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LEGISLATIVE SUMMARY

Bill S-3:
Federal Law–Civil Law Harmonization Act, No. 3

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Legislative Summary of Bill S-3

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL S-3: FEDERAL LAW–CIVIL LAW HARMONIZATION ACT, NO. 3

1 BACKGROUND[1]

On 29 September 2011, the Leader of the Government in the Senate introduced Bill S-3, A third Act to harmonize federal law with the civil law 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 (short title: Federal Law–Civil Law Harmonization Act, No. 3) in the Senate and it was given first reading. This bill appears to be identical to Bill S-12, which was introduced during the 3rd Session of the 40th Parliament. Bill S-12 was adopted by the Senate, then passed first reading stage in the House of Commons before dying on the *Order Paper* when Parliament was dissolved on 26 March 2011.

This is the third harmonization bill to be tabled by the Government in conjunction with the harmonization initiative that was begun by the Department of Justice Canada following the coming into force of the *Civil Code of Québec* in 1994. The two previous harmonization statutes (*Federal Law – Civil Law Harmonization Act, No. 1* and *Federal Law – Civil Law Harmonization Act, No. 2*) came into force in 2001 and 2004 respectively.

In 1993, in anticipation of the coming into force on 1 January 1994 of the *Civil Code of Québec* (CCQ), which would replace the *Civil Code of Lower Canada* (CCLC), the federal Department of Justice created the Civil Code Section to review federal statutes to ensure that they properly reflect both legal traditions, the civil law system in Quebec and the common law system in the rest of Canada.

1.1 COMPLEMENTARITY OF FEDERAL LAW AND CIVIL LAW[2]

Since 1867, the Parliament of Canada has enacted more than 300 statutes that are designed, in whole or in part, to regulate matters of private law. It has done so primarily under Parliament's exclusive jurisdiction over matters that, had it not been for the division of powers in the *Constitution Act, 1867*,[3] would have fallen under the provinces' jurisdiction over property and civil rights. Examples of these matters are marriage and divorce, bankruptcy and insolvency, bills of exchange and promissory notes, interest on money, admiralty law, patents of invention, and copyright. To the same end, though less directly, Parliament has enacted statutes that primarily regulate questions of public law but also include provisions that rest on concepts or regulate relationships governed by private law.

All these statutes do not create an independent legal system. Because these Acts derogate from or add to the *jus commune*[4] of each province, they are supplemented by the relevant provincial law, which is used to interpret them and to apply them. There is, therefore, a complementary relationship between federal legislation and the *jus commune* of the provinces.

In Quebec, the civil law – the *jus commune* governing private law – supplements federal legislation in the same way as the common law does in the other provinces. In this way, the *jus commune* is said to make up for "the incompleteness of the federal legislation" and to have a "suppletive role."

1.2 Objective of Harmonization

Harmonization aims to ensure that the existing provisions of federal laws are brought into line with the existing civil law. It also addresses the question of pre-Confederation law and the need to rewrite the French versions of federal statutes in order to reflect the common law.[5]

The changes in language and in substance made to the *jus commune* of Quebec also have an impact on federal legislation. Changes in vocabulary have separated the rights at issue so that the language of the federal statutes is no longer exactly that of the civil law; it is now rather old-fashioned and over time will seem increasingly out of date, if not archaic.[6] As for the substantive changes, they reflect the transformation of traditional institutions, the formulation of new concepts, the establishment of new institutions, and the reform of the existing rules.

With respect to pre-Confederation law that continues to be in effect in Quebec, this problem has been described as follows:

> [T]he survival of a number of pre-Confederation provisions from the *Civil Code of Lower Canada*, which Quebec has not been able to repeal because they relate to matters that have since 1867 been within the jurisdiction of Parliament, which has not repealed them either, is another source of problems. These provisions were included in a Code; they were one of the components of the system then in effect. Since the Code in question no longer exists, they are as a result isolated and separated from the body of which they once formed part. They express a law in language that has been frozen for over a century now. Their relations with the civil law of today have become conflictual [translation].[7]

However, the reform of the civil law in Quebec is not the only factor responsible for the lack of harmony between the federal law and the civil law. The problem existed long before the CCQ came into force because Parliament has not always taken the civil law system and its language into account when setting out any new private law standards. This has been obvious in three different ways:

- the use of vague or inaccurate phrases to express concepts for which there is a recognized vocabulary in the civil law;
- the expression of legislative provisions only in accordance with the common law system, so that the two legal traditions did not receive equal treatment; and
- the policy of so-called semi-legal legislative drafting, whereby, for a number of years, the language of the civil law was used only in the French version and the language of the common law was used only in the English version, resulting in unequal treatment of Canada's Anglophone and Francophone communities.[8]

The Government of Canada has cited other reasons to justify the need to harmonize federal statutes with the civil law of Quebec. Some of these reasons are set out in the preamble to the *Federal Law–Civil Law Harmonization Act, No. 1*, which states, among other things, that:

- all Canadians are entitled to have access to federal laws in keeping with their legal tradition;
- the civil law reflects the unique character of Quebec society;
- the harmonious interaction of federal and provincial legislation is essential; and
- the full development of our two major legal traditions gives Canadians a window on the world and facilitates exchanges with the vast majority of other countries.

1.3 Stages in the Harmonization Project

Since 1993, the federal Department of Justice has examined over 700 federal statutes and has identified 350 that need to be harmonized. The first stage in the harmonization project was to establish how and on what basis Quebec civil law came into contact with federal law, in order to determine the nature and extent of action necessary. Two studies were then completed.[9] At the same time, the Department of Justice held consultations with leading authorities in the faculties of law in the province of Quebec. Following these consultations, the Department issued a report suggesting a methodology and a work plan.

In the second stage, pilot studies were carried out to determine what amendments should be made to the federal legislation in order to reflect the new situation.[10]

The third stage involved specific studies of surviving provisions of the CCLC (enacted in 1866) governing subjects that, after 1867, came within the exclusive jurisdiction of Parliament (for example, marriage, insolvency, maritime law, the Crown and bills of exchange) and that had not been repealed or even amended by the province because it lacked jurisdiction.[11] Researchers identified 478 provisions of the 1866 CCLC that were likely to cause problems.[12] They also found that 111 of these had been validly repealed, in whole or in part, by Parliament and 64 had been repealed by the pertinent provincial legislature. Another 261 articles were affected by federal legislation, rendering them of no force or effect, in whole or in part. This meant that 42 articles were still in effect, although 17 of these were subject to dispute.[13] According to the Department of Justice, the repeal of these provisions would help to clarify legislation and avoid conflict between laws.

Consultation papers were published in preparation for both previous Harmonization Acts. The same approach was taken with this bill. A third consultation paper in relation to what would become Bill S-12 (now Bill S-3) was published in February 2008.[14] In addition, a special issue of the *Revue juridique Thémis* published in 2008 contained articles by corporate law experts on some of the harmonization proposals to amend the *Canada Business Corporations Act*.[15]

The list of those who contributed to the development of this third harmonization bill includes the provincial and territorial attorneys general and their deputy ministers, the Barreau du Québec, the Chambre des notaires du Québec, the Canadian Bar Association, professors, civil law and comparative law experts, lawyers and judges.

The harmonization process is now almost halfway complete. During their 1 December 2010 appearance before the Standing Senate Committee on Legal and Constitutional Affairs, Department of Justice officials indicated that they had harmonized 46% of the identified statutes.[16] They also said that because new legislation is drafted with harmonization in mind, the number of statutes needing harmonization does not increase over time.

In addition, the officials stated that some of the identified statutes will be harmonized during the review and/or modernization of the pertinent Acts rather than through the harmonization process.

1.4 Policy on Legislative Drafting

In June 1995, the federal Department of Justice adopted a policy on legislative drafting[17] with the goal of giving Canadians access to federal legislation that – in both the French and English versions – respects the system of law that governs them. According to this policy, the Department of Justice:

- formally recognizes that it is imperative that the four Canadian legal audiences[18] may read federal statutes and regulations in the official language of their choice and find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system of their province or territory;
- undertakes, 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;
- charges the Legislative Services Branch with the mandate of seeing to the respect and the implementation of legislative bijuralism, in bills and proposed regulations.

2 DESCRIPTION AND ANALYSIS

2.1 Main Amendments

Bill S-3 seeks to make harmonization changes to 12 statutes, including the *Canada Business Corporations Act* and the *Expropriation Act*. The bill contains 165 clauses. The following summarizes the nine main terminology changes that are consistently found throughout the bill. For each term examined, an example of the amendment is given, followed by a brief rationale for the change. The underlined words are the new words added by Bill S-3 for which an explanation is provided below.

2.1.1 IMMOVABLES/BIENS RÉELS

2.1.1.1 EXAMPLES

Clause 127(2) amending section 2 of the *Expropriation Act*:

"registrar" means the officer with whom the titles relating to real property and immovables are registered or recorded.	« registrateur » Fonctionnaire auprès de qui les titres relatifs aux immeubles ou biens réels sont enregistrés.

Clause 156 amending paragraph 5(*b*) of the *Standards Council of Canada Act*:

(*b*) acquire and hold real property or immovables or any interest or right in them and dispose of that real property or those immovables or interest or right at pleasure; …	*b*) acquérir et détenir des immeubles ou biens réels ou un droit ou intérêt sur ceux-ci et en disposer à son gré; …

2.1.1.2 RATIONALE

An "immovable" in the civil law is the equivalent to "real property" in the common law. The problem in much of the legislation addressed by Bill S-3 is that only civil law terminology ("*immeuble*") is used in the French version and only common law terminology ("real property") is used in the English version.

The solutions proposed in the bill are to add the term "immovables" to the English versions of legislation to reflect the civil law, while adding the term "*biens réels*" to the French versions in order to reflect the common law.

2.1.2 IMMOVABLE REAL RIGHTS/DROIT RÉEL IMMOBILIER

2.1.2.1 EXAMPLE

Clause 131(1) amending subsection 8(1) of the *Expropriation Act*:

(1) If a notice of intention to expropriate an interest in land or immovable real right has been registered, the Minister shall cause a copy of the notice …	(1) Lorsqu'un avis d'intention d'exproprier un droit réel immobilier ou intérêt foncier a été enregistré, le ministre : …

2.1.2.2 RATIONALE

A right in an immovable is an interest or right in real property or land. The problem in the legislation addressed by Bill S-3 is that the term "interest in land" is used in the English version, while "*droit réel immobilier*" is used in the French version. These two terms are not equivalent. The term "interest in land" is better reflected by the French "*intérêt foncier*," while the term "*droit réel immobilier*" is better reflected by the English "immovable real right."

The solutions proposed in the bill are to add “immovable real right” to the English provisions that contain “interest in land,” and to add “*intérêt foncier*” to the French provisions that contain “*droit réel immobilier*.”

2.1.3 MANDATARY/MANDATAIRE

2.1.3.1 EXAMPLES

English version only: Clause 30(1) amending subsection 50(2) of the English version of the *Canada Business Corporations Act*.

(2) A corporation may appoint an agent or mandatary to maintain a central securities register and branch securities registers.	(2) La société peut charger un mandataire de tenir, pour les valeurs mobilières, un registre central et des registres locaux.

English and French versions: Clause 41(1) amending subsection 81(1) of the *Canada Business Corporations Act*.

(1) An authenticating trustee, registrar, transfer agent or other agent or mandatary of an issuer has, in respect of the issue, registration of transfer and cancellation of a security of the issuer, …	(1) Les personnes chargées par l’émetteur de reconnaître l’authenticité des valeurs mobilières, notamment les mandataires, les agents d’inscription ou de transfert et les fiduciaires, ont, lors de l’émission, de l’inscription du transfert et de l’annulation d’une valeur mobilière de l’émetteur : …

French version only: Clause 98 amending section 245 of the French version of the *Canada Cooperatives Act*.

An authenticating trustee, transfer agent or other agent or mandatary of an issuer has, in respect of the issue, registration of transfer and cancellation of a security of the issuer, …	Les personnes chargées par l’émetteur de reconnaître l’authenticité des valeurs mobilières, notamment les mandataires, les agents de transfert ou les fiduciaires, ont, lors de l’émission, de l’inscription du transfert et de l’annulation d’une valeur mobilière de l’émetteur : …

2.1.3.2 RATIONALE

A “mandatary” in the civil law is the equivalent to an “agent” in the common law.[19] The problem in most of the legislation addressed by Bill S-3 is that only the common law terminology (“agent”) is used in the English version, and at times “*agent*” is the only term used in the French version as well. There is also one circumstance where “mandatary” is found in the English but not in the French.

The solutions proposed in the bill are to add the term “mandatary” after the term “agent” in the English version of the targeted legislation in order to correspond, in civil law, to the common law concept of “agent.” In these circumstances no amendment is required to the French version, since the term “*mandataires*” is appropriate for both civil law and

common law. As well, in the few cases where the French version of an Act at issue does not contain the term "*mandataires*," the bill adds the term where necessary. Finally, the bill adds "*mandataires*" to the French version of one section of the *Canada Cooperatives Act* as the section includes "mandatary" in the English version but not in the French.

2.1.4 Personal Representative/Représentant personnel

2.1.4.1 Example

Clause 21(1) amending subsection 31(1) of the *Canada Business Corporations Act*:

(1) A corporation may in the capacity of a personal representative hold shares in itself or in its holding body corporate unless it or the holding body corporate or a subsidiary of either of them has a beneficial interest in the shares.	(1) La société peut, en qualité de représentant personnel, détenir ses propres actions ou des actions de sa personne morale mère, à l'exception de celles dont l'une ou l'autre d'entre elles ou leurs filiales ont la propriété effective.

2.1.4.2 Rationale

The French version originally contained the term "*mandataire*," which is derived from the concept of "mandate," a term that has a specific and more limited meaning in civil law. The generic term "personal representative/*représentant personnel*" is used as it is sufficiently broad to cover all cases in both systems where a person acts on behalf of another.

2.1.5 Rights/Intérêt

2.1.5.1 Example

Clause 82 amending subsection 131(3) of the *Canada Cooperatives Act*:

(3) A person who owned an investment share that was sold under this section is divested of all interests or rights in the investment share and is entitled to receive only the net proceeds of the sale and any net income on the proceeds.	(3) La personne qui était propriétaire des parts de placement vendues conformément au présent article perd tout droit ou intérêt sur ces parts et a droit uniquement au produit net de la vente majoré du revenu net perçu sur ce produit.

2.1.5.2 Rationale

The original French version used only the civil law term "*droit*." The English version used only the common law term "interest." The solution to this problem was to add "rights" in the English version, for civil law purposes, and to add "*ou intérêt*" in the French version to reflect the common law.

2.1.6 REAL SECURITY/SÛRETÉ

2.1.6.1 EXAMPLE

Clause 142 amending paragraph 26(10)(*c*) of the *Expropriations Act*:

(*c*) if part only of the interest or a more limited right that was subject to a security interest or real security was expropriated, the value of the security interest or real security is that proportion of its value otherwise determined under this subsection as though the whole of the interest or a less limited right subject to the security interest or real security had been expropriated, that: …	*c*) lorsque l'expropriation ne porte que sur un droit plus restreint ou une partie de l'intérêt assujettis à une sûreté, la valeur de la sûreté est la fraction de sa valeur totale, déterminée conformément au présent paragraphe comme si le droit moins restreint ou la totalité de l'intérêt assujettis à la sûreté avait été exproprié, que : …

2.1.6.2 RATIONALE

There was no term in the English version that corresponded to the concept of "*sûreté*" used in the French version. Therefore, the term "real security," which reflects both legal systems, was added to the English version.

2.1.7 HYPOTHEC/HYPOTHÈQUE

2.1.7.1 EXAMPLE

Clause 26 amending subsections 42(2) and (3) of the *Canada Business Corporations Act*:

(2) Subject to subsection 49(8), the articles may provide that the corporation has a lien or hypothec on a share registered in the name of a shareholder or the shareholder's personal representative for a debt of that shareholder to the corporation, including an amount unpaid in respect of a share issued by a body corporate on the date it was continued under this Act.	(2) Sous réserve du paragraphe 49(8), les statuts peuvent prévoir qu'une hypothèque ou un privilège en faveur de la société grève les actions inscrites au nom d'un actionnaire débiteur, ou de son représentant personnel, y compris celui qui n'a pas entièrement libéré des actions émises par une personne morale avant sa prorogation sous le régime de la présente loi.
(3) A corporation may enforce a lien or hypothec referred to in subsection (2) in accordance with its by-laws.	(3) La société peut faire valoir l'hypothèque ou le privilège visé au paragraphe (2) dans les conditions prévues par ses règlements administratifs.

2.1.7.2 RATIONALE

Where the common law term "lien" was used in the English version, the equivalent term in civil law, "hypothec," has been added.

2.1.8 HYPOTHECARY CREDITOR/CRÉDITEUR HYPOTHÉCAIRE

2.1.8.1 EXAMPLE

Clause 124(1) amending subsections 31(2) and (3) of the *Electricity and Gas Inspection Act*:

(2) When any meter is ordered to be forfeited under subsection (1), any person, other than a party to the proceedings that resulted in the order, who claims an interest or right in the meter as owner, mortgagee or hypothecary creditor, as lien holder or holder of a prior claim or of any like interest or right may, within 30 days after the making of the order of forfeiture, apply to any superior court of competent jurisdiction for an order under subsection (5) after which the court shall fix a day for the hearing of the application.	(2) Lorsque des compteurs sont confisqués en vertu du paragraphe (1), quiconque n'est pas partie aux procédures dont résulte l'ordonnance de confiscation et revendique un droit ou intérêt sur ces compteurs à titre de propriétaire, de créancier hypothécaire, de titulaire d'une priorité ou d'un privilège ou de créancier d'un droit ou intérêt semblable peut, dans les trente jours suivant l'ordonnance de confiscation, requérir de toute cour supérieure compétente une ordonnance en vertu du paragraphe (5), après quoi la cour fixe la date d'audition de la requête.
(3) An applicant for an order under subsection (5) shall, at least 30 days prior to the day fixed for the hearing of the application, serve a notice of the application and of the hearing on the Minister and on all other persons who have claimed an interest or right in the meter that is the subject matter of the application as owner, mortgagee or hypothecary creditor, as lien holder or holder of a prior claim or of any like interest or right of whom the applicant has knowledge.	(3) Quiconque requiert une ordonnance en vertu du paragraphe (5) doit donner avis de la requête et de la date fixée pour son audition au moins trente jours avant cette date, au ministre et à toute personne qui, au su du requérant, revendique sur les compteurs, objet de la requête, un droit ou intérêt à titre de propriétaire, de créancier hypothécaire, de titulaire d'une priorité ou d'un privilège ou de créancier d'un droit ou intérêt semblable.

2.1.8.2 RATIONALE

The term "mortgagee" used in the English version refers to a common law concept. To take the civil law concept into account, "hypothecary creditor" has been added. The same issue does not arise in the French version because "*créancier hypothécaire*" is the term used in both legal systems.

2.1.9 SEQUESTRATOR/SÉQUESTRE

2.1.9.1 EXAMPLE

Clause 44 amending section 94 of the *Canada Business Corporations Act*:

A receiver or sequestrator of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property, pay the liabilities connected	Sous réserve des droits des créanciers garantis, le séquestre des biens d'une société peut en recevoir les revenus, en acquitter les dettes, réaliser les sûretés de

with the property and realize the security interest of those on behalf of whom the receiver or sequestrator is appointed, but, except to the extent permitted by a court, the receiver or sequestrator may not carry on the business of the corporation.	ceux pour le compte desquels il est nommé et, dans les limites permises par le tribunal, en exploiter l'entreprise.

2.1.9.2 RATIONALE

The concept of a "receiver" in common law corresponds to a "sequestrator" in the civil law. As such, both terms are now included in the English version of the legislation.

NOTES

1. Much of the material in the "Background" section of this paper is borrowed from Wade Raaflaub, *Bill S-10: Federal Law–Civil Law Harmonization Act, No. 2*, Publication no. LS-487E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 17 December 2004.
2. This section is based on the following summary of the work done in the harmonization project: André Morel, "Harmonizing Federal Legislation with the *Civil Code of Québec*: Why? And Wherefore?," in Department of Justice, *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies*, Ottawa, 1997, pp. 1–25 [*Collection of Studies No. 1*].
3. *The Constitution Act, 1867*, 30 and 31 Vict., c. 3 (U.K.).
4. The *jus commune* is the foundational general law of a legal order. The Civil Code of Québec is a central expression of the *jus commune* in Quebec. See Roderick A. Macdonald, "Encoding Canadian Civil Law," in *Collection of Studies No. 1*, p. 138.
5. Morel, "Harmonizing Federal Legislation" (1997), p. 16.
6. Ibid., pp. 11–12.
7. Ibid., pp. 12–13.
8. This unequal treatment of the two communities has come about because each language version is associated with only one of the two legal systems; thus the Anglophone community in Quebec does not have access to legislative documents expressed in terms of the civil law in English, and the Francophone community in the other provinces does not have access in French to documents expressed in terms of the common law in French; ibid., p. 15.
9. The first study consisted of two papers prepared by Roderick A. Macdonald. (For a synthesis and elaboration of these works, see Roderick A. Macdonald, "Encoding Canadian Civil Law," in *Collection of Studies No. 1*, pp. 135–213, or in *Mélanges Paul-André Crépeau*, Éditions Yvon Blais, Cowansville, 1997, pp. 579–640). The second study consisted of the following paper: Jean-Maurice Brisson and André Morel, "Federal Law and Civil Law: Complementarity, Dissociation," in *Collection of Studies No. 1*, pp. 215–264.
10. These pilot studies examined the following federal statutes: the *Federal Real Property Act*, S.C. 1991, c. 50; the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; the *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2; and the *Supreme Court Act*, R.S.C. 1985, c. S-26.

11. These studies were specially commissioned from researchers in the law faculties in Quebec and the Civil Law Section of the University of Ottawa and from experts in civil and comparative law. Most of the studies were brought together in *Collection of Studies No. 1*. The findings and recommendations in these studies were brought together in this report: André Morel, "Pre-Confederation Civil Law and the Role of Parliament after the New Civil Code," revised version, April 1997, in *Collection of Studies No. 1*, pp. 71–133.

12. See *Collection of Studies No. 1*.

13. Morel, "Pre-Confederation Civil Law" (1997), pp. 97–98.

14. Department of Justice, *Third series of proposals to harmonize the federal law with the civil law of the Province of Quebec: Consultation Document – February 2008*.

15. *Revue juridique Thémis*, Vol. 42, Nos. 1 and 2, 2008.

16. Senate, Standing Committee on Legal and Constitutional Affairs, meeting of 1 December 2010.

17. Department of Justice, *Policy on Legislative Bijuralism*, Ottawa, June 1995.

18. This policy identifies four Canadian legal audiences: Francophone civil law lawyers, Francophone common law lawyers, Anglophone civil law lawyers, and Anglophone common law lawyers.

19. A "mandatary" is "an agent, especially one who acts gratuitously but is entitled to be indemnified for expenses incurred in carrying out the mandate." (*Black's Law Dictionary*, 9th ed., Thomson Reuters, St. Paul, Minn., 2009.)