THE INTERPRETATION OF BIJURAL OR HARMONIZED FEDERAL LEGISLATION: *SCHREIBER V. CANADA (A.G.)*

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Although the Schreiber affair[1] gained considerable attention in the general media, court decisions in 1998[2] and 2002[3] relating to the matter have been the subject of limited commentary in legal circles. The following comment addresses the 2002 decision, specifically, the issue of the interpretation of bijural or harmonized federal legislation.

The facts in *Schreiber v. Canada (A.G.)* are straightforward.[4] A German court issued a warrant for the arrest of Schreiber, a Canadian citizen, for tax evasion and other offences. Germany then requested that Canada extradite him under the provisions of the extradition treaty between Canada and Germany. Schreiber was duly arrested and spent eight days in prison until released on bail. He commenced an action in Ontario against Germany and the Attorney General of Canada seeking damages for personal injuries suffered as a result of his arrest and detention. Germany brought a motion requesting that the action be dismissed on the basis that it was immune from the jurisdiction of Canadian courts pursuant to the *State Immunity Act* (*SIA*).[5] The Attorney General of Canada also brought a motion requesting a stay of the action pending the determination of proceedings between the appellant and Germany. The Ontario Superior Court of Justice allowed both motions.[6] The Court of Appeal unanimously dismissed the appeal

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1 Karlheinz Schreiber, a German-Canadian businessman, allegedly received commissions from various contracts. The matter was of considerable interest in Canada because of his alleged political connections.

2 *Schreiber v. Canada (A.G.)*, [1998] 1 S.C.R. 841.

3 *Schreiber v. Canada (A.G.)*, [2002] 3 S.C.R. 269. See, in relation to this decision, R. Sullivan, "The Challenges of Interpreting Multilingual, Multijural Legislation" (2004) 29 Brook. J. Int'l L. 985 at 1045-54 and S. Hassan, "Jurisprudence administrative récente – Bijuridisme (Partie B)" in 2002 *Congrès Association de planification fiscale et financière* (Montreal: APFF, 2003) 52:39 at 52:45-50.

4 *Ibid.*

5 R.S.C. 1985 c. S-18.

6 (2000), 48 O.R. (3d) 521.

concerning the claim for damages against Germany and the majority allowed the appeal concerning the stay.[7] Schreiber appealed the dismissal of his claim against Germany. The Supreme Court, in a decision penned by Justice LeBel, unanimously dismissed the appeal.

The Supreme Court was called upon to interpret sections 4 and 6(a) of the *SIA*. The sections set out exceptions to the immunity granted to foreign states in section 3(1) of the *SIA*. Justice LeBel first concluded that Germany had not submitted to the jurisdiction of Canadian courts within the meaning of the exceptions contained in section 4 and that, accordingly, it had not lost the immunity recognized by section 3(1).[8] He then turned his attention to the personal injury exception contained in section 6(a). Pursuant to that section, a foreign state is not immune from the jurisdiction of a court if the proceedings relate to personal injury that occurred in Canada. Schreiber argued that the mental distress, denial of liberty and damage to reputation suffered as a result of his wrongful arrest and imprisonment constituted "personal injury" under the exception in section 6(a).

After tracing the development of the principles of sovereign immunity, and reviewing the limited Canadian case law relating to section 6(a), Justice LeBel held that "the scope of the exception in s. 6(a) is limited to instances where mental distress and emotional upset were linked to a physical injury. For example, psychological distress may fall within the exception where such distress is manifested physically, such as in the case of nervous shock."[9] Justice LeBel concluded (1) that this was "consistent with the position taken in academic writings and international law sources," (2) that no conflict existed "between the principles of international law, at the present stage of their development, and those of the domestic legal order" and (3) that the "questions at stake fall within the purview of the domestic legislation."[10] Those conclusions should have ended the matter. Schreiber, however, also raised the issue of the proper interpretation of section 6(a). That part of the decision is the focus of this comment.

The original English and French versions of section 6(a) read as follows:

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[7] (2001), 52 O.R. (3d) 577.

[8] *Schreiber*, *supra* note 3 at 282-84.

[9] *Ibid.* at 290.

[10] *Ibid*. at 291, 293, 294.

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to *(a)* any death or personal injury, or *(b)* any damage to or loss of property that occurs in Canada.	6. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant : *a)* des décès ou dommages corporels survenus au Canada; *b)* des dommages matériels survenus au Canada.

The harmonized versions are: [11]

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to *(a)* any death or personal *or bodily* injury, or *(b)* any damage to or loss of property that occurs in Canada.	6. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant : *a)* des décès ou dommages corporels survenus au Canada; *b)* des dommages *aux biens ou perte de ceux-ci* survenus au Canada.

Justice LeBel first restated the fundamental principle that "the proper way to construe s. 6*(a)* of the Act is to read its words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[12] He also referred to a number of basic principles applicable to the interpretation of bilingual statutes:

> Both language versions of federal statutes are equally authoritative. Where the meaning of the words in the two official versions differs, the task is to find a meaning common to both versions that is consistent with the context of the legislation and the intent of Parliament.[13]

> A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred…. Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning.[14]

The principles relating to the interpretation of bilingual statutes were applicable because the original English version of section 6(a)

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[11] Section 6(a) of the *SIA* was amended by section 121(1) of the *Federal Law – Civil Law Harmonization Act, No 1*, S.C. 2001, c. 4 [*First Harmonization Act*], which came into effect on June 1, 2001. Neither the Ontario Superior Court of Justice nor the Court of Appeal had the benefit of the amendment. See *Schreiber, supra* note 3 at 300.

[12] *Schreiber*, *supra* note 3 at 295.

[13] *Ibid.*

[14] *Ibid*. at 296.

used the expression "personal injury" and the French version used the expression "dommages corporels." After referring to the Quebec civil code and the relevant case law, Justice LeBel concluded that, although "personal injury" was broad enough to include non-physical injury**,** the term "dommages corporels" was not, since it required "some form of interference with physical integrity." Justice LeBel went on to conclude that the French version was clearer and more restrictive than the English version and that it best reflected the common intention of the legislator.[15]

It was also necessary for Justice LeBel to interpret the *harmonized* versions, since section 6(a) had been amended by the *First Harmonization Act*. Schreiber argued that the reference to "personal or bodily injury" in the harmonized English version necessarily meant that the expression "personal injury" included something more than just "bodily injury," otherwise its inclusion would be redundant.[16] In order to understand the decision, it is first necessary to understand the *raison d'être* and methodology of the harmonization process.

Bijural or Harmonized Federal Legislation

The term "bijuralism" refers to the co-existence of two legal traditions within the same state. In its narrow sense, Canadian bijuralism refers to the co-existence of the civil law in Quebec and the common law elsewhere in Canada.[17] In a much wider sense, it has been described as follows:

> Bijuralism can be approached from several angles. The simple co-existence of two legal traditions, the interaction between two traditions, the formal integration of two traditions within a given context (e.g. in an agreement or a legal text) or, on a more general level, the recognition of and respect for the cultures and identities of two legal traditions. However, beyond the factual situation that it presupposes with respect to the co-existence of traditions, bijuralism raises the issue of the interaction or relationship between different legal traditions. In general and especially in the Canadian context, it calls for an examination of the relationship between civil law and common law.[18]

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[15] *Ibid.* at 295-99.

[16] *Ibid.* at 300-301.

[17] L. Wellington, "Bijuridisme canadien : questions d'harmonisation/Canadian Bijuralism: Harmonization Issues" (2000) 33 L'Actualité terminologique/Terminology Update 5 at 7.

[18] F. Allard, "The Supreme Court of Canada and its Impact on the Expression of Bijuralism" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2d publication, booklet 3 (Ottawa: Minister of Justice and Attorney General of Canada, 2001) at 1.

Given the growing importance of aboriginal law and the existence of variations in the law from one province to another, Canada is occasionally referred to as being multijural or plurijural.[19] In that particular sense, the use of the terms "multijural" and "plurijural" is accurate. The terms are not accurate, however, to describe federal legislation based on property and civil rights concepts. Although it can be argued that there are three legal traditions in Canada (aboriginal, civil and common law), only two legal traditions are relevant in the context of property and civil rights, which fall within the jurisdiction of the provinces pursuant to section 92(13) of the *Constitution Act, 1867*.[20] Those "private law"[21] matters are regulated by the civil law, applicable in Quebec pursuant to *The Quebec Act, 1774,*[22] and by the common law, applicable elsewhere in Canada on the basis of the "rules of reception."[23] Here the terms "bijural" and "bijuralism" are appropriate as they refer to the two legal traditions that form the basis of provincial jurisdiction in matters relating to property and civil rights.

Pursuant to section 91 of the *Constitution Act, 1867*, the Parliament of Canada has the power to make laws in the areas that fall within its jurisdiction. Often, however, federal legislation is not complete and self-sufficient because it does not express all the applicable law. In such circumstances, underlying provincial property and civil rights concepts will supplement federal legislation, as the following examples illustrate. A reference to the term "secured creditor" in a federal statute that does not define that term will necessarily constitute a reference to the term as it is understood in the provinces. The same is true for a reference in a federal statute to "property held in trust" or, more simply, a reference to "property." It is also possible for the federal enactment to refer to private law concepts by means of neutral or non-legal language (for example, the terms activity/*activités* or distribute/*distribuer*). When federal legislation refers either directly or indirectly to underlying private law concepts, the latter complement the former and

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[19] See Sullivan, *supra* note 3. See also D. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism" (2003) 51 Can. Tax J. 1 at 4**.**

[20] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[21] Although the terms "private law" and "public law" are increasingly used in common law Canada, they are essentially civil law concepts. The former is the law dealing with private persons and their property and the latter is the law dealing with the relations between private individuals and governments and the structure and operation of government. For the purposes of this comment, the term "private law" is used as shorthand to describe provincial law relating to property and civil rights.

[22] (U.K.), 14 George III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2.

[23] On the rules of reception, see P. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough: Carswell, 1997) vol. 1 at 2-1 to 2-17.

a "complementarity" relationship is said to exist between federal legislation and private law. Conversely, if federal legislation excludes the application of private law, the former is said to be "dissociated" from the latter. Dissociation will occur, for example, where as a matter of public policy, there is a need to ensure uniform application of federal legislation throughout Canada and reliance on private law rules would not achieve that result. Variations in underlying private law from one province to another can result in federal legislation having different effects depending on the province and that is a natural consequence of the division of powers between the federal and provincial governments. In cases where important private law variations exist and uniform results are required as a matter of public policy, however, dissociation of federal legislation from the underlying private law becomes essential. That dissociation is partial if the legislation adopts common law concepts rather than civil law concepts (or vice versa). It will be total if the legislation is independent from the law of all of the provinces (for example, the legislation forms a "complete code" or incorporates a rule based on international law or on some other source of law which is different from both the common law and the civil law).[24]

The need to refer correctly in federal legislation to relevant private law terminology and concepts is obvious. However, following the reform of Quebec's civil law and the coming into force of the *Civil Code of Québec* in 1994,[25] some terms and concepts in French federal provisions were out of date. The federal government began to focus on the problem in 1993 when it created the Civil Code Section of the Department of Justice to ensure that federal legislation meshed with Quebec civil law.[26] It soon became apparent, however, that the problem extended well beyond the use of inappropriate civil law terminology and concepts in the French version of federal legislation. There is a large anglophone population in Quebec that requires English civil law

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[24] See, in this regard, J. Brisson, "L'impact du Code civil du Québec sur le droit fédéral : une problématique" (1992) 52 R. du B. 345. See generally J. Brisson & A. Morel, "Droit fédéral et droit civil : complémentarité, dissociation" (1996) 75 Can. Bar Rev. 297. For the English version of this paper, see J. Brisson & A. Morel, "Federal Law and Civil Law: Complementarity, Dissociation," c. 5 in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies* (Ottawa: Department of Justice, 1999). See also *St-Hilaire v. Canada (A.G.)* (2001), 204 D.L.R. (4th) 103 (F.C.A.).

[25] S.Q. 1991, c. 64.

[26] L. Wellington, "Bijuralism in Canada: Harmonization Methodology and Terminology" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2d publication, booklet 4 (Ottawa: Minister of Justice and Attorney General of Canada, 2001) 1 at 2 and Appendix II.

terminology.[27] There are also substantial francophone populations in the common law regions of Canada that require common law terminology in French.[28] In order to ensure that federal legislation is accessible to all, language and concepts familiar to the legal representatives of these four audiences must be used. Hence the need for the harmonization process to become more inclusive.

With its 1995 "Policy on Legislative Bijuralism," the Department formally recognized 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."[29] In order to achieve this, the Department undertook "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."[30] In 1997, the "Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec" was established.[31] Subsequently, the need for bijural drafting was recognized in the "Cabinet Directive on Law-Making."[32] New legislation is now drafted in accordance with the objectives expressed in the bijuralism policy and the cabinet directive. Existing legislation is being revised on the same basis. It is this revision process that led to the adoption of the *First Harmonization Act*[33] and the *SIA* amendments that were the subject of interpretation in *Schreiber*.

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[27] See R. Kouri *et al.*, eds., *Private Law Dictionary and Bilingual Lexicons*, 2d ed. (Cowansville, Que.: Yvon Blais, 1991).

[28] See *Vocabulaire anglais-français et lexique français-anglais de la 'Common Law'/English-French Vocabulary and French-English Glossary of the Common Law*, (Moncton: Centre de traduction et de terminologie juridiques, published in 6 volumes between 1980 and 1994).

[29] Wellington, *supra* note 26 at 3 and Appendix III.

[30] *Ibid.* at Appendix III.

[31] *Ibid*. at 3.

[32] See *Guide to Making Federal Acts and Regulations*, 2d ed. (Ottawa: Department of Justice Canada, 2000) at 3-16. The Directive is also found at the Privy Council website: www.pco-bcp.gc.ca (Publications).

[33] *Supra* note 11. The *First Harmonization Act* was the first in a series of harmonization bills to be presented for adoption by the Parliament of Canada**.** The second in the series, Bill C-37, was tabled before the House of Commons on Wednesday, May 13, 2004 but died on the Order Paper when a general election was called on May 23, 2004. It was tabled again, as Bill S-10, and received royal assent on December 16, 2004.

In order to understand the principles of interpretation applicable to harmonized legislative provisions such as section 6(a), it is necessary to understand the methodology of the harmonization process.[34] The simplest and most natural technique is the use of terms that can be used in both systems, such as "loan/*prêt*." That, however, is not always feasible. Another involves the use of a definition to establish a meaning that is compatible with both the civil law and the common law. A third involves recourse to the "double." The word describes the technique whereby the rule applicable to each legal tradition is expressed in the legislative provision, albeit in different ways. A double can be simple or paragraphed. When the simple double is used, the terms specific to each legal tradition are used one after the other in the same sentence.[35] When the paragraphed double is used, the terms specific to each legal tradition are presented in separate paragraphs. A bijural federal enactment which refers to "real property and immovable," for example, is a simple double which constitutes a reference to the common law concept of "real property" and to the civil law concept of "immovable." *These are not synonymous terms*. Although they appear to refer to identical general concepts (lands and buildings), they in fact refer to legal concepts specific to each system, with consequential variations. Whereas ownership in the common law system is divisible,[36] ownership in the civil law system is unitary (there can only be one owner).[37]

Obviously, the use of a double can be problematic. The paragraphed double can make the legislation more complex. On the other hand, recourse to the simple double can produce uncertainty if the person reading the statute is not familiar with the objectives and techniques of harmonization. That is what happened in *Schreiber*. The harmonized version of section 6(a) of the *SIA* contained a simple double ("personal or bodily injury") that led to Schreiber arguing the term "personal injury" included something more than just "bodily injury."

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[34] For a detailed description of the methodology, see Wellington, *supra* note 26. It must be emphasized, however, that the methodology continues to evolve as legal drafters acquire greater expertise in the area.

[35] Note that in cases where different terminology is used in Quebec and elsewhere in Canada, the common law term (for example, real property) will be followed by the civil law term (immovable) in the English version. Conversely, in the French version, the civil law term (*immeuble*) will be followed by the common law term (*bien réel*). That is similar to the method used in bilingual texts, where priority is given to the language of the majority of the targeted population. See Wellington, *supra* note 26 at 10.

[36] B. Ziff, *Principles of Property Law,* 3d ed. (Scarborough: Carswell, 2000) at 5.

[37] For a recent analysis of ownership in a civil law context, see D. Vincelette, "Définition et notion de la propriété. Plaidoyer pour la vraisemblance" (2001) 31 R.G.D. 677.

In preliminary remarks, Justice LeBel recognized that the objective of the *First Harmonization Act* was to "ensure that the wording used in [federal] legislation which relies upon complementary provincial law reflect Canada's bijural and bilingual nature."[38] He quoted the Minister of Justice: "The objectives of harmonization of federal legislation with the civil law of Quebec are to ensure that federal legislation is fully consistent with the new civil law concepts and institutions, that federal legislation employs correct and precise terminology, and that amendments to federal legislation take into account French common law terminology. *Let me be clear that Bill S-4 does not create substantive rights or enshrine any new individual or collective rights*."[39] Justice LeBel emphasized that this "statement on the limited purpose of the *Harmonization Act* seems entirely consistent with the purpose set out in its preamble as well as the numerous parliamentary and senate debates explaining its purview and *raison d'être*."[40] In effect, he rightly held that amendments made with a view to harmonizing legislation are intended only to change the form and not the substance of the legislation. He also referred to the techniques used to attain the objectives of the *First Harmonization Act* and, specifically, the use of the simple double.[41] In doing so, Justice LeBel implicitly approved the harmonization process and its methodology. He then proceeded to interpret the original and harmonized versions of section 6(a) on the basis of several techniques of interpretation, including the rule against redundancy and the shared meaning rule. Unfortunately, he failed to refer to sections 8.1 and 8.2 of the *Interpretation Act,* which should have served as primary rules of interpretation.[42]

The Rule against Redundancy

The presumption against tautology and the manner in which it can be rebutted, has been described as follows: "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.… Although the presumption against tautology is frequently invoked, it is also easily rebutted. This is done by coming up with a meaning or function for the words in question, to show that they are not in fact meaningless or superfluous."[43]

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[38] *Schreiber*, *supra* note 3 at 301.

[39] *Ibid*.

[40] *Ibid.* at 301.

[41] *Ibid.* at 302.

[42] R.S.C. 1985, c. I-21.

[43] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed.

After confirming that the rule against redundant drafting is simply a presumption, Justice LeBel went on to state that "there are cases which allow for redundancies" and that this was apparently such a case.[44] He stated that the amendment to section 6(a) "seems to use the 'simple double' technique to ensure that the civil law term…was added to the English version by inserting the words 'or bodily injury'."[45] Nevertheless, relying on extracts from two federal documents, he held that the phrase "personal or bodily injury" was redundant. That finding of redundancy is surprising because the documents Justice LeBel referred to appear to state the opposite. In the first document, *Bijuralism in Canada: Harmonization Methodology and Terminology,* the extract explains that 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" and that the simple double is "a drafting technique that consists in presenting the terms or concepts specific to each legal system, one after the other …."[46] The second document, a *Bijural Terminology Record*, contained a specific reference to the meaning of the expression "personal injury" and stated that the expression had a potentially broader meaning in the common law.[47] The harmonization solution proposed in the document, adopted in the amendment to section 6(a), was: "The words 'or bodily' are added to the English version to better reflect the scope of this provision for civil law. No change is required to the French version as the concept of *dommages corporels* has a similar meaning in common law and civil law."[48] In the circumstances, it would have been more accurate for Justice LeBel to say that the presumption against redundant drafting had been rebutted because the words "personal injury" and "bodily injury" did have specific meanings or functions and that the double "personal or bodily injury" includes common law and civil law terms respectively. The terms "personal injury" and "bodily injury" are accordingly *not* redundant. Rather, they are "terms or concepts specific to each legal system, one after the other,"[49] and they would normally be interpreted pursuant to sections 8.1 and 8.2 of the *Interpretation Act.*

(Vancouver: Butterworths, 2002) at 158-162. See also P. Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough: Carswell, 2000) at 277-78.

[44] *Schreiber*, *supra* note 3 at 303-304.

[45] *Ibid.* at 302.

[46] *Supra* note 26 at 1, 9-10.

[47] At www.canada.justice.gc.ca/en/ps/bj/harm/dommages_corporels.html.

[48] *Ibid.*

[49] See quote at note 46 *supra*.

Justice LeBel applied the shared meaning rule in his analysis: "Under the principles governing the interpretation of bilingual and bijural legislation, where there is a difference between the English and French versions, the Court must search for the common legislative intent which seeks to reconcile them. The gist of this intellectual operation is the discovery of the essential concepts which appear to underlie the provision being interpreted and which will best reflect its purpose, when viewed in its proper context."[50] He concluded that "the French version is the clearer and more restrictive of the two versions" and that "the guiding principle in the interpretation of the s. 6*(a)* exception, more consonant with the principles of international law and with the still important principle of state immunity in international relations, is found in the French version of the provision."[51] He was of the opinion the French version demonstrated a legislative intent to limit the exception to state immunity to "claims arising out of a physical breach of personal integrity."[52] Although such a breach "could conceivably cover an overlapping area between physical harm and mental injury, such as nervous stress," it did not cover "the mere deprivation of freedom and the normal consequences of lawful imprisonment."[53] On that basis, the appeal was dismissed.

Justice LeBel appeared to assume the principles governing the interpretation of bilingual and bijural provisions are the same. There is, however, an important difference between bilingual and bijural legislation. The English and French versions of the *Civil Code of Québec* and of the *Business Corporations Act* of Ontario[54] are examples of bilingual legislation, but not bijural legislation, since each was enacted in the context of a specific legal tradition. They constitute bilingual unijural legislation, that is, legislation that is dependent on only one legal tradition. In such circumstances, the shared meaning rule is one of the main tools of interpretation. The shared meaning rule is

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[50] *Schreiber*, *supra* note 3 at 305. See also 295-96. Courts use the shared meaning rule to determine the meaning that is common to both the English and French versions of a statute. Although courts may, as in *Schreiber*, rely on the more restrictive version as representing the common meaning, that is not always the case. See Sullivan, *supra* note 43 at 80-87; Côté, *supra* note 43 at 326-32. For an interesting critique of the shared meaning rule, see P. Salembier, "Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule" (2003-2004) 35 Ottawa L. Rev. 75.

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] R.S.O. 1990, c. B-16.

also one of the main rules used to interpret federal legislation that either does not refer to private law concepts or which overrides them. However, when a court is called upon to interpret federal legislation that is both bilingual and bijural, two rules are now available. Sections 8.1 and 8.2 of the *Interpretation Act* were added in 2001 by the *First Harmonization Act*[55] precisely to facilitate the interpretation of bijural and harmonized federal legislation.

The two sections read as follows:

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.	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.
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.	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 ou l'autre de ces systèmes.

Section 8.1 of the *Interpretation Act* recognizes the authority of the common law and the civil law in the area of property and civil rights and provides that federal legislation that relies on private law rules and concepts is to be interpreted in accordance with the provincial law in effect at the relevant time. Pursuant to section 8.2, if terms from both legal traditions are contained in a legislative provision, the civil law terminology will apply in Quebec and the common law terminology will apply in the other provinces. In so far as bijural or harmonized

[55] *Supra* note 11.

federal legislation is concerned, sections 8.1 and 8.2 obviously constitute primary tools of interpretation, although other tools remain relevant. For example, the shared meaning rule may be useful when a court is called upon to interpret an English common law term and French common law term within the same bijural federal enactment. It remains, however, that respect for Canada's bijural nature, and the imperative wording of sections 8.1 and 8.2, require courts interpreting federal legislation based on property and civil rights concepts to take the sections into consideration.

For reasons that are not clear, Justice LeBel made no reference to sections 8.1 and 8.2.[56] Possibly he was of the opinion that these sections did not apply since the facts of the case arose prior to 2001. However, both sections were relevant. Section 8.1, in particular, was applicable for the purpose of interpreting the original version of section 6(a) of the *SIA*. Although section 8.1 only came into effect in June of 2001,[57] the provisions of the *Interpretation Act* apply to previously enacted legislation.[58] The phrase "at the time the enactment is being applied" found in the last part of section 8.1 also supports that view.[59] The phrase was added to make it clear the applicable provincial rules, principles or concepts are those in force at the time the federal provision is applied and not those in force at the time the federal provision was enacted.[60]

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[56] *Schreiber*, *supra* note 3 at 304. The court was aware of sections 8.1 and 8.2. The brief filed with the court on January 23, 2002 by the Attorney General of Canada referenced the sections.

[57] *Supra* note 11.

[58] *Supra* note 42, s. 3(1).

[59] See also A. Morel, "Harmonizing Federal Legislation with the *Civil Code of Québec*: Why? and Wherefore?" in *The Harmonization of Federal Legislation with Quebec Civil law and Canadian Bijuralism, Collection of Studies,* (Ottawa: Department of Justice, 1999) at 23, where the author states that, "[a]lthough this problem can arise anywhere, it is particularly acute in Quebec because of the replacement of the *Civil Code of Lower Canada* by the *Civil Code of Québec.*" See also, in the same collection of studies, A. Morel, "The Revision of Federal Legislation in Light of the *Civil Code of Québec*: Methodology and Work Plan" (265 at 281) and A. Morel, "Drafting Bilingual Statutes Harmonized with the Civil Law" (305 at 324-25).

[60] H. Molot, "Clause 8 of Bill S-4: Amending the *Interpretation Act*" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2d publication, booklet 6 (Ottawa: Minister of Justice and Attorney General of Canada, 2001) at 15-16 (**"**Of course, rules, principles and concepts evolve and change over time. As of what date would the cl. 8.1 duty of reference be triggered? Since, as noted above, the principal purpose of the *Interpretation Act* is as an aid to the interpretation, and hence application, of federal legislation, the critical moment in time is when the legislation is being applied. That is why cl. 8.1 expressly provides that reference is to be made to the rules, principles and concepts 'in force…at

Section 8.1 is also relevant for the purpose of interpreting the original version of section 6(a) because its application is not limited to harmonized legislation. The wording of the section indicates that it applies to federal legislation that uses property and civil rights concepts or rules, whether or not the legislation has been harmonized. There is no reference in the section to harmonized legislation. It is important to keep in mind that the harmonization process is corrective in nature. Its purpose is to ensure that bijural federal legislation employs the appropriate terminology of each tradition. Only bijural federal legislation which fails to use such terminology will be the subject of harmonization. Accordingly, whether or not legislation has been harmonized, section 8.1 will apply if the enactment to be interpreted uses property and civil rights concepts and rules, and section 8.2 will apply if the enactment uses terminology from both legal traditions.

For these reasons, section 8.1 should have applied to the original version of section 6(a) of the *SIA*, and section 8.2 should have applied to the harmonized version of section 6(a). Had sections 8.1 and 8.2 been applied, the analysis might have been as follows:[61]

1. It would first be necessary to determine whether or not the enactment to be interpreted called into play rules, principles or concepts forming part of the law of property and civil rights, that is, the private law of the provinces. In order to make that determination, the language used in the enactment might be useful if it clearly constituted legal terminology. Since, however, it is possible for an enactment to refer to private law concepts by means of neutral or non-legal language, the language used is of secondary importance for this purpose. It is more important to determine whether or not private law concepts are necessary in order for the enactment to have meaning and effect.

2. If it is concluded that the enactment *does not* rely on private law, then sections 8.1 and 8.2 do not apply and other rules of interpretation come into play. If it is concluded that the enactment *does* rely on private law, sections 8.1 and 8.2 apply and it is then necessary to apply the common law meaning in the common law provinces and the civil law meaning in Quebec, unless otherwise provided by law.

3. In addition to sections 8.1 and 8.2, other rules of interpretation could be relied on as needed (for example, the shared meaning rule to interpret English and French civil law terminology contained in the two versions of the enactment).

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the time the enactment is being applied'/'*en vigueur…au moment de l'application de texte*'. This provision therefore would have an ambulatory effect in relation to any such referenced rules, principles or concepts.").

[61] For another approach, see Sullivan, *supra* note 3 at 1047-48.

4. If the proviso "otherwise provided by law" applies, it becomes necessary to determine, using other rules of interpretation, the exact nature and ambit of the enactment, which would then be applied in a uniform fashion (insofar as possible) throughout the country.[62] The uniform rule might be derived from various sources or combinations of sources (common law, civil law, international law or some other source of law) but, irrespective of the source, the effect of the proviso "unless otherwise provided by law" is to dissociate in whole or in part, the enactment from private law.[63]

If Justice LeBel had taken that approach, he would first have had to determine whether or not section 6(a) of the *SIA* employed rules, principles or concepts forming part of the law of property and civil rights. If he had concluded that the provision did not rely on private law, then sections 8.1 and 8.2 would not apply. He might have concluded, for example, that the provision referred to international law concepts. Such an interpretation would have been unlikely, however, because both the original and harmonized versions of section 6(a) refer to "personal injury…that occurs in Canada" and the harmonized version of section 6(a) uses both civil law and common law terminology.

If Justice LeBel determined that section 6(a) did rely on private law concepts and that the phrase "except otherwise provided by law" did not apply, it follows that the reference to "personal injury" contained in the original version of section 6(a) of the *SIA* is, pursuant to section 8.1, a reference to the rules, principles and concepts in force in Ontario because Shreiber commenced his action in that province. Justice LeBel would then have turned his attention to the concept of "personal injury" as that concept is understood in the common law provinces, and as it has been interpreted in the context of the *SIA*, particularly in the *Friedland* case that Justice LeBel cited and approved.[64]

The harmonized version of section 6(a) of the *SIA*, containing both common law and civil law terms ("personal or bodily injury"), would normally be interpreted in light of both sections 8.1 and 8.2. The

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[62] It must be noted that, even in cases in which a uniform rule was applied throughout the country, there would probably be interaction at some point between the uniform rule and provincial private law, with possible variable applications of the rule from province to province.

[63] The dissociation would be partial if, for example, the uniform rule was of civil law or common law origin. There would then be dissociation in only one part of the country. On the other hand, the dissociation would be complete if the uniform rule were based on international law or on some other source of law that was different from both the common law and civil law.

[64] *United States of America v. Friedland* (1999), 182 D.L.R. (4th) 614 (Ont. C.A.).

analysis would have been the same as for the original version, although the process would presumably have been simplified because of the use of the double in the English version.[65] Only the common law terminology applicable in common law jurisdictions ("personal injury" in the English version of section 6(a) and "dommages corporels" in the French version) would have been relevant for the purposes of the decision. The presence of the double, together with the rules contained in sections 8.1 and 8.2 of the *Interpretation Act*, would have constituted signposts allowing the court to identify and interpret the relevant terms and concepts. Reference to Quebec civil law would no doubt have been useful from a comparative law perspective and to demonstrate that the result would have been similar in a civil law context, but it would not have been essential for the decision.

Had Justice LeBel relied on sections 8.1 and 8.2, the result would have been the same for Schreiber. In section 6(a) of the *SIA*, the term "personal injury" would have been limited to "physical injury" including instances in which mental distress and emotional upset are linked to physical injury.

The Meaning of "unless otherwise provided by law"/ "règle de droit s'y opposant"

If a federal enactment expressly states that it is intended to have uniform application throughout Canada, it satisfies the conditional phrase "unless otherwise provided by law" contained in sections 8.1 and 8.2. Absent such an explicit statement, however, it is not always easy to determine whether or not the law provides otherwise.[66] Is the common law, for example, to be regarded as "law" within the meaning of this phrase? Although it has been suggested, that "the general exception in cl. 8.1 and cl. 8.2…requires a 'law' to the contrary, that is, a legislative provision to the contrary or 'règle de droit s'y

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[65] As a general rule, an easy way to identify the presence of a simple double in a legislative provision is to examine the other language version. In the English version, the common law term will usually be followed by the civil law term, whereas in the French version the terms will be reversed. That is a general rule only. Thus, for example, in section 6(a) of the *SIA* there was a double only in the English version. Apparently the legislator was of the opinion the term "*dommages corporels*" in the French version was appropriate terminology in both a civil law and a common law context.

[66] An examination of parliamentary proceedings prior to the adoption of the *First Harmonization Act* does not cast light on the subject. See Journals of the Senate (31 January, 7 February 2001); proceedings of the Standing Senate Committee on Legal and Constitutional Affairs (21 February 2001; 1, 14, 21, 22, 28 March 2001); *Debates of the Senate* (3, 4, 5, 24, 25, 26 April 2001); *House of Commons Debates* (30 April, 10 May 2001).

opposant,'"[67] it is likely the phrase will be given a wider interpretation by the courts. It may be noted that the Supreme Court of Canada has held that the terms "law"/"*règle de droit*" in section 52(1) of the *Constitution Act, 1982* include the common law.[68] In addition, the French versions of sections 8.1 and 8.2 refer to "*règle de droit*" rather than "*loi.*" The former has a much broader meaning than the latter.[69]

If the phrase were to be interpreted as including the common law, one would expect the courts to dissociate federal enactments from provincial law on rare occasions and *only by necessary implication*, given the imperative wording of sections 8.1 and 8.2, and the intention expressed in section 8.1 that federal legislation reflect the bijural nature of private law in Canada. In what circumstances could federal legislation be dissociated in whole or in part from private law by necessary implication? Examples include: (1) a conflict between intra vires federal legislation and private law, (2) matters involving maritime law[70] and (3) matters involving Crown prerogatives.[71] Matters of public policy requiring that federal legislation have uniform country-wide application could also give rise to dissociation. It must be emphasized, however, that situations in which federal legislation does not apply uniformly throughout the country should not give rise to dissociation as a matter of course. Sections 8.1 and 8.2 clearly open the door to variations in the application of federal legislation and such variations can be viewed as a natural consequence of federalism.[72]

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[67] Molot, *supra* note 60 at 19. That restrictive interpretation is based on a close reading of the relevant provisions of the *Interpretation Act*, including section 3(1), which contains the phrase "unless a contrary intention appears" rather than "unless otherwise provided by law."

[68] *RWDSU v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573 at 592-93, referred to in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1164-65. The court came to this conclusion, however, in a context involving the application of the *Charter,* where a wide interpretation was clearly required.

[69] In *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1988), 49 D.L.R. (4th) 749 at 755 (B.C.C.A.), the court stated: " 'La loi' translates to mean the body of rules enacted by the legislature whereas 'règle de droit' has a much broader meaning and would include the common law." An appeal from this decision was dismissed by the Supreme Court of Canada without reference to the meaning of the terms "loi" and "règle de droit." See *Douglas/Kwantlen Faculty Assn. v. Douglas College,* [1990] 3 S.C.R. 570.

[70] See *ITO-International Terminal Operators Ltd.v. Miida Electronics Inc.,* [1986] 1 S.C.R. 752 at 771 ("[T]he term 'Canadian maritime law' includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date.").

[71] Hogg, *supra* note 23 at 1-14 to 1-17.

[72] See Morel (The Revision of Federal Legislation), *supra* note 59 at 301-302 ("It

In the event the phrase "unless otherwise provided by law"/"*sauf règle de droit s'y opposant*" were to be interpreted as having this somewhat wider meaning, an important restriction would apply. For the purpose of determining whether or not the federal enactment was intended, by necessary implication, to have uniform application throughout the country and that it was therefore to be dissociated from private law, judicial precedents rendered prior to 2001 could not be applied automatically. Those precedents would have to be reviewed in light of sections 8.1 and 8.2 to ensure that they had taken into consideration the bijural nature of the enactment. It is likely that many would be discarded precisely because they had failed to do so. In short, courts could not blindly rely on judicial precedents to conclude that an enactment, by necessary implication, was intended to have uniform application.

In the past, when courts concluded that a federal enactment was intended to be dissociated from the underlying private law, they not infrequently opted to dissociate federal legislation from private law by resorting to a partial dissociation, that is, by opting for common law rules and concepts without reference to the civil law.[73] Sections 8.1 and 8.2 now stand in the way of that approach. Courts called upon to interpret bijural federal legislation now have two alternatives. They can apply the civil law in Quebec and the common law elsewhere in Canada or, if "otherwise provided by law," they can conclude that the intent of Parliament was to dissociate federal law from provincial law in order to apply a uniform rule throughout the country. At that point, three outcomes are possible: 1) the common law rule applies, 2) the civil law rule prevails, or 3) a third rule applies, for example, a rule contained in an international treaty or convention or a rule taken from a combination of sources.

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may be opportune to assert the principle, which has until now remained implicit, that the private law of each province constitutes the fundamental law of any legislation dealing with matters of private law. Clearly, as we have seen, this principle can be set aside many ways. Nonetheless, the interpretative provision considered here could be drafted to take this into account. Moreover, this provision should be inserted into the *Interpretation Act*…this would give the provision greater visibility and would make its use more common. What drawback would there be in explicitly stating what is otherwise accepted and in accordance with prevailing and consistent judicial decisions? In fact, there would be clear advantages. In addition to clarifying the situation, *it would force recognition of the fact that, subject to express derogation or necessary implication, the application of federal legislation is not necessarily uniform in all respects throughout Canada, and that this diversity is acceptable as a consequence of federalism itself*" [emphasis added]). See also R. Macdonald, "Provincial Law and Federal Commercial Law: Is '*Atomic Slipper*' a New Beginning?" (1992) 7 B.F.L.R. 437 at 447.

[73] For examples of this approach, see Duff, *supra* note 19 at 20-43.

In the *Schreiber* case, if the phrase "unless otherwise provided by law"/"*sauf règle de droit s'y opposant*" had been given a wider meaning, the court might have chosen the third outcome and concluded that section 6(a) was to be dissociated from private law because it incorporated an international law rule.[74] However, courts would more frequently have to make a choice between only the first and second outcomes. The result would be one rule across Canada that could be of common law or civil law origin, with the resulting sharing of concepts between the two traditions. That is unlikely to occur often in the context of the interpretation by the courts of bijural federal legislation, since the phrase "unless otherwise provided by law"/"*sauf règle de droit s'y opposant*" will probably be given a restricted meaning. Such situations, however, will give rise to sharing between the two traditions, leading to the development of similar or integrated solutions in cases in which certain areas of the law are problematic or poorly developed in one tradition but not the other. It must be emphasized that in such cases civil law concepts are as likely to prevail as common law concepts. If that were to occur, Canada would then assume a leading role in the dialogue that is ongoing in many parts of the world between the common law and civil law traditions, including Europe and South America. With a few notable exceptions, judges, lawyers and law teachers in Canada have avoided this dialogue despite the fact the Canadian legal system is particularly conducive to such an exchange of views. Developments in Canada, such as the enactment of the *Civil Code of Québec* and sections 8.1 and 8.2 of the *Interpretation Act*, the harmonization of federal legislation and the increasing number of Canadian jurists with bijural backgrounds will hopefully encourage greater dialogue between the civil law and common law traditions in Canada.

Conclusion

The harmonization of bijural federal legislation and, in particular, the adoption of sections 8.1 and 8.2 of the *Interpretation Act*, signal a new era in the development of Canadian law. The recognition in section 8.1 that both the common law and the civil law are equally authoritative sources of the law of property and civil rights in Canada, and of the need to take into consideration both the common law and the civil law in interpreting bijural federal legislation, should have transformative effect. The civil law should cease to be the *l'enfant pauvre* of Canada's legal system and opportunities should arise at all levels for the sharing of concepts between the civil and common law traditions. The *Schreiber* decision was the first opportunity for the Supreme Court to

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[74] Once again, however, the result for Schreiber would have been the same. See *Schreiber*, *supra* note 3 at 292.

interpret harmonized legislation. As this comment demonstrates, it did not address all the issues. The court nevertheless implicitly approved the process of harmonization and the methodology used for that purpose. Doctrinal analysis will in due course provide further guidelines.