

Introductory Note

Consultation

*FOURTH SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW
WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC*

DEPARTMENT OF JUSTICE CANADA

FEBRUARY 2017

The Bijuralism Group of the Legislative Services Branch, Public Law and Legislative Services Sector, on behalf of the Department of Justice Canada, is seeking comments regarding the *Fourth series of proposals 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.*

This fourth series of harmonization proposals was prepared in cooperation with the departments responsible for the selected Acts. As well, some stakeholders have been consulted on preliminary proposals.

The comments received will be considered in preparing a potential fourth harmonization bill.

This introductory note will provide you with the context in which these proposals were developed.

Canadian Bijuralism and the Harmonization Initiative

Two legal systems coexist in Canada, each having their own unique terminology, civil law in the Province of Quebec and common law in the other provinces and territories. This means that federal legislation, Acts and Regulations, must speak to four audiences when its provisions deal with private law matters: common law Anglophones, civil law Anglophones, common law Francophones, and civil law Francophones.

This coexistence can be traced back to the *Quebec Act*, which was passed by the Parliament of the United Kingdom in 1774, and restored to the colony, with the exception of criminal laws, French laws that had existed prior to the British conquest and that were accordingly of civilist origin. The division of legislative powers provided for in the *Constitution Act, 1867* maintained the coexistence

of the two legal traditions since the power to legislate with respect to property and civil rights was conferred on the provinces under subsection 92(13). Consequently, the provinces have the power to legislate with respect to most of private law, subject to specific areas of jurisdiction belonging to Parliament, such as bankruptcy and intellectual property.

The bijural status of Canada and its legislation, coupled with the fact that federal legislation, taken as a whole, does not constitute an autonomous legal system, means that when Parliament is silent on the meaning to be given to a private law expression to which reference is made, it is necessary to refer to the applicable provincial private law for interpretation. This is known as the principle of complementarity. Furthermore, a standard or rule of provincial private law will supplement a federal statute that is silent on a question relating to property and civil rights. The provincial private law is then applied in a suppletive manner to the federal statute. For example, when reference is made in a federal statute to the concept of lease without any further qualification, it is the private law of the province that will provide, on a suppletive basis, a definition of this concept. Similarly, a federal statute that does not provide specific rules with respect to successions will be interpreted, on a suppletive basis, according to the rules of provincial private law.¹

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

The initiative to harmonize federal legislation with the civil law of the Province of Quebec was established by the Department of Justice Canada in the wake of the coming into force of the *Civil Code of Québec* on January 1, 1994, a new codification that changed the concepts, institutions and terminology of Quebec civil law. The harmonization initiative's primary objective is to review all federal Acts and regulations the application of which requires the use of provincial private law and, where necessary, adjust their content to ensure that they are consistent with the concepts, institutions and terminology of Quebec civil law. Also, particular care is taken to ensure respect for the terminology of the common law in French.

¹ See the detailed analysis of the basis of this suppletive relationship by the Honourable Justice Décaré of the Federal Court of Appeal in *St-Hilaire v. Canada (Attorney General)*, [2001] 4 F.C. 289 (C.A.). See also Morel, A. Brisson, J.-M., *Federal Law and Civil Law: Complementary, Dissociation*, in the *Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism – Collection of studies*, Department of Justice Canada, 1997, at pp. 215 to 264.

As a result of the harmonization initiative, Canadians are able to refer to federal Acts and regulations that will display a greater respect for the common law and civil law legal traditions in both official languages. Indeed, all Canadians, those living in Quebec, who are subject to the civil law, and those living in the other provinces and territories, who are subject to the common law, are able to read federal Acts and regulations that display terminology, concepts and institutions more respectful of both legal traditions in English and in French. The implementation of the harmonization initiative helps in this way to ensure better access to justice.

A Series of Harmonization Acts

The first Harmonization Act, the [Federal Law-Civil Law Harmonization Act, No. 1](#), S.C., 2001, c. 4, came into force by Order in Council on June 1, 2001.² Among the amendments made by this act, two rules of construction were added to the *Interpretation Act*,³ specifically [sections 8.1 and 8.2](#),⁴ which provide as follows:

RULES OF CONSTRUCTION

Property and Civil Rights

Duality of legal traditions and application of provincial law

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.

2001, c. 4, s. 8.

RÈGLES D'INTERPRÉTATION

Propriété et droits civils

Tradition bijuridique et application du droit provincial

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.

2001, ch. 4, art. 8.

² For more information on this Act, see <http://canada.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/harmonization-loisdharmonisation.html>

³ R.S., c. I-21.

⁴ See also <http://canada.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/interpretation.html>.

Terminology

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.

2001, c. 4, s. 8.

Terminologie

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.

2001, ch. 4, art. 8.

The Supreme Court of Canada referred to sections 8.1 and 8.2 of the *Interpretation Act* in the following cases in particular:

- [*Peoples Department Stores Inc. \(Trustee of\) v. Wise*](#), [2004] 3 S.C.R. 461;
- [*Canada 3000 Inc., Re; Inter-Canadian \(1991\) Inc. \(Trustee of\)*](#), [2006] 1 S.C.R. 865;
- [*A.Y.S.A. Amateur Youth Soccer Association v. Canada \(Revenue Agency\)*](#), 2007 CSC 42;
- [*Caisse populaire Desjardins de l'Est de Drummond v. Canada*](#), 2009 SCC 29;
- [*Bank of Montreal v. Innovation Credit Union*](#), 2010 SCC 47;
- [*Quebec \(Attorney General\) v. Canada \(Human Resources and Social Development\)*](#), 2011 SCC 60;
- [*Hinse v. Canada \(Attorney General\)*](#), 2015 SCC 35.

The Federal Court of Appeal and the Federal Court made use of sections 8.1 and 8.2 of the *Interpretation Act* in the following cases in particular:

- [*St-Hilaire v. Canada \(A.G.\)*](#), [2001] 4 F.C. 289;
- [*Wolf v. Canada*](#), [2002] 4 F.C. 396;
- [*Canada \(A.G.\) v. National Bank of Canada*](#), 2004 FCA 92;
- [*9041-6868 Quebec Inc. v. Canada \(M.N.R.\)*](#), 2005 FCA 334;
- [*Quebec \(Commission de la Construction\) v. Canada \(M.N.R.\)*](#), 2006 FCA 49;
- [*Dupuis v. Canada \(Revenue Agency\)*](#), 2006 FC 228;
- [*Royal Winnipeg Ballet v. Canada \(M.N.R.\)*](#), 2006 FCA 87;
- [*Travel Just v. Canada \(C.R.A.\)*](#), 2006 FCA 343;
- [*Bédard v. Kellogg Canada Inc.*](#), 2007 F.C. 516;
- [*Widrig v. Regroupement Mamit Innuat Inc.*](#), 2007 F.C. 1224;
- [*Bouchard v. Canada \(Attorney General\)*](#), 2009 CF 249;
- [*NCJ Educational Services Ltd. v. Canada \(M.N.R.\)*](#), 2009 FCA 131;
- [*Grimard v. Canada*](#), 2009 FCA 47;
- [*Bouchard v. Canada \(Attorney General\)*](#), 2009 FCA 321;
- [*Canadian Broadcasting Corp. v. Montréal \(City\)*](#), 2012 FCA 184;
- [*Hann v. Canada \(M.N.R.\)*](#), 2013 TCC 359;
- [*Kouper FKS Industries Inc. v. Canada \(M.N.R.\)*](#), 2013 TCC 315;
- [*Canada \(M.N.R.\) v. 9001-2310 Québec inc.*](#), 2013 FCA 241;

- [*Abel v. Asselin*](#), 2014 FC 66;
- [*Baribeau v. Canada \(Attorney General\)*](#), 2015 FC 615;
- [*French v. Canada*](#), 2016 FCA 65.

The [Index of Bijuralism and Harmonization Caselaw](#)⁵ contains other cases in which references were made to these sections.

The second Harmonization Act, the [*Federal Law-Civil Law Harmonization Act, No. 2*](#), S.C., 2004, c. 25, amended 26 statutes. It completed the harmonization of 23 Acts, which were partially harmonized by the [*Federal Law-Civil Law Harmonization Act, No. 1*](#), notably the [*Bank of Canada Act*](#), the [*Bankruptcy and Insolvency Act*](#), the [*Crown Liability and Proceedings Act*](#) and the [*National Energy Board Act*](#). It came into force on Royal Assent on December 15, 2004.⁶

The third Harmonization Act, the [*Federal Law-Civil Law Harmonization Act, No. 3*](#), S.C. 2011, c. 11, made harmonization changes to 12 Acts, including the [*Canada Business Corporations Act*](#), the [*Canada Cooperatives Act*](#) and the [*Expropriation Act*](#). It came into force on Royal Assent on November 29, 2011.⁷

The first three Harmonization Acts are the result of both internal work at the Department of Justice Canada that was carried out in close cooperation with the departments responsible for the application of the Acts in question, and the contributions of a number of stakeholders, including the Ministère de la Justice du Québec, the Barreau du Québec, the Chambre des notaires du Québec, the Canadian Bar Association, professors and experts in civil law and comparative law, legal counsel, judges and associations of French-speaking jurists.

Other Harmonization Acts will follow. Other amending acts and regulations have been adopted to make harmonization amendments to federal law, such as:

- [*Income Tax Amendments Act, 2000*](#), S.C. 2001, c. 17;
- [*An Act to amend the Customs Act and to make related amendments to other Acts*](#), S.C. 2001, c. 25;

⁵ <http://canada.justice.gc.ca/eng/csjsj/harmonization/bijurillex/biju/case-repel.html>.

⁶ For more information on this Act, see <http://canada.justice.gc.ca/eng/csjsj/harmonization/bijurillex/harmonization-loisdharmonisation.html>

⁷ For more information on this Act, see <http://canada.justice.gc.ca/eng/csjsj/harmonization/bijurillex/harmonization-loisdharmonisation.html>

- [Rules Amending the Bankruptcy and Insolvency General Rules \(Miscellaneous Program\)](#), SOR/2007-61;
- [An Act to amend the First Nations Land Management Act](#), S.C. 2007, c. 17;
- [Regulations Amending Certain Department of Industry Regulations](#), SOR/2010-128 (these regulations harmonized the *Canada Business Corporations Regulations, 2001*, SOR/2001-512 and the *Canada Cooperatives Regulations*, SOR/99-256);
- [Regulations Amending the Controlled Goods Regulations](#), SOR/2010-303;
- [Technical Tax Amendments Act, 2012](#), S.C. 2013, c. 34.

As well, the [Department of Justice Canada](#) ensures that all new federal Acts and regulations are reviewed in light of bijuralism.

Bijural Records and Useful References

Following the enactment and coming into force of each Harmonization Act and other amendment acts – tax law or others – making harmonization changes, [Bijural terminology records](#)⁸ are published by the [Department of Justice Canada](#) on its [website](#)⁹ to explain the bijuralism problems identified and their solutions.¹⁰

For more information on bijuralism and harmonization, please consult the [Bijuralism and Harmonization](#) page on the [Department of Justice Canada](#) website.

⁸ <http://canada.justice.gc.ca/eng/csjsjc/harmonization/bijurilex/terminolog/index.html>.

⁹ <http://canada.justice.gc.ca/eng/index.html>.

¹⁰ Note that in a unanimous judgment in [Schreiber v. Canada \(Attorney General\)](#), [2002] 3 S.C.R. 269, the Supreme Court of Canada made use of these bijural terminology records in interpreting legislation that had been amended as a result of the *Harmonization Act, No. 1* (see the Honourable Justice Lebel for the Court at paragraphs 72 to 79).

Your comments

Please submit your comments on the *Fourth series of proposals 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* to the Department of Justice Canada **no later than May 1st, 2017** to:

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