Legislative Summary **LS-379E**

BILL S-4: FEDERAL LAW-CIVIL LAW HARMONIZATION ACT, NO. 1

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LEGISLATIVE HISTORY OF BILL S-4

HOUSE OF COMMONS	
Bill Stage	**Date**
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Second Reading:	7 May 2001
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SENATE	
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL S-4:
FEDERAL LAW-CIVIL LAW HARMONIZATION ACT, NO. 1

INTRODUCTION

The full title of Bill S-4 is A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law. The bill was tabled and received first reading in the Senate on 31 January 2001.

Bill S-4 was preceded by Bill S-22, of the same title, which was tabled in the Senate on 11 May 2000, but which later died on the *Order Paper*. It is noteworthy that the differences between Bill S-4 and Bill S-22 are minor and technical and simply take into account legislative evolutions since the tabling of Bill S-22. Bill S-22 was preceded by Bill C-50, which was introduced in the House of Commons in the 1st Session of the 36th Parliament but which also died on the *Order Paper*.

As its title indicates, Bill S-4 is the first tabled of a series of bills, all of which have the same purpose: to harmonize federal law with the civil law of the Province of Quebec by amending certain federal statutes so that both the French-language and English-language versions take into account the common law and the civil law.

Bill S-4 would:

- enact three provisions relating to marriage (consent, the minimum age, and cases where a new marriage may not be contracted) that apply solely to the Province of Quebec;

- repeal the pre-Confederation provisions of the 1866 *Civil Code of Lower Canada* [hereinafter C.C.L.C.] that now fall within the legislative jurisdiction of the federal government;

- amend the *Interpretation Act*[1] to include rules of interpretation recognizing the bijural tradition in Canada so as to clarify the law to be used as the suppletive law to federal law and the bijural provisions in federal statutes; and

- harmonize the *Federal Real Property Act*,[2] the *Bankruptcy and Insolvency Act*,[3] the *Crown Liability and Proceedings Act*,[4] and a number of other federal statutes (some of these amendments are examined in greater detail below).

BACKGROUND

In 1993, because the *Civil Code of Québec* [hereinafter C.C.Q.] was going to replace the C.C.L.C. in Quebec as of 1 January 1994, the federal Department of Justice created the Civil Code Section to review the federal government's attitude to the co-existence of the civil law system (in Quebec) and the common law system (in the other provinces and territories of this country).

A. Reminder of the Complementary Nature of Federal and Civil Law[5]

Since 1867, the Parliament of Canada has enacted more than 300 statutes, some or all of whose provisions are designed 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*,[6] would have fallen under the provinces' jurisdiction over property and civil rights. Examples of these matters are marriage and divorce, bankruptcy and

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(1) R.S.C. 1985, c. I-21.

(2) S.C. 1991, c. 50.

(3) R.S.C. 1985, c. B-3.

(4) R.S.C. 1985, c. C-50.

(5) This section is based on a summary by André Morel of the work done in the harmonization project: "L'harmonisation de la législation fédérale avec le Code civil du Québec – Pourquoi? Comment?" in Canada, Department of Justice, *L'harmonisation de la législation fédérale avec le droit civil québécois et le bijuridisme canadien : recueil d'études*, Ottawa, 1997, pp. 1-25. This collection was recently translated into English. Professor Morel's study appears in the English version as follows: "Harmonizing Federal Legislation with the *Civil Code of Québec*: Why? And Wherefore?" [hereinafter Harmonizing Federal Legislation with the *Civil Code of Québec*] in Canada, Department of Justice, *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies*, Ottawa, 1999 [hereinafter *Collection of Studies*].

(6) 30 & 31 Vict., U.K., c. 3.

insolvency, bills of exchange and promissory notes, interest on money, admiralty law, patents of invention, and copyright. To the same end, albeit less directly, Parliament has enacted statutes designed primarily to regulate questions of public law with some provisions relying upon private law concepts or regulating private law relationships.

All these statutes do not create an independent legal system. Because these Acts derogate from or add to the *jus commune*(7) 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."

B. Object 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.(8)

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.(9) As far as the substantive changes are concerned, changes have occurred in traditional institutions, the formulation of new concepts, establishment of new institutions, and reform of the existing rules.

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(7) The *jus commune* is the foundational general law of a legal order. The C.C.Q. is a central expression of the *jus commune* in Quebec. See Roderick A. Macdonald, "Encoding Canadian Civil Law" in *Collection of Studies*, p. 138.

(8) Harmonizing Federal Legislation with the *Civil Code of Québec*, p. 16.

(9) *Ibid.*, pp. 11-12.

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

> [TRANSLATION]
> ... the 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 controversial.(10)

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 C.C.Q. came into force because Parliament has not always adequately included the civil law system and its language 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 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 the anglophone and francophone communities in this country.(11)

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(10) *Ibid.*, pp. 12-13.

(11) 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.

The Government of Canada has also cited other reasons to justify the need to harmonize federal statutes with the civil law of Quebec, some of which are set out in Bill S-4's Preamble, 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.

In a speech given at the *Conference on the Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, held in Montreal on 24 November 1997, the federal Minister of Justice stated that the proposed harmonization sought to achieve three goals:

- to reaffirm the unique bijural nature of Canadian federalism;
- to strengthen the legitimate place of civil law beside the common law in the statutes of Canada; and
- to ensure that federal statutes would continue to have the desired effect in Quebec.(12)

The Minister of Justice also felt that harmonization would help to facilitate the application of federal statutes in Quebec and increase the effectiveness of the courts responsible for applying federal statutes in that province. This would: help to improve access to justice; reduce problems of interpretation; save time and money for litigants and both the federal and the provincial governments; and clarify the intention of the legislator for the public.

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(12) The Hon. Anne McLellan, Minister of Justice, "Notes for a Speech by the Honourable Anne McLellan, Minister of Justice and Attorney General of Canada and M.P. for Edmonton-West, to the Conference on the Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism," Montreal, 24 November 1997, available on the Internet at the following address: http://canada.justice.gc.ca/en/news/sp/1997/bijur.html [hereinafter *Notes for a Speech by the Honourable Anne McLellan*]. See also Canada, Department of Justice, *Harmonization of Federal Statutes with Quebec Civil Law: Backgrounder*, Ottawa, June 1998, available on the Internet at the following address: http://canada.justice.gc.ca/en/news/nr/1998/bacg.html [hereinafter *Backgrounder*].

C. Stages in the Harmonization Project

Since 1993, the federal Department of Justice has examined some 700 federal statutes and has identified 300 that will need to be harmonized. The Government of Canada expects to accomplish this over the next nine years, at a rate of one bill per year.(13)

The first stage in the harmonization project was to establish how and in what way Quebec civil law came into contact with federal law in order to then determine the nature and extent of action necessary. Two studies were then completed.(14) 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.(15)

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(13) *Backgrounder*. See also Canada, Department of Justice, "The Minister of Justice Tables the First Bill to Harmonize Federal Acts with Quebec Civil Law," Press Release, Ottawa, 12 June 1998; and Anne McLellan, "Un jeu qui en vaut la chandelle : l'harmonisation des lois fédérales avec le droit civil québécois est une grande première," *Le Devoir* (Montreal), 3 August 1998, p. A7.

(14) 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*, pp. 135-213, or in *Mélanges Paul-André Crépeau*, Éditions Yvon Blais, Cowansville, 1997, pp. 579-640). The second study consisted of a paper by Jean-Maurice Brisson and André Morel ("Federal Law and Civil Law: Complementarity, Dissociation," in *Collection of Studies*, pp. 215-264).

(15) These pilot studies examined the following federal statutes: the *Federal Real Property Act*, the *Bankruptcy and Insolvency Act,* the *Crown Liability and Proceedings Act*, 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. See in *Collection of Studies*: John E.C. Brierley & Nicholas Kasirer, "Document I – Review of the *Federal Real Property Act/Loi sur les immeubles fédéraux* in Light of the Coming Into Force of the *Civil Code of Québec*," pp. 773-830; John E.C. Brierley & Nicholas Kasirer, "Document II – Review of Proposals to Amend the *Federal Real Property Act/Loi sur les immeubles fédéraux* in Light of the Bijural and Bilingual Character of Federal Statutory Instruments," pp. 831-840; Albert Bohémier, "Research in Bijuralism: *Bankruptcy and Insolvency Act*," pp. 841-886; Jacques Auger, Albert Bohémier & Roderick A. Macdonald, "The Treatment of Creditors in the *Bankruptcy and Insolvency Act* and Security Mechanisms in the Civil Law of Quebec," pp. 887-965; Jacques Auger, "The Treatment of Creditors in the *Bankruptcy and Insolvency Act* and Security Mechanisms in the Civil Law of Quebec – Summary," pp. 967-986; and Daniel Jutras, "Crown Liability and Proceedings Act," pp. 987-1036.

The third stage involved specific studies[16] of surviving provisions of the C.C.L.C. (enacted in 1866) governing subjects that, after 1867, came within the exclusive jurisdiction of Parliament (for example, marriage, insolvency, admiralty law, the Crown and bills of exchange)[17] and that had not been repealed or even amended by the province because it lacked jurisdiction. Researchers[18] identified 478 provisions of the 1866 C.C.L.C. that were likely to cause problems. 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 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.[19] According to the Department of Justice, the repeal of these provisions would help to clarify legislation and avoid conflict between laws.[20]

In November 1997, the federal Department of Justice issued a consultation paper to facilitate the drafting of the legislative provisions required and to seek public input on their implementation.[21]

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(16) 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*. The findings and recommendations in these studies were brought together in a report: André Morel, "Pre-Confederation Civil Law and the Role of Parliament after the New Civil Code," revised version, April 1997 [hereinafter Pre-Confederation Civil Law] in *Collection of Studies*, pp. 71-133.

(17) Canada, Department of Justice, *L'harmonisation de la législation fédérale avec le droit civil québécois et le bijuridisme canadien : respect de la coexistence de deux traditions juridiques canadiennes*, Consultation Paper, Ottawa, November 1997, pp. 8-9 [hereinafter *Consultation Paper*].

(18) See in *Collection of Studies*: Jean Leclair, "Thoughts on the Constitutional Problems Raised by the Repeal of the *Civil Code of Lower Canada*," pp. 347-394; Pierre-André Côté, "Survival of Pre-Confederation Law: Provisions on the Interpretation and Application of Statutes in the *Civil Code of Lower Canada*," pp. 395-428; André Morel, "Pre-Confederation Provisions on Marriage in the *Civil Code of Lower Canada*," pp. 429-448 [hereinafter Pre-Confederation Provisions on Marriage in the *Civil Code of Lower Canada*]; Gaspard Côté, "Pre-Confederation Provisions of the *Civil Code of Lower Canada* Affecting the Crown and Their Possible Repeal Insofar as They Deal with Matters Falling Within the Legislative Jurisdiction of the Federal Parliament," pp. 449-479; Jacques Auger, "Claims of the Crown," pp. 481-525; Albert Bohémier, "Bankruptcy and Insolvency," pp. 527-611; Jean Leclair, "Study of the Constitutional Legality of the Repeal by the Quebec Legislature of Pre-Confederation Provisions of the *Civil Code of Lower Canada* Relating to Bills of Exchange and Interest," pp. 613-713; and André Braën, "The Maritime Provisions of the *Civil Code of Lower Canada*," pp. 715-745.

(19) Pre-Confederation Civil Law, pp. 97-98.

(20) *Consultation Paper*, p. 9.

(21) *Ibid.*, p. 2.

The list of those who contributed to the development of Bill S-4 includes civil law scholars, the Barreau du Québec, the Chambre des notaires du Québec, the Quebec Department of Justice, and the Canadian Bar Association.

D. Policy on Legislative Drafting

In June 1995, the federal Department of Justice adopted a policy on legislative drafting[22] 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[23] 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;
- will undertake, in drafting both versions of every bill and proposed regulation that touches on provincial or territorial private law, to take care to reflect the terminology, concepts, notions and institutions of both of Canada's private law systems;
- charges the Legislative Services Branch with the mandate of seeing to the respect and the implementation of legislative bijuralism, in bills and proposed regulations.

ANALYSIS OF PROVISIONS

A. Preamble

The bill includes a Preamble containing seven declarations or assertions aimed at situating the bill in a policy context and setting out the principal objectives of the legislation:

- first statement: asserts that all Canadians are entitled to federal legislation that respects the common law and civil law traditions;
- second statement: acknowledges that the unique character of Quebec society is largely reflected by its civil law tradition;

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(22) Canada, Department of Justice, *Policy on Legislative Bijuralism*, Ottawa, June 1995.

(23) This policy identifies four Canadian legal audiences: francophone civil law lawyers, francophone common law lawyers, anglophone civil law lawyers, and anglophone common law lawyers.

- third statement: highlights the need for the harmonious interaction of federal and provincial legislation; the health of such interaction being dependent on an interpretation of federal legislation that is compatible with common or civil law, as the case may be;

- fourth statement: notes that harmonization provides Canada with a full view of the world and facilitates exchanges with the vast majority of other countries;

- fifth statement: emphasizes that, in the areas of property and civil rights, provincial law completes federal law in most situations;

- sixth statement: focuses on the objective of facilitating access to federal legislation that takes into account the common and civil law traditions in their English and French versions; and

- seventh statement: notes the importance of the establishment of the harmonization program organized by the federal Department of Justice.

B. Clause 1

Clause 1 of the bill provides that the Act's short title would be *Federal Law-Civil Law Harmonization Act, No. 1*.

C. Clauses 2 to 7

Clauses 2 to 7 constitute Part 1 of the bill. According to clause 2, this Part itself would constitute an Act which would be entitled the Federal Law and Civil Law of the Province of Quebec Act. This Act would apply solely to the province of Quebec and its provisions would be interpreted as though they were an integral part of the C.C.Q. (section 3). These new sections would essentially reproduce the content of certain provisions of the C.C.Q.

Clause 4 provides that marriage would require the free and informed consent of a man and a woman to be the spouse of the other. This provision would correspond to the second paragraph of article 365 of the C.C.Q., which provides that marriage may be contracted only between a man and a woman who openly express their free and informed consent.

Clause 5 states that no person who is under the age of 16 years could enter into marriage. This corresponds to paragraph 1 of article 373 of the C.C.Q., which provides that a

marriage may not be solemnized unless the intended spouses are at least 16 years of age and, in the case of minors, the person officiating has ascertained that the person with parental authority (or, where appropriate, the guardian) consents to the solemnization of the marriage.

Clause 6 provides that no person could enter into a new marriage before a previous marriage had been annulled or dissolved by the death of one of the parties or by divorce. This clause corresponds to paragraph 3 of article 373 of the C.C.Q., which provides that the person officiating should ascertain that the intended spouses are free from any previous marriage bond.

The federal Department of Justice has followed, at least in part, Professor André Morel's recommendation in his March 1996 report entitled Pre-Confederation Provisions on Marriage in the *Civil Code of Lower Canada*.(24) Professor Morel put forward three options: refraining from legislating; enacting a uniform law on marriage for the whole of Canada; or replacing the pre-Confederation provisions of the C.C.L.C. governing marriage. Of these, he preferred the last option.(25) With respect to the conditions required for a marriage to be contracted, he proposed that the legislation regulate:

1. difference in gender (the second paragraph of article 365 of the C.C.Q. provides that marriage may be contracted only by a man and a woman);

2. the minimum age at which marriage can be entered into (see above on clause 5);

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(24) In *Collection of Studies*, p. 439.

(25) Because all the pre-Confederation provisions still in effect would be repealed (see the analysis of clause 7 below), Professor Morel stated that it was essential to enact replacement provisions for all the rules within the exclusive federal jurisdiction over marriage. In his view, this field could not be left vacant because marriage was nowhere subject in every respect to the ordinary rules governing other contracts. These provisions could not, without serious inconvenience, be allowed to continue to apply or be reenacted; it was essential, in his opinion, that the existing rules be revised to bring them into line with contemporary values and the philosophy of the C.C.Q. in this regard. According to Professor Morel, this goal could only be attained through a measure designed in light of the undesirable situation that resulted from the changes to the civil law of Quebec. Otherwise, in his view, the result could be a failure to provide an adequate response to the problem. In his view, enacting uniform legislation that would apply in both Quebec and the common law provinces would take an excessively long time: Pre-Confederation Civil Law, pp. 102-103, and Pre-Confederation Provisions on Marriage in the *Civil Code of Lower Canada*, pp. 442, 445-446.

3. the consent of the future spouses, its nature and its sincerity (see above on clause 4);

4. the consent of third parties where the intending spouses are still minors (paragraph 1 of article 373 of the C.C.Q. states that the person officiating may not celebrate a marriage unless he or she has ensured that the intending spouses are minors [although at least 16 years of age], that the person with parental authority or, where appropriate, the guardian, has consented to the contracting of the marriage);

5. the monogamous nature of the marriage (see comments above on clause 6);

and with respect to declaring the marriage to be null:

6. reproduce the wording of article 380 of the C.C.Q;(26)

and with respect to the dissolution of the marriage:

7. reproduce the wording of article 516 of the C.C.Q., which provides that marriage is dissolved by the death of either spouse or by divorce.(27)

Only numbers 1, 2, 3 and 5 form part of Bill S-4.

Finally, it should be noted that clauses 2 to 6 of the bill did not appear in the *Consultation Paper* issued by the Department of Justice in November 1997.

Clause 7 would repeal the provisions of the C.C.L.C. that relate to areas now within the jurisdiction of Parliament but that are still in effect, not having been expressly repealed by Parliament. The Department of Justice adopted the unanimous recommendation of the experts to the effect that provisions not yet legally repealed by either the federal or the provincial government, or whose force was doubtful, should not be retained in their current form.(28) To justify this position, the Department gave a number of reasons:

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(26) C.C.Q., art. 380: "A marriage which is not solemnized according to the prescriptions of this Title and the necessary conditions for its formal validity may be declared null upon the application of any interested person, although the court may decide according to the circumstances.

No action lies after the lapse of three years from the solemnization, except where public order is concerned."

(27) *Collection of Studies*, pp. 446-447.

(28) *Ibid.*, p. 98.

- the pointlessness of the provisions;
- the fact that the federal government had not made use of them for several decades;
- the lack of any harmful consequences or of a judicial vacuum should the provisions be repealed;
- the elimination or virtual impossibility of any dispute arising through their repeal;
- the difficult application of these provisions in the context of the new civil law;
- the undesirable anachronistic nature of some of the provisions; and
- the existence of conflicting rules.(29)

The experts also recommended the repeal of rules that no longer had any force or effect(30) to the extent and as long as they conflict with federal statutes (because federal laws take precedence over provincial laws). This recommendation was designed to avoid any controversy arising through the absence of agreement as to how to apply the *Interpretation Act* to pre-Confederation legislation; examples are section 2(2) of that Act, which provides that an enactment that has expired or lapsed or otherwise ceased to have effect shall be deemed to have been repealed, and section 43(*a*), which provides that repeal does not result in the reinstatement of any statutes or other rules of law that are not in force when the repeal takes effect. According to Professor Morel, the provisions of the C.C.L.C. that are currently of no force or effect could come into force again on the repeal of the preponderant federal legislation.(31)

D. Clause 8

Clause 8, which alone makes up Part 2 of the bill, would amend the *Interpretation Act* by adding two sections (8.1 and 8.2) concerning property and civil rights.

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(29) *Ibid.*, pp. 98-99.

(30) For more details on this concept, see Jean Leclair, "Thoughts on the Constitutional Problems Raised by the Repeal of the *Civil Code of Lower Canada*," in *Collection of Studies*, p. 376. See also, Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed., Éditions Yvon Blais, Cowansville, 1993, p. 95.

(31) *Collection of Studies*, p. 100.

Under proposed section 8.1, both the common law and the civil law would be equally authoritative and recognized sources of the law of property and civil rights. It would also provide that, in applying a statute in a province, the rules, principles and concepts in force in that province would have to be taken into consideration.(32)

Proposed section 8.2 would provide that, unless otherwise provided by law, when a statute used both Quebec civil law and common law terminology, or terminology that had a different meaning in the civil law and the common law, the interpretation would have to be consistent with the legal system of the province in which it was being applied.(33)

E. Clauses 9 to 24

Clauses 9 to 24, which make up Part 3 of the bill, propose numerous amendments to the *Federal Real Property Act,* either because the Act does not fully reflect the concepts in both English and in French or because there is now a different terminology. For example, the expression "*immeuble*" is used to translate "real property" even though the two terms do not mean exactly the same thing. Bill S-4 would ensure that each concept of property has the correct equivalent in the other language. The concept of "federal immovables" or "*bien réel fédéral*" would be added to this statute (currently, only the concepts of "federal real property" or "*immeuble fédéral*" are used). A number of definitions would be amended or added. Some of the proposed changes with respect to equivalence between the French and English versions include:

- "*biens réels*" would be the equivalent of "real property" (clause 11(3));
- "*intérêt*" would be the equivalent of "interest" (clause 11(3));
- "*immeuble fédéral*" would be the equivalent of "federal immovable" (clause 11(4));
- "*immeuble*" would be the equivalent of "immovable" (clause 11(5));
- "*bien réel fédéral*" would be the equivalent of "federal real property" (clause 11(6));
- "*acte*" would be the equivalent of "instrument or act" (clause 12).

Some of the proposed changes in the French version include:

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(32) The second part of proposed section 8.1 corresponds more or less to the wording proposed by Professor Morel: André Morel, "Drafting Bilingual Statutes Harmonized with the Civil Law," in *Collection of Studies*, p. 323.

(33) The proposed section 8.2 corresponds more or less to the wording proposed by Professor Morel: *Ibid.*, p. 326.

- "*sujets de droit privé*" would be replaced by "*personnes physiques*" (clause 15(3));
- "*cession*" would be replaced by "*transfert*" (clause 16);
- "*remise*" would be replaced by "*délivrance*" (clause 16);
- "*personne qui loue*" would be replaced by "*locataire*" (clause 16);
- "*conseillers juridiques*" would be replaced by "*avocats ou notaires de la province de Québec ou des avocats des autres provinces*" (clause 16);
- "*vente*" would be replaced by "*disposition*" (clause 18);
- "*aliénation*" would be replaced by "*disposition*" (clause 18);
- "*achat*" would be replaced by "*acquisition*" (clause 18);
- "*rétrocession*" would be replaced by "*résiliation ou résignation*" (clause 18);
- "*pleine propriété*" would be replaced by "*droit de propriété en fief simple*" (clause 19);
- "*droit à l'usage*" would be replaced by "*droit à l'utilisation*" (clause 20);
- "*droits accessoires*" would be replaced by "*leurs accessoires et toutes leurs dépendances*" (clause 21);
- "*ayants droit*" would be replaced by "*ayants droit ou ayants cause*" (clause 22);
- "*bénéficiaires testamentaires*" would be replaced by "*légataires*" (clause 22);
- "*détenteur*" would be replaced by "*concessionnaire*" (clause 24);
- "*détenteur initial*" would be replaced by "*concessionnaire initial*" (clause 24).

Some of the proposed changes in the English version include:

- "private person" would be replaced by "natural person" (clause 15);
- "act of concession" would be added to fully convey the concept of "*acte de concession*" in French (clause 15);
- "instrument or act" would be used instead of "instrument" alone to fully convey the concept of "*acte*" in French (clause 15);
- "person who holds a lease" would be replaced by "lessee" (clause 16);
- "solicitors" would be replaced by "advocate or a notary of the Province of Quebec or a barrister or solicitor of any other province" (clause 16);
- "sale" would be replaced by "disposition" (clause 18);
- "leasehold estate in" would be replaced by "lease of" (clause 18);
- the concept of "hypothec" would be added (clause 18);
- "appurtenances" would be replaced by "appurtenances of the real property and the accessories and dependencies of the immovables" (clause 21);

- "assigns" would be replaced by "assigns or successors" (clause 22);
- "devisees" would be replaced by "legatees or legatees by particular title" (clause 22).

F. Clauses 25 to 33

Clauses 25 to 33 constitute Part 4 of the bill and would make many amendments to the *Bankruptcy and Insolvency Act,* either because that Act does not express certain concepts adequately in both English and French or because new terminology is now used. For example, clause 25 would amend the definition of "secured creditor" by giving examples of persons who would be considered as such.

Some of the proposed changes in the French version include:

- "*personne détenant*" would be replaced by "*personne titulaire*" (clause 25);
- "*privilège*" would be replaced by "*charge*" (clause 28);
- "*obligations fiduciaires*" would be replaced by "*obligation d'agir de bonne foi et en vue de l'intérêt général de l'administration de*" (clause 30);
- "*droit ou charge privilégié*" would be replaced by "*créance garantie*" (clause 31);
- "*compétence en droit et en équité*" would be replaced by "*compétence en droit et en equity*" (clause 33).

Some of the proposed changes in the English version include:

- the concept of "suretyship" would be added to fully convey the concept of "*sûreté*" used in civil law (clause 26);
- the concept of "hypothec" would be added (clause 29);
- "preferential lien or charge" would be replaced by "secured claim" (clause 31).

Finally, it is important to note the amendments proposed by clause 33 to section 183 of the *Bankruptcy and Insolvency Act*. The Quebec Superior Court and the Quebec Court of Appeal would be the subject of specific provisions designed to ensure that they would not have the same jurisdiction to hear cases in law and in equity that is exercised by the superior courts of the common law provinces.(34)

(34) According to Professor Albert Bohémier, the common law concept of equity is foreign to the Civil Code: Albert Bohémier, "Research in Bijuralism: *Bankruptcy and Insolvency Act*," in *Collection of Studies*, pp. 882-883.

G. Clauses 34 to 52

Clauses 34 to 52, which constitute Part 5 of this bill, would make numerous amendments to the *Crown Liability and Proceedings Act*. It is particularly noteworthy that the Act would include two concepts of liability, namely extra-contractual civil liability in the Province of Quebec and liability in tort in all the other provinces (clause 34(2)). Clause 36 would amend the Act so that section 3(*a*)(i) would reflect the liability provided for in article 1463 of the C.C.Q. (liability for the act or fault of another or an employee) and section 3(*a*)(ii) would reflect the liability provided for in the third paragraph of article 1457 of the C.C.Q. (liability for the act of a thing).

Other proposed changes in the French version include:

- "*personne physique, majeure et capable*" would be replaced by "*personne*" (clause 37);
- "*particulier*" would be replaced by "*personne*" (clause 38);
- "*responsabilité matérielle*" would be replaced by "*garde matérielle*" (clause 41);
- as a rule, the singular and not the plural of the expressions "*dommage*" and "*perte*" would be used (clause 43);
- "*ordonnance d'exécution*" would be replaced by "*ordonnance d'exécution en nature*" (clause 46);
- the words "*à personne*" would be deleted when the reference is to the serving of instruments (clause 47);
- "*exécution par voie de contrainte*" would be replaced by "*exécution forcée*" (clause 49);
- "*créance d'une somme determinée*" would be replaced by "*créance liquide*" (clause 51);
- in the case of Quebec, the concept of "*somme à titre de perte pécuniaire antérieure au procès*" would be added to fully convey the concept of "special damages" used in the common law (clause 51).

Some of the proposed changes in the English version include:

- "private person" would be replaced by "person" (clause 36);
- "between subject and subject" would be replaced by "between persons" (clause 48).

H. Clauses 53 to 128

Clauses 53 to 128, which form Part 6 of the bill, would make a variety of miscellaneous amendments to the following Acts:

- *Aeronautics Act*, R.S.C. 1985, c. A-2;
- *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5;
- *Animal Pedigree Act*, R.S.C. 1985, c. 8 (4th Supp.);
- *Bank of Canada Act*, R.S.C. 1985, c. B-2;
- *Bell Canada Act*, S.C. 1987, c. 19;
- *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.);
- *Canada Council Act*, R.S.C. 1985, c. C-2;
- *Canada Pension Plan*, R.S.C. 1985, c. C-8;
- *Canadian Centre for Management Development Act*, S.C. 1991, c. 16;
- *Canadian Space Agency Act*, S.C. 1990, c. 13;
- *Defence Production Act*, R.S.C. 1985, c. D-1;
- *Department of Industry Act*, S.C. 1995, c. 1;
- *Employment Insurance Act*, S.C. 1996, c. 23;
- *Energy Supplies Emergency Act*, R.S.C. 1985, c. E-9;
- *Explosives Act*, R.S.C. 1985, c. E-17;
- *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.);
- *Farm Products Agencies Act*, R.S.C. 1985, c. F-4;
- *Feeds Act*, R.S.C. 1985, c. F-9;
- *Firearms Act*, S.C. 1995, c. 39;
- *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29;
- *Canada Grain Act*, R.S.C. 1985, c. G-10;
- *Integrated Circuit Topography Act*, S.C. 1990, c. 37;
- *Interest Act*, R.S.C. 1985, c. I-15;

- *An Act to incorporate the Jules and Paul-Émile Léger Foundation*, S.C. 1980-81-82-83, c. 85;
- *Labour Adjustment Benefits Act*, R.S.C. 1985, c. L-1;
- *Law Commission of Canada Act*, S.C. 1996, c. 9;
- *Meat Inspection Act*, R.S.C. 1985, c. 25 (1st Supp.);
- *Motor Vehicle Transport Act, 1987*, R.S.C. 1985, c. 29 (3rd Supp.);
- *National Arts Centre Act*, R.S.C. 1985, c. N-3;
- *National Energy Board Act*, R.S.C. 1985, c. N-7;
- *National Film Act*, R.S.C. 1985, c. N-8;
- *National Research Council Act*, R.S.C. 1985, c. N-15;
- *Natural Sciences and Engineering Research Council Act*, R.S.C. 1985, c. N-21;
- *Old Age Security Act*, R.S.C. 1985, c. O-9;
- *Pension Fund Societies Act*, R.S.C. 1985, c. P-8;
- *Pesticide Residue Compensation Act*, R.S.C. 1985, c. P-10;
- *Seeds Act*, R.S.C. 1985, c. S-8;
- *Social Sciences and Humanities Research Council Act*, R.S.C. 1985, c. S-12;
- *Special Economic Measures Act*, S.C. 1992, c. 17;
- *State Immunity Act*, R.S.C. 1985, c. S-18;
- *Telecommunications Act*, S.C. 1993, c. 38;
- *Trade Unions Act*, R.S.C. 1985, c. T-14;
- *Department of Veteran Affairs Act*, R.S.C. 1985, c. V-1;
- *Visiting Forces Act*, R.S.C. 1985, c. V-2;
- *Canada Wildlife Act*, R.S.C. 1985, c. W-9.

Some of the proposed changes in the French version of some of these Acts include:

- "*usage délictuel*" would be replaced by "*contravention*" (clause 54);
- "*biens mobiliers*" would be replaced by "*meubles*" (clause 56);
- "*biens immobiliers*" would be replaced by "*immeubles*" (clause 56);
- the concept of "*biens personnels*" would be added (clause 56);
- the concept of "*biens réels*" would be added (clause 56);

- "*céder*" would be replaced by "*en disposer*" (clause 56);
- "*hypothèque mobilière sans dépossession*" would be added (clause 58);
- "*acheter*" would be replaced by "*acquérir*" (clause 58);
- "*aliéner*" would be replaced by "*en disposer*" (clause 58);
- "*gage*" would be added (clause 59);
- "*remis en nantissement*" would be replaced by "*remis en gage*" (clause 59);
- "*biens immeubles*" would be replaced by "*immeubles ou biens réels*" (clause 59);
- "*les installations ... ne peuvent ... être vendues*" would be replaced by "*les installations ne peuvent faire l'objet d'une vente ou d'une autre forme de disposition*" (clause 61);
- "*servitudes*" would be replaced by "*grèvements*" (clause 62) or "*charges*" (clause 73);
- "*transport*" would be replaced by "*cession*" (clause 62);
- "*instrument*" would be replaced by "*acte ou instrument*" (clause 62);
- "*privilège*" would be replaced by "*charge*" (clause 67);
- "*acquérir*" would be added (clause 68);
- "*titres de propriété analogues*" would be replaced by "*droits de propriété analogues*" (clause 68);
- "*priorité ou droit de rétention selon le Code civil du Québec ou les autres lois de la province de Québec*" would be added (clause 72);
- "*charges*" would be added (clause 73);
- "*baillements*" would be added (clause 73);
- "*écoulement*" would be replaced by "*mode de disposition*" (clause 79);
- "*créance prioritaire à*" would be replaced by "*créance qui prend rang avant*" (clause 81);
- "*prise en gage*" would be replaced by "*prêt sur gages*" (clause 85);
- "*ayant droit de purger l'hypothèque*" would be replaced by "*ayant le droit de payer en vue d'éteindre ou de racheter l'hypothèque*" (clause 95);
- "*grevées de privilèges*" would be replaced by "*grevées*" (clause 97);
- "*fondée de pouvoir au sens du Code civil du Québec*" would be added (clause 102);
- "*immunité*" would be replaced by "*garantie*" (clause 104);
- "*détenir*" would be added (clause 108);
- "*caution*" would be replaced by "*cautionnement*" (clause 117);
- "*possédé en propriété ... par*" would be replaced by "*appartenant à*" (clause 126);

- "*biens meubles corporels*" would be replaced by "*meubles corporels ou biens personnels corporels*" (clause 127).

Some of the proposed changes in the English version of some of these Acts include:

- the concept of "solidary liability" would be added (clause 53);
- "suretyship" would be added to fully convey the concept of "*sûreté*" used in civil law (clause 55);
- "movable" would be added (clause 56);
- "immovable" would be added (clause 56);
- "hypothecate" would be added (clause 56);
- "movable hypothec without delivery" would be added (clause 58);
- "obtain security on any immovable" would be added (clause 59);
- "hypothec" would be added (clause 62);
- "acquire" would be added (clause 68);
- "design" would be added (clause 68);
- "prior claims or rights of retention within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec" would be added (clause 72);
- "pledge" would be added (clause 73);
- "release of hypothec" would be added to fully convey the concept of "*mainlevée d'hypothèque*" (clause 78);
- "take in pawn" would be replaced by "pawnbroking" (clause 85);
- "extinguish the hypothec" would be added (clause 95);
- "holder of a power of attorney within the meaning of the *Civil Code of Québec*" would be added (clause 102);
- "mandatary" would be added (clause 115);
- "hypothecary creditor" would be added (clause 125);
- "letting" would be replaced by "lease" (clause 125);
- "tangible personal property" would be replaced by "tangible personal or corporeal movable property" (clause 127).

I. Clauses 129 to 173

Clauses 129 to 173, which comprise Part 7 of the bill, would make consequential amendments to the following Acts:

- *Canada Customs and Revenue Agency Act*, S.C. 1999, c. 17;
- *Canada Marine Act*, S.C. 1998, c. 10;
- *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3;
- *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28;
- *Department of Canadian Heritage Act*, S.C. 1995, c. 11;
- *Department of Public Works and Government Services Act*, S.C. 1996, c. 16;
- *Financial Administration Act*, R.S.C. 1985, c. F-11;
- *International Boundary Commission Act*, R.S.C. 1985, c. I-16;
- *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7;
- *Manitoba Claim Settlements Implementation Act,* S.C. 2000, c. 33;
- *Parks Canada Agency Act*, S.C. 1998, c. 31;
- *Revolving Funds Act*, R.S.C. 1985, c. R-8;
- *Surplus Crown Assets Act*, R.S.C. 1985, c. S-27;
- *Department of Transport Act*, R.S.C. 1985, c. T-18;
- *Visiting Forces Act*, R.S.C. 1985, c. V-2.

Some of the proposed changes in the French version of some of these Acts include:

- the concept of "*biens réels fédéraux*" would be added (clause 131);
- "*immeubles…qu'elle loue à titre de locataire*" would be added (clause 131);
- the concept of "*cession*" would be added (clause 131);
- the concept of "*servitude*" would be added (clause 131);
- "*déclaré pour plus de certitude*" would be replaced by "*entendu*" (clause 144);
- "*n'est pas assimilé à un droit réel le droit du locataire d'un immeuble*" would be replaced by "*le bail immobilier n'est pas considéré comme un immeuble*" (clause 169);
- the concept of "*faute*" would be added (clause 172);
- "*par elle occupés, possédés ou contrôlés*" would be replaced by "sous sa garde" (clause 172).

Some of the proposed changes in the English version of some of these Acts include:

- the concept of "federal immovables" would be added (clause 131);
- "immovables…of which it is a lessee" would be added (clause 131);
- the concept of "conceding" would be added (clause 131);
- the concept of "servitude" would be added (clause 131);
- "notwithstanding" would be replaced by "despite" (clause 145);
- "leasehold interest or rights of a lessee in real property" would be replaced by "lease of real property" (clause 169);
- "any instrument" would be replaced by "any instrument or act" (clause 171);
- the concept of "fault" would be added (clause 172).

Clause 173 reflects, in the French version of the *Health of Animals Act* and *Plant Protection Act*, the new French title of the *Pesticide Residue Compensation Act* ("Loi sur l'indemnisation du dommage causé par des pesticides").

J. Clauses 174 to 176

Clauses 174 to 176, which comprise Part 8 of the bill, would make coordinating amendments to the following Acts:

- *Canada Grain Act*, R.S.C. 1985, c. G-10;
- *Interest Act,* R.S.C. 1985, c. I-15.

K. Clauses 177 to 178

Clause 177 would be a transitional provision stating that the proposed new definition of "secured creditor" in the *Bankruptcy and Insolvency Act* (see clause 25) and the proposed modifications to paragraphs 136(1)(e) (see clause 31) and 178(1)(d) (see clause 32) of the same Act would have no retroactive effect. That is, they would take effect only once clauses 25, 31 and 32 of the bill come into force.

According to clause 178, the provisions of the bill, other than Part 8 (Coordinating Amendments), would come into force on the day or days fixed by order of the Governor in Council.

COMMENTARY

To date, there has been minimal mainstream public discussion of, or exposure to, Bill S-4. No articles have been published in the Canadian press about the bill. Bill C-50, one of the predecessors to Bill S-4, garnered some press attention before dying on the *Order Paper*. Two articles appeared in Quebec newspapers; one of these, in the "Idées" section of *Le Devoir*, was authored by the federal Minister of Justice, the Honourable Anne McLellan.(35)

Nonetheless, support and enthusiasm for the process of harmonization and for Bill S-4 are evident. The Quebec Department of Justice, the Barreau du Québec, the Chambre des notaires du Québec, the Canadian Bar Association and members of the civil law academic community have expressed their support for the harmonization project and the previous versions of this bill.

On 14 June 2000, the federal Minister of Justice appeared before the Standing Senate Committee on Legal and Constitutional Affairs to describe the process of harmonization and Bill S-22. The Committee began consideration of Bill S-22 at that meeting but the bill was not reported back to the Senate before the dissolution of Parliament. It is expected that Bill S-4 will be referred to the same Committee for consideration in the coming weeks.

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(35) Anne McLellan, "Un jeu qui en vaut la chandelle : l'harmonisation des lois fédérales avec le droit civil québécois est une grande première," *Le Devoir* (Montréal), 3 August 1998, p. A7; Joël Denis Bellavance, "Un processus long et coûteux : neuf ans et 55 millions $ pour harmoniser les lois fédérales avec le Code civil du Québec," *Le Soleil* (Québec), 15 June 1998, p. A12.