal legislation with the new civil law concepts and terminology. This exercise led to the development of a harmonization guide, from which the methodology described below is drawn.

III. Harmonization methodology⁸

First of all, the purposes of the harmonization program are: to ensure that the federal legislative corpus adequately reflects the concepts and institutions specific to Quebec civil law; and to ensure that federal legislative amendments take French common law terminology into account.

The harmonization process includes exploration of fields that include statutory interpretation, constitutional law, private law in both the civil law and common law traditions, and comparative law. The harmonization process is divided into four stages.

1. Initial verification

Before beginning to study an enactment for harmonization purposes, the enactment must be verified to ascertain whether it applies in Quebec.

Some legislation and regulations apply only in certain provinces or territories. A statute such as the *Yukon Act*,⁹ for example, may not apply in Quebec. Thus it is appropriate to verify at the outset whether the enactment is applicable in whole or in part in Quebec.

⁷ Article by Nicole-Marie Fernbach, then a legal revisor, Translation Bureau, Montreal Section, *Terminology Update*, Vol. 17, No. 7 and 8, 1984.

⁸ This part was prepared in co-operation with Martin-François Parent, a lawyer in the Civil Code Section.

⁹ R.S.C. 1985, c. Y-2.

2. Verification in context

Study of an enactment includes study of its legal and political context and thus, firstly, of the constitutional distribution of powers between the federal Parliament and the provincial legislatures.¹⁰ The applicable authorities and case law must be consulted on the constitutional points raised by the enactment being studied.

Not only constitutional but also political background forms part of an enactment's context. An indication of Parliament's intent can be found in the preamble to the enactment, which usually describes the objectives sought in bringing the enactment into force, and in the speech of the Minister sponsoring the enactment when it was tabled as a bill in the House.

The enactment being studied may have been intended to implement an international treaty to which Canada is a signatory, and may incorporate the treaty provisions in whole or in part. This must be kept in mind in the context of harmonization.

Once the contextual verification has been completed, it must be determined whether Parliament intended to make complementary use of provincial law or to dissociate itself from provincial law, in other words, whether there is complementarity or dissociation.

Complementarity

Unless there is a legal rule to the contrary, provincial legislation complements federal legislation in property and civil law matters. This situation is referred to as complementarity, or suppletive application of provincial legislation. For example, although the federal Parliament has exclusive jurisdiction over bankruptcy and insolvency, it often refers to the concepts of security and securityship developed in provincial private law, particularly in matters involving the notion of distribution.¹¹

In situations of complementarity, reference must be made to the rules, principles and concepts in force in the province at the time the federal enactment is being applied. Clause 8 of Bill S-4 provides for this principle to be included in section 8.1 of the *Interpretation Act*.¹²

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.

As a result, when a federal enactment is applied in Quebec, it is clear that civil law, not common law, is to complement the federal enactment in property and civil law matters. Similarly, of course, common law is the suppletive law to federal legislation in the other provinces and territories.

¹⁰ Although in general the provincial legislatures have exclusive jurisdiction in property and civil law matters, the federal Parliament has exclusive jurisdiction in certain areas of private law, particularly bankruptcy and insolvency, bills of exchange, and marriage and divorce: *Constitution Act, 1867*, 30 & 31 Vict., c. 3., subs. 91(18), 91(21), 91(26) and 92(13).

¹¹ See *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 136.

¹² R.S.C. 1985, c. I-21.

Dissociation

When a legal rule prohibits suppletive application of provincial legislation, the situation is referred to as dissociation.¹³

For instance, the definition of “Canadian maritime law” in section 2 of the *Federal Court Act* expressly excludes the application of private law in the following terms:

“Canadian maritime law” means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

Enactments to be harmonized

Federal enactments showing complementarity with or dependence on provincial private law are to be harmonized with Quebec civil law. On the other hand, “stand-alone” enactments, which make no reference to provincial private law concepts, are considered dissociated from Quebec civil law. Although, exceptionally, full dissociation is possible, usually dissociation is partial in that it involves only certain parts or provisions of an enactment.

In some cases, whether an enactment refers to provincial private law can be ascertained simply by reading it. In other cases, authorities and case law must be consulted to make this determination.

Typically, a federal enactment can relate to civil law in two ways: explicit dependence or implicit dependence.¹⁴

Explicit dependence

When an enactment contains an express reference to civil law or its specific rules, it is said to be explicitly dependent on civil law. For example, the *Crown Liability and Proceedings Act* provides as follows:

Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.¹⁵

Implicit dependence

When a federal enactment uses a civil law concept or term without assigning it a special meaning, there is said to be an implicit relationship of dependence with the civil law. This is also the case when Parliament fails to legislate on a private law matter that falls under its exclusive or ancillary federal jurisdiction. For example, the *Crown Liability and Proceedings Act* provides that:

¹³ R.S.C. 1985, c. F-7.

¹⁴ These categories and explanations are taken from J. M. Brisson and A. Morel, “Droit fédéral et droit civil : complémentarité et dissociation”; A. Morel, “Méthodologie et plan de travail — Rapport final”, p. 273 ff., *L’harmonisation de la législation fédérale avec le droit civil québécois et le bijuridisme canadien*, Recueil d’études, Justice Canada.

¹⁵ Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 32.

The Crown is liable in tort for the damages for which, if it were a private person ...¹⁶

In addition, terms defined in an enactment can raise specific problems in that, theoretically, they acquire their own meaning. Terms may be defined in four sources: the text of the act to be harmonized, its regulations, the *Interpretation Act*, and other federal acts on the same subject.¹⁷

Once a term is defined, additional terms contained in the definition may themselves be points of contact. In this case, the terms contained in the definitions must be noted as potential points of contact,¹⁸ and enactments using the term and variants of it must be noted as well.¹⁹

A point of contact is a concept or term found in a federal enactment that refers to specific private law rules contained in provincial legislation or in case law on property or civil law matters.

3. Identification of points of contact with provincial private law

Once complementarity with provincial law has been established, terms in the enactment being studied that are points of contact with provincial private law must be identified. This stage is the beginning of the actual harmonization process that will eventually lead to the preparation of proposed federal legislative amendments.

Instances of unijuralism, or absence of points of contact, must also be noted, for example if a rule in an enactment takes only one legal tradition into account but does not dissociate itself from provincial law. For example, some enactments refer to the concept expressed by the terms “settlement of property”/“*disposition de biens*”, a concept that is foreign to civil law. At this point, it must be determined whether Parliament did intend to dissociate the enactment from civil law or whether, the civil law concept should be added. Unijuralism may occur in only one language version of an enactment while the other version reflects both concepts.²⁰

4. Study of points of contact

This stage of the harmonization process consists in verifying points of contact in context and comparing them with the common law, by taking the following steps.

(a) Preliminary verification of applicable civil law

As a result of the Quebec National Assembly's desire to adopt certain new concepts, such as prior claims, and to modernize legal language, the 1994 reform of the *Civil Code of Quebec* made conceptual and terminological changes in a number of areas of civil law. The specific purpose of

¹⁶ Ibid., s. 3.

¹⁷ Under section 15 of the *Interpretation Act*, some definitions can be found in other enactments on the same subject. This section reads as follows:

Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

¹⁸ An example is the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5, s. 2.

¹⁹ An example is found in the terms “person”/“individual”/“subject”/“*personne*”/“*particulier*”.

²⁰ For example, enactments may use the term “mortgage” in the English version and the term “*hypothèque*” in the French version. In these cases, some legal research shows that the term “mortgage” belongs to the common law tradition, while the term “*hypothèque*” belongs to both traditions. In the English version, there is an absence of a point of contact with Quebec civil law. Such a provision is called semi-bijural, and must be harmonized; in this instance, the appropriate solution would be to add the English term “*hypothec*”.

preliminary verification is to identify and clearly understand the changes between old and new civil law concepts and terms.

(b) Contextual verification of the enactment

The purpose of contextual verification is to ascertain whether the meaning of new terms corresponds to the meaning intended by the legislature, by verifying in particular:

- the historical evolution of the enactment;
- Hansard or other sources such as position papers, statements by Ministers, and departmental documentation;
- any applicable case law;
- any parent legislation;²¹ and
- other federal legislation.

At the end of this step, before developing recommendations, there is one final step: comparison of civil law concepts with their common law equivalents.

(c) Comparison of civil law concepts with their common law equivalents

As is noted above, harmonization must be carried out with respect to the common law in both official languages: proposed changes in terminology must not affect the common law in either English or French. Therefore, in establishing conceptual and terminological parallels between the two legal traditions, the meaning of the common law concepts and terms contained in the enactment being studied must be verified.

The purpose of this verification is to find a way to bring terminology from two different legal traditions and two different languages together under one roof, so to speak, in the enactment being studied.

Harmonization proposals may, if necessary, include proposed French-language equivalents for common law terms. French-language common law terminology has been developed over the past 20 years under the auspices of the National Program for the Integration of the Two Official Languages in the Administration of Justice (POLAJ).²² This new terminology is the result of research aimed at ensuring that there are French-language equivalents of common law concepts originally expressed only in English.

5. Development of recommendations

Once the preliminary verification, contextual verification, and comparison steps have been completed, it is time to develop harmonization recommendations. Usually recommendations will involve one or more of the following steps:

- replacing the old term with the new one;
- revising the wording of the enactment in accordance with the new term;
- eliminating the old term if it is obsolete and if the context requires no further replacements;

²¹ For example, the *Financial Administration Act*, R.S.C. (1985), c. F-11.

²² For more details about the POLAJ, see: http://www.pajlo.org/english/who/pajlo_eng.html

and

- if necessary, proposing a French-language equivalent for a common law term.

After recommendations have been fully developed, the next step is the drafting of legislative amendments.

IV. Drafting techniques used in a bijural context

Drafting legislation and regulations is the responsibility of Justice Canada's Legislative Services Branch. Harmonization clauses can form part of general harmonization bills, new legislation, or legislative amendments.

The drafting techniques that shaped Bill S-4 are based on the above-mentioned *Policy for Applying the Civil Code of Quebec to Federal Government Activities*²³ and on the Report of the Legislative Bijuralism Committee; this Committee is responsible for identifying problems raised in implementing legislative bijuralism, and for proposing solutions.

The Honourable Mr. Justice Michel Bastarache clearly outlined the challenge of bilingual and bijural legislative drafting as follows:

[Translation] [...] Federal legislation must be drafted in the English and French languages and in a manner which is compatible with two legal systems. Canada is blessed with four different legal languages and federal legislation must not only be bilingual but bijural. Indeed, federal legislation must simultaneously address four different groups of persons: (1) anglophone common law lawyers; (2) francophone common law lawyers; (3) anglophone Quebec civilian lawyers; and (4) francophone Quebec civilian lawyers.

It is crucial that these four legal audiences in Canada be able to both read federal statutes and regulations in the official language of their choice and also be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal tradition of their particular province or territory. This task is easier said than done, and the courts should play a role in fostering this task.²⁴

Justice Canada took the opportunity provided by the January 1, 1994 coming into force of the *Civil Code of Quebec*, which overhauled Quebec civil law, to revise its concept of the coexistence of the common law and the civil law traditions in federal legislation and regulations.

As the 1993 *Policy for Applying the Civil Code of Quebec to Federal Government Activities* points out, bijural wording can be achieved by various means.

The techniques described below can be applied depending on the situation, the structure of the enactment in which the legislative provision is to be included, the legislative corpus as a whole, and the imperative so clearly described by the Honourable Mr. Justice Bastarache of simultaneously addressing four different groups.

Common term (neutral, generic, or general)

This drafting technique consists in using the same term in civil law and common law. Examples include the terms “lease”/“*bail*” and “loan”/“*prêt*”.

²³ See the section of this paper entitled “Historical Background” above.

²⁴ *Supra*, note 2.

Definition

Definition is a legislative drafting technique; in legislative bijuralism, it consists in giving a term a meaning specific to both the civil law and the common law.

Clause 25 of Bill S-4 is a good example of this type of definition which, in this particular case, prevents long recital of terms throughout the text.

<p>“secured creditor” means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes</p> <p>(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the <i>Civil Code of Quebec</i> or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or</p> <p>(b) any of</p> <p>(i) the vendor of any property sold to the debtor under a conditional or instalment sale,</p> <p>(ii) the purchaser of any property from the debtor subject to a right of redemption, or</p> <p>(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,</p> <p>if the exercise of the person's rights is subject to the provisions of Book Six of the <i>Civil Code of Quebec</i> entitled <i>Prior Claims and Hypothecs</i> that deal with the exercise of hypothecary rights;</p>	<p>« créancier garanti » Personne titulaire d'une hypothèque, d'un gage, d'une charge ou d'un privilège sur ou contre les biens du débiteur ou une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement. S'entend en outre :</p> <p>a) de la personne titulaire, selon le <i>Code civil du Québec</i> ou les autres lois de la province de Québec, d'un droit de rétention ou d'une priorité constitutive de droit réel sur ou contre les biens du débiteur ou une partie de ses biens;</p> <p>b) lorsque l'exercice de ses droits est assujéti aux règles prévues pour l'exercice des droits hypothécaires au livre sixième du <i>Code civil du Québec</i> intitulé <i>Des priorités et des hypothèques</i> :</p> <p>(i) de la personne qui vend un bien au débiteur, sous condition ou à tempérament,</p> <p>(ii) de la personne qui achète un bien au débiteur avec faculté de rachat en faveur de celui-ci,</p> <p>(iii) du fiduciaire d'une fiducie constituée par le débiteur afin de garantir l'exécution d'une obligation.</p>
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Double

The double is a drafting technique that consists in expressing the legal rule applicable to each legal system, in different terms. A double can be simple or paragraphed.

Simple double

The simple double is a drafting technique that consists in presenting the terms or concepts specific to each legal system, one after the other, as shown in the following example.

<p>The title to the <u>real property or immovable</u> intended to be granted . . .</p>	<p>le titre sur l'<u>immeuble ou le bien réel</u> est dévolu ...</p>
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It is worth nothing that, similar to the approach followed in the context of bilingualism where priority is given to the language of the majority of the targeted population in bilingual texts, the common law term (real property) comes first, followed by the civil law term (immovable) in the

English version. Conversely, the civil law term (*immeuble*) comes first followed by the common law term (*bien réel*) in the French version.

Paragraphed double

The paragraphed double is a drafting technique that consists in presenting the concepts specific to each legal system in separate paragraphs. Also known in Great Britain as the Scottish clause,²⁵ this technique is particularly useful when it is necessary to define clearly the application of a legal rule in Quebec and elsewhere in Canada.

<p>“liability” means (a) in the Province of Quebec extracontractual civil liability, and (b) in any other province, liability in tort;</p>	<p>« responsabilité » a) dans la province de Québec, la responsabilité civile extracontractuelle; b) dans les autres provinces, la responsabilité délictuelle.</p>
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V. Examples of harmonization problems and solutions

Problems encountered in reading enactments for harmonization are grouped into three types: unijuralism, semi-bijuralism and apparent bijuralism.

Examples of these types of problems, and the drafting techniques used to harmonize them, follow. All the examples of proposed harmonization solutions are taken from Bill S-4, *Federal Law—Civil Law Harmonization Act, No. 1*²⁶ They are the result of consensus that emerged from internal and external consultations by Justice Canada, particularly with the departments responsible for harmonized legislation, the Quebec *ministère de la Justice*, the *Barreau du Québec*, the *Chambre des notaires du Québec*, the Canadian Bar Association's Quebec Section, and experts in the academic community and private practice.

1. Unijuralism

Unijuralism is a situation that arises, when a legislative provision is based on a concept or term specific only to one legal tradition in both language versions.

An example of unijuralism is found in the terms “special damages”/“*dommages-intérêts spéciaux*”, in subsection 31(3) of the *Crown Liability and Proceedings Act*.²⁷

The English term “special damages” and its French equivalent “*dommages-intérêts spéciaux*” are specific to the common law. The correct equivalent civil law concepts are “pre-trial pecuniary loss” and “*pertes pécuniaires antérieures au procès*”.

To solve the problem of unijuralism, the **double** technique is used to define clearly the application of the legal rule in Quebec and elsewhere in Canada, as in the following example.

<p>When an order referred to in subsection (2) includes an</p>	<p>Si l’ordonnance de paiement accorde <u>une somme, dans la</u></p>
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²⁵ A technique used, in certain acts of the British Parliament, to enact special provisions applicable in Scotland.

²⁶ *Supra*, note 1.

²⁷ R.S.C. 1985, c. C-50.

amount for, <u>in the Province of Quebec, pre-trial pecuniary loss or, in any other province</u> , special damages . . .	<u>province de Québec, à titre de perte pécuniaire antérieure au procès ou, dans les autres provinces, à titre de dommages-intérêts spéciaux</u> ...
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See Bill S-4, clause 51(2).

2. Semi-bijuralism

Semi-bijuralism is a situation that arises, for example, when a legislative provision is based on concepts or terminology specific to the common law in the English version, and concepts or terminology specific to the civil law in the French version.

An example of semi-bijuralism is found in the terms “real property”/“*immeuble*”, in section 20 of the *Federal Real Property Act*.²⁸

This instance of the problem of semi-bijuralism is caused by the use of terminology specific to the common law in the English version only (“real property”) and the use of terminology specific to the civil law in the French version only (“*immeuble*”).

To solve this problem, the French term “*biens réels*” is added to the French version in order to reflect the common law terminology in French, and the term “immovable” is added to the English version in order to reflect the civil law terminology in English. These changes can be made using the **simple double** technique, as in the following example.

A Crown grant that is issued to or in the name of a person who is deceased is not for that reason null or void, but the title to the real property <u>or immovable</u> intended to be granted . . .	La concession de l'État octroyée à une personne décédée ou à son nom n'est pas nulle de ce fait; toutefois, le titre sur l' <u>immeuble ou le bien réel</u> est dévolu ...
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See Bill-4, clause 22.

3. Apparent bijuralism

Apparent bijuralism is a situation that arises when a legislative provision contains civil law terms that are inappropriate in the context for any of the following reasons.

a) Obsolete terminology

Examples of obsolete terminology are the terms “*délit civil*”, “*délit*”, and “*quasi-délit*”, in section 2 of the *Crown Liability and Proceedings Act*.²⁹

These terms used to exist in Quebec civil law. The concepts they designate, based on the existence of fault, remain unchanged in the new *Civil Code of Quebec*, but are now referred to by the term “*responsabilité civile extracontractuelle*”.

²⁸ S.C. 1991, c. 50.

²⁹ *Supra*, note 26.

By combining the techniques of **definition**, the **neutral terms** “liability”/“*responsabilité*”, and the **paragraphed double**, the problem of obsolete terminology can be solved as in the following example.

<p>“liability” means (a) in the Province of Quebec, extracontractual civil liability, and (b) in any other province, liability in tort;</p>	<p>« responsabilité » a) dans la province de Québec, la responsabilité civile extracontractuelle; b) dans les autres provinces, la responsabilité délictuelle.</p>
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See Bill S-4, clause 34(2).

b) Inadequate terminology

An example of inadequate terminology is found in the terms “surrender”/“*rétrocession*”, in paragraph 16(1)(d) of the *Federal Real Property Act*.³⁰

Although the term “*rétrocession*” exists in civil law, in this context it does not reflect Parliament’s intent but constitutes **inadequate terminology** that creates a disparity of content. The correct civil law concept here is “*résiliation*”; the correct French common law term is “*résignation*”.

This instance of the problem of apparent bijuralism can be solved by using the **simple double** technique, as in the following example.

<p>(d) authorize, on behalf of Her Majesty, a surrender <u>or resiliation</u> of any lease . . .</p>	<p>d) autoriser, au nom de Sa Majesté, soit la <u>résiliation ou la résignation</u> d'un bail . . .</p>
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See Bill-4, clause 18(1).

c) Incompatibility with a new civil law principle

An example of incompatibility with a new civil law principle is found in the French term “*privilège*”, in section 20 of the *Defence Production Act*.³¹

This term creates a problem of **incompatibility with a new civil law principle** because, in the new *Civil Code of Quebec*, the concept of “*privilège*” has been eliminated and replaced in part by the concept of “*priorités et hypothèques*” (in English, “prior claims and hypothecs”). While the French term “*privilège*” has been retained for the French common law audience, “*priorités et hypothèques*” must be added for Quebec civil law audience.

Using the **double** technique, wording specific to the civil law has been created to make this provision compatible with the new rule in the *Civil Code of Quebec*, as in the following example.

<p>. . . clear of all claims, liens, <u>prior claims or rights of retention within the meaning of the <i>Civil Code of Quebec</i> or any other statute of the</u></p>	<p>. . . libre <u>de toute priorité ou droit de rétention selon le <i>Code civil du Québec</i> ou les autres lois de la province de Québec</u>, ainsi que de</p>
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³⁰ *Supra*, note 27.

³¹ R.S.C. 1985, c. D-1.

Province of Quebec, charges . . .	tout privilège ou de toute réclamation, charge ...
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See Bill-4, clause 72.

VI. Bijural terminology

The experience of harmonizing federal legislation with Quebec civil law led, not only to the development of innovative drafting techniques and methodology but also, quite naturally, to the development of new concepts and terminology. Under a memorandum of agreement with the Translation Bureau, the terminology resulting from the harmonization process in particular and bijuralism in Canada in general will be entered in TERMIUM[®], the federal government's terminology bank.³² Examples of bijural terminology to be found in TERMIUM[®] follow.

1. Bijural terminology records

Bijural terminology records are intended for the use of four groups: English-speaking common law audience; French-speaking common law audience; English-speaking civil law audience; and French-speaking civil law audience. The **double** technique is used to provide a specific term for each language group and law tradition, as in the following example.

English-language common law real property	French-language common law <i>bien réel</i>
English-language civil law Immovable	French-language civil law <i>immeuble</i>

It can happen that the **double** technique is used in only one language, while in the other language a common term (neutral, generic or general) is used for both law traditions, as in the following example.

English-language common law mortgage	French-language common law <i>hypothèque</i>
English-language civil law hypothec	French-language civil law <i>hypothèque</i>

If a common term is used in both languages, the terminology record will resemble the following example.

English-language common law lease	French-language common law <i>bail</i>
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³² See the Translation Bureau's site: http://www.translationbureau.gc.ca/pwgsc_internet/francais/menu_e.htm.

English-language civil law	French-language civil law
lease	<i>bail</i>

Each terminology record will include context, sources, and references to research reports as appropriate.

2. New terminology and official names

Not only the bijural terminology records, but also new terminology and official names resulting from harmonization, are to be distributed via TERMIUM®; some examples follow.

bijuralism

The co-existence of two legal systems within a state or international community.

Canadian bijuralism

The co-existence of the common law and the civil law in Canada.

bijural

Refers in particular to a legislative provision that incorporates civil law and common law terminology and concepts in each of its language versions.

legislative bijuralism

The co-existence of the terminology of two legal systems in legislative documents. In the Canadian context, the object of legislative bijuralism is to ensure that each of the versions of a statute, regulation, provision or part of a provision takes both common law and civil law into account when the enactment contains a point of contact with provincial private law.³³

legal harmonizer

A jurist whose work involves the drafting of bijural texts. In the Canadian context jurists who implement the *Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec*.

Point of contact

A concept or term found in a federal enactment that refers to specific private law rules contained in provincial legislation, or in case law on property or civil law matters.

Policy for Applying the Civil Code of Quebec to Federal Government Activities³⁴

A policy adopted on June 7, 1993 by the Law and Policy Committee of the Department of Justice Canada. Its purpose is to reflect the specificity of Quebec civil law in federal law.

Policy on Legislative Bijuralism

³³ See Appendix III.

³⁴ See Appendix I.

A policy adopted by the Department of Justice Canada in 1995. Its purpose is to produce federal legislation that reflects, in both language versions, the system of law in force in each province and territory³⁵

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

A program adopted by the Department of Justice Canada in 1997. Its purpose is to adapt federal legislation to the civil law concepts and institutions of the province of Quebec, having regard to the terminology specific to the common law.

VII. Conclusion

The methodology and drafting techniques used in harmonizing federal legislation with Quebec civil law are innovative and indeed unique worldwide. Although this methodology and these drafting techniques continue to evolve, Justice Canada wanted to communicate them to the general public and especially to the legal community because they shaped Bill S-4, *Federal Law—Civil Law Harmonization Act, No. 1*, tabled in the Senate on January 31, 2001.

As the harmonization process progresses and more experience is gained in applying harmonization legislation and regulations, Justice Canada will continue to share the results of its experience, in particular in the form of bijural terminology records and a harmonization guide. The Department will also publish the research carried out on its behalf by experts in the academic community and private practice; Justice Canada hopes that this expertise will provide valuable assistance to practitioners in bijural situations and will encourage them, in turn, to share the results of their own experience.

³⁵ See Appendix III.

APPENDIX I**POLICY FOR APPLYING THE CIVIL CODE OF QUEBEC
TO FEDERAL GOVERNMENT ACTIVITIES
(EXCERPTS)****SUBJECT**

The *Civil Code of Lower Canada* is to be replaced by the *Civil Code of Quebec* at the beginning of 1994. As the preamble to new Code indicates, it establishes the new *jus commune* for the province of Quebec. Given that federal government activities may be subject to provincial law and that there are areas in which there is a connection between the federal legal system and provincial law, the government must evaluate the impact of this reform on its activities as a whole.

The urgency of this issue is apparent from certain transitional provisions of the *Act respecting the implementation of the reform of the Civil Code*, which provide that the new Code applies to situations in which legal rights, whether contractual or other, are in issue, and to a lesser degree to proceedings which have already been instituted.

OBJECTIVE

The federal government legislates in respect of Quebec and is a party to numerous situations in which legal rights are in issue, as well as to numerous proceedings in that province. The government must therefore take the transitional measures that are necessary in order to adapt to the new Civil Code. We must also ensure that we take into account the specificity of Quebec civil law within federal law.

CONTEXT

Concern with how Quebec civil law is to be applied in the federal context is not new. In fact, at the time of the Glassco Report³⁶ the importance of dealing with matters involving Quebec civil law was already being discussed.

The following is quoted from the report under the heading Drafting—Statutes, at page 384:

“It is essential that a French-speaking lawyer trained in the law of Quebec should be associated at an earlier stage than is now customary to ensure that the French version is juridically accurate and to point out any special implications that the bill may have for persons in Quebec under the Civil Code. [...] Departments and agencies which do not have legal officers trained in the Civil Law should take care to refer the particularly complex problems arising under the Civil Code to the Civil Law Section of the Department of Justice.”

The observations made in this report still hold true in the 1990s. They have returned to the forefront because of the coming into force of the reformed Civil Code. As well, the constitutional discussions of recent years have opened the door to the expression of new trends in how we envisage relations between various levels of government.

³⁶ Report of the Royal Commission of Inquiry on Government Organization (the Glassco Commission), 1962.

Relations with Quebec have been marked by conflicts arising from overlaps between civil law and certain federal statutes, *inter alia* in respect of marriage, marine insurance and insolvency. Conflicts of this sort has always existed, but the manner in which we resolve such cases in the 1990s demonstrates an openness on the part of the federal government to more express accommodation of the peculiarities of the provincial legal systems.

We would note the precedent created in Great Britain by the enactment of separate provisions for Scotland in some Acts of Parliament.

Legal experts agree that the existence of the civil law in Canada finds its roots in the *Quebec Act, 1774*. However, unlike institutional bilingualism, there is almost no other legal foundation for the duality of the Canadian legal system. And yet Canada is recognized on the international scene as a living laboratory for the coexistence of two systems of law.

Statutes and regulations

Parliament legislates in respect of both public and private law. *A priori*, it is not concerned with making a distinction between common law and civil law rules. The points at which there is a connection between federal legislation and provincial law are not always clear. In some cases, the question will be brought, directly or indirectly, before the courts to be resolved.

The reform of the Civil Code has a dual effect. The need to adapt federal statutes and regulations to the new Code makes us aware of the work that is yet to be done if they are to reflect the duality of the Canadian legal system. Disputes with Quebec remind us that the mission set out in the Glassco Report should be brought to the forefront of our efforts.

It is important not to confuse the dual legal system with bilingualism. Too often in the past we have allowed ourselves to suggest in some policy documents, sometimes clearly and sometimes less so, that the French version of federal statutes and regulations should reflect civil law concepts and the English version common law concepts. This idea is unacceptable, particularly since common law in French has become an instrument that is used in legal activity throughout the country.

The enactment of legislative measures and constitutional amendments in respect of the equal status of the two official languages has promoted the development of new instruments.

In response to a report of the Commissioner of Official Languages concerning the process of establishing the French version of statutes and regulations, the Department created the Garon Committee, in 1977, and the Desjardins Committee, in 1978, to examine the question and respond to the Commissioner's recommendations.

A parade of administrative measures followed the report of each of these committees, *inter alia* the creation of the position of francophone Chief Legislative Counsel responsible for the quality of the French version of legislation. No concrete action has been taken in respect of the examination and drafting of regulations.

At the same time, the legal bibliography has been enriched by reference works designed to meet the expanded needs in respect of drafting and interpreting laws in the context of the dual legal system and bilingualism.

Among other innovations, we have developed and published vocabularies and lexicons for common law in French.

We have entered the 1990s armed with new instruments which will enable us to insert precise civil law and common law concepts where they are needed in each official language version of federal legislative texts. New Brunswick is officially bilingual, and several other jurisdictions legislate in French. The result is that we can no longer allow ourselves to be vague or ambiguous in federal texts, in terms of the concepts used in civil and common law respectively.

We may reach the goal of wording that is appropriate to each legal system through a variety of approaches. For purposes of illustration, three typical cases where there is a connection between the common law and civil law systems can be identified.

In the first, which it is sufficient to use a general concept, a neutral expression may render the legal concept unequivocally in both systems. For example: a "security".

In the second, where a specific concept is being used, the legal concept must be rendered by using the terminology that is specific to each system. For example: "fee simple or ownership".

In the third, where it is necessary to adapt an entire situation in which legal rights are in issue to a particular system, reference must be made to specific concepts—most often in Quebec civil law—by having what are called asymmetric provisions, or provisions of restricted application to that system. An example of asymmetric provisions is found in former sections 86 *et seq.* of the *Bankruptcy Act* where reference were made to certain rules of Quebec civil law.

We now have the instruments we need to render common law concepts in French, using terminology that is recognized throughout the country.

Suppletive Law

Federal legislative texts sometimes stipulate, in respect of certain provisions, that the law applicable in a province will apply to all matters on which the provision is silent. This is the case for, *inter alia*, the *Crown Liability and Proceedings Act*. However, most often, these texts contain no provision in this respect—and this can be a source of problems.

In an article published in 1982, the Honourable Louis-Philippe Pigeon made the following comments, at page 181:

[Translation] "Federal legislation must, of course, be drafted in accordance with the basic principle that the fundamental law is the common law, which is the foundation on which it is built (*R. v. National Trust Co.* [1933] S.C.R. 670). Only in a case where civil law is involved should an attempt be made to determine how to take civil law into account, with a view to application of the text in Quebec ..."

This comment prompts us to mention one of the difficulties that may arise when we insert a civil law concept in a federal legislative text with a view to its application in Quebec: if it is not stipulated that the rules by which the provision is to be interpreted are the *jus commune* rules set out in the Civil Code, the courts are free to select rules that are contrary to the spirit of the civil law. We are well aware of the assimilating effect of such ambiguous situations in cases where the court of last resort is asked to rule on issues involving the Quebec civil law.

Accordingly, it is imperative that the texts in question, or perhaps another law of general application, specify the rules by which they are to be interpreted, in order to avoid any uncertainty as to the scope of provisions which have specific application in Quebec civil law.

Situations in which legal rights are in issue

In Quebec alone the government is involved in a great number of varying types of contracts and proceedings. We should first identify the types of situations and proceedings which are modified by the new Code and, second, make the necessary adjustments.

We have already done an initial identification of the points at which there is a connection between the Civil Code and federal government activity. They are as follows.

Contracts of adhesion, operating of business, co-operation agreements, superficies ownership, leases of immoveables, suretyship, contract of enterprise, contractual clauses that are contrary to the mandatory provisions of the new Civil Code, contracts for legal services, hypothecs on immoveables and deeds of sale.

In the area of taxation, the amendments affect the valuation of capital gains and the definitions of residence and charities. In the area of Crown liability, the concept of civil delict should be examined attentively.

In proceedings that have already been instituted, evidence and procedure will be governed by the new Code. In a case where the judgment confers rights, it will be governed by the new Code. We would note the new provisions in respect of legal hypothecs, extinctive prescription and arbitration clauses.

We would also note, in respect of the publication of rights: real security on moveables, transfers of authority over immoveables and expropriation procedure.

RECOMMENDATIONS

The consequences of the coming into force of the new Code is one element of policy in the administration of justice, an area which falls under the authority of the Department of Justice.

It is the responsibility of the Department to develop a departmental policy to carry out the application of the reform of the Civil Code and to establish a permanent legal service specializing in providing support for the Department as a whole.

A draft management plan has been submitted earlier this year to departmental sector heads. It contains detailed information on the proposed activities of the Civil Code Section for the next few years.

The role of the Civil Code Section is seen as analogous to that of the Human Rights Section in terms of research and consultation.

In addition to the activity of counsel in the Civil Code Section, research would be carried out by establishing a documentation centre and computerized data bank.

The documentation centre would be open to all practitioners in the Department as a source of specialized bibliographic references. Its work would supplement that of the library and care would be taken not to duplicate the library's work.

Coming in the footsteps of the GASPARD³⁷ project, the computerized data bank would also be a source of specialized information available on line. It would provide legal opinions, explanatory notes, legal texts, case law, relevant portions of federal statutes, pleadings and argument, model contracts, registration forms, and so on.

With respect to the consultation role, counsel in the Civil Code Section would ensure that they could provide the necessary support in the context of departmental practice both in situations where legal rights are in issue and proceedings are pending and in respect of developing policy and drafting legislation and regulations.

³⁷ A computerized data bank at Justice Canada's Regional Office in Montreal.

APPENDIX II

MANDATE OF THE CIVIL CODE SECTION

The mandate of the Civil Code Section is to implement the Program for the Harmonization Federal Legislation with the civil law of the Province of Quebec. It is made up of four components.

1. Harmonization of statutes and regulations

- harmonize federal legislation that refers to provincial private law with Quebec civil law, in a manner that respects common law and the two official languages;
- achieve this harmonization in cooperation with the Legislative Services Branch and in conjunction with departmental legal services units, and Crown agencies and corporations served by the Department of Justice.

2. Bilingual documentation and terminology

- maintain a documentation centre and a computerized databank specialized in civil law, comparative law (civil and common) and in bijural terminology;
- develop bijural terminological records and make them available to legal counsel translators and other interested persons.

3. Consultative services in civil law and harmonization

- provide specialized civil law legal opinions to departments, agencies and Crown corporations served by the Department of Justice;
- provide consulting services in the area of policy development.

4. Development and sharing of harmonization expertise

- disseminate work tools developed by the Civil Code Section relating to the process and methodology of harmonization;
- publish studies and bijural vocabularies on the harmonization of federal legislation with Quebec civil law;
- provide training on the harmonization of federal legislation with Quebec civil law;
- share expertise in the harmonization of federal legislation with Quebec civil law through activities designed to promote Canadian bijuralism.

APPENDIX III

POLICY ON LEGISLATIVE BIJURALISM

Why a policy on legislative bijuralism?

Canada has two official languages and two legal systems: the French civil law system in Quebec and the English common law system elsewhere.

The Department of Justice has never set itself an official policy on legislative bijuralism. The context in which federal legislation is prepared has changed a great deal since the end of the 1960s, and the time has come for the Department to move boldly and decisively.

The policy on legislative bijuralism is consistent with the leadership role the department plays in the field of bijuralism at the national level. It is also linked directly to one of the priorities of this Department, access to justice. Indeed, drafting legislative texts that take into account both legal systems is part of the commitment of the Department regarding the improvement of access to justice for all Canadians.

Objective of the legislative bijuralism policy

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.

Context

Since the end of the 1960s, a number of factors have come into play to drastically change the context in which federal acts and regulations are drafted. These factors should logically lead us to officially recognize the central role that bijuralism must occupy in the drafting of legislative texts.

The factors

- Co-drafting of legislative texts
- Access to a bilingual and bijural legal education (Ottawa, Moncton, McGill)
- Production of terminological aids for bijural drafting of acts and regulations
- Consultations on the French version of federal statutes
- Plan language
- Policy for applying the *Civil Code of Quebec* to federal government activities
- New *Civil Code of Quebec*
- Legislative Services Branch Committee on legislative bijuralism

mandate: to identify legislative bijuralism problems, to propose solutions and to advise drafters on all matters related to legislative bijuralism.

Application of the policy on legislative bijuralism

- The Department will ensure that all legal counsel in the Department are made aware of the

requirements of legislative bijuralism in order for them to be able to take it into account when advising client departments on legislative reforms.

- The Legislative Services Branch will enhance its capacity to draft bijural legislative texts.

DECISIONS

The Department of Justice:

- a) formally recognizes that it is imperative that the four Canadian legal audiences (Francophone civil law lawyers, Francophone common law lawyers, Anglophone civil law lawyers and Anglophone common law lawyers) may, on the one hand, read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory;
- b) will undertake, in drafting both versions of every bill and proposed regulation that touches on provincial or territorial private law, to take care to reflect the terminology, concepts, notions and institutions of both of Canada's private law systems;
- c) charges the Legislative Services Branch with the mandate of seeing to the respect and the implementation of legislative bijuralism, in bills as well as in proposed regulations.

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Program for the Harmonization of Federal Legislation with the Civil Law

³⁸ This lexicon was prepared in co-operation with Marie-Thérèse Mocanu, a terminologist at the Translation Bureau, Public Works and Government Services Canada.

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