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## Canadian Bijuralism At A Crossroad? The Impact Of Section 8.1 Of The Interpretation Act On Judicial Interpretation Of Federal Legislation

Aline Grenon

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# Canadian Bijuralism At A Crossroad? The Impact Of Section 8.1 Of The Interpretation Act On Judicial Interpretation Of Federal Legislation

## Abstract

Section 8.1 of the Interpretation Act affirms the equal authority of the common law and civil law in the field of property and civil rights. The section states, subject to two exceptions, that federal enactments based on rules and concepts that are part of the law of property and civil rights are to be interpreted in accordance with these rules and concepts. Prior to the enactment of section 8.1 in 2001, courts had a tendency to opt for a uniform application of federal legislation based on common law concepts, with often negative results for Quebec civil law. Since then, the Supreme Court of Canada (SCC) has had a number of opportunities to interpret federal legislation in light of section 8.1. Following an analysis of the Court's decisions, the author concludes that the SCC has had an ambivalent rapport with section 8.1, and has not yet subjected it to in-depth analysis or explained its underlying objectives. The author emphasizes that section 8.1 has the potential to promote exchanges between Quebec civil law and Canadian common law at the level of federal legislation and submits proposals in this regard.

## Keywords

Legal polycentricity; Canada. Interpretation Act. Section 8.1; Québec; Canada

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## Canadian Bijuralism At A Crossroad? The Impact Of Section 8.1 Of The *Interpretation Act* On Judicial Interpretation Of Federal Legislation

ALINE GRENON\*

Section 8.1 of the *Interpretation Act* affirms the equal authority of the common law and civil law in the field of property and civil rights. The section states, subject to two exceptions, that federal enactments based on rules and concepts that are part of the law of property and civil rights are to be interpreted in accordance with these rules and concepts. Prior to the enactment of section 8.1 in 2001, courts had a tendency to opt for a uniform application of federal legislation based on common law concepts, with often negative results for Quebec civil law. Since then, the Supreme Court of Canada (SCC) has had a number of opportunities to interpret federal legislation in light of section 8.1. Following an analysis of the Court's decisions, the author concludes that the SCC has had an ambivalent rapport with section 8.1, and has not yet subjected it to in-depth analysis or explained its underlying objectives. The author emphasizes that section 8.1 has the potential to promote exchanges between Quebec civil law and Canadian common law at the level of federal legislation and submits proposals in this regard.

L'article 8.1 de la *Loi d'interprétation* met sur un pied d'égalité la common law et le code civil dans le domaine des droits de propriété et civils. Cet article énonce, à deux exceptions près, que les promulgations fédérales reposant sur les règles et les concepts qui font partie du droit de la propriété et des droits civils doivent être interprétées conformément à ces règles

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\* Aline Grenon is a member of the Law Society of Upper Canada and of the Barreau du Québec. She is currently a Visiting Professor at the Faculty of Law of the Université de Montréal, having retired as Full Professor from the French Common Law Program of the University of Ottawa in 2013. This article is a revised and updated English-language version of Aline Grenon, "Le bijuridisme canadien à la croisée des chemins? Réflexions sur l'incidence de l'article 8.1 de la *Loi d'interprétation*" (2011) 56:4 McGill LJ 775. The author thanks Mélanie Beaumier, a student in the National Program of the University of Ottawa, Faculty of Law, for her invaluable assistance. The author also thanks the many colleagues who reviewed and commented on the article.

et concepts. Avant la promulgation de l'article 8.1 en 2001, les tribunaux avaient tendance à opter pour une application uniforme des lois fédérales axées sur des concepts de common law, ce qui allait souvent à l'encontre *du code civil du Québec*. Depuis 2001, la Cour suprême du Canada a souvent eu l'occasion d'interpréter des lois fédérales à la lumière de l'article 8.1. À la suite d'une analyse de ses jugements, l'auteur conclut que la Cour suprême du Canada possède une attitude ambivalente devant l'article 8.1, ne l'a pas encore soumis à une analyse en profondeur et n'en a pas expliqué les objectifs sous-jacents. L'auteur souligne que l'article 8.1 pourrait promouvoir les échanges entre le *code civil du Québec* et la common law canadienne au niveau de la législation fédérale et il présente des propositions à cet égard.

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## I. INTRODUCTION

CANADA IS OCCASIONALLY REFERRED to as being multijural or plurijural because of the existence of variations in the law among its multiple jurisdictions and because of the growing importance of aboriginal law. It is also often referred to as being bijural. In the Canadian context, the terms “bijural” and “bijuralism” have a very specific meaning: they refer to the relationship between civil law and common law.<sup>1</sup> That relationship is primarily limited to federal legislation

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1. France 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 ed, booklet 3 (Ottawa: Minister of Justice and Attorney General of Canada, 2001) 1 at 1:

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.

and it has on occasion given rise to tension and dissonance, particularly when well-meaning judges sought to achieve a uniform, pan-Canadian application of federal legislation by resorting to common law concepts, thereby skewing Quebec civil law in the process. Such decisions have been the subject of considerable commentary, by Quebec authors in particular.<sup>2</sup>

In 2001, sections 8.1 and 8.2 were added to the *Interpretation Act*.<sup>3</sup> Since section 8.1, the full text of which is set out in Part II, is the more important of the two, only

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2. See e.g. Jean Leclair, "L'interface entre le droit commun privé provincial et les compétences fédérales 'attractives'" in Association Littéraire et Artistique Internationale, ed, *Un cocktail de droit d'auteurs* (Montreal: Éditions Thémis, 2007) [Leclair, "L'interface entre le droit"]; Guy Lefebvre, "L'uniformisation du droit maritime canadien aux dépens du droit civil québécois: lorsque l'infidélité se propage de la Cour suprême à la Cour d'appel du Québec" (1997) 31:2 RJT 577; Rosalie Jukier & Roderick A Macdonald, "The New Quebec Civil Code and Recent Federal Law Reform Proposals: Rehabilitating Commercial Law in Quebec?" (1992) 20:2 Can Bus LJ 380 at 398-404; Roderick A Macdonald, "Provincial Law and Federal Commercial Law: Is 'Atomic Slipper' a New Beginning?" (1991-1992) 7 BFLR 437; H Patrick Glenn, "Le droit comparé et la Cour suprême du Canada" in Ernest Caparros et al, eds, *Mélanges Louis-Philippe Pigeon* (Montréal: Wilson & Lafleur, 1989) 197.
  3. RSC 1985, c I-21. In essence, the Act contains rules to facilitate the interpretation of federal enactments. This is apparent from its long title, *An Act respecting the interpretation of statutes and regulations*. Section 3 states that every provision of the Act "applies, unless a contrary intention appears, to every enactment." Sections 8.1 and 8.2 were added to the *Interpretation Act* by the *First Harmonization Act* effective 1 June 2011 (*Federal Law-Civil Law Harmonization Act, No 1*, SC 2001, c 4 [*First Harmonization Act*]). The preamble of the *First Harmonization Act* states:

WHEREAS all Canadians are entitled to access to federal legislation in keeping with the common law and civil law traditions;

WHEREAS the civil law tradition of the Province of Quebec, which finds its principal expression in the *Civil Code of Québec*, reflects the unique character of Quebec society;

WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

WHEREAS the full development of our two major legal traditions gives Canadians enhanced opportunities worldwide and facilitates exchanges with the vast majority of other countries;

WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

WHEREAS the objective of the Government of Canada is to facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions;

it will be the subject of detailed analysis in this article. Section 8.1 affirms the equal authority of the common law and civil law in the field of property and civil rights and states, subject to two exceptions, that federal enactments based on rules and concepts that are part of the law of property and civil rights are to be interpreted in

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AND WHEREAS the Government of Canada has established a harmonization program of federal legislation with the civil law of the Province of Quebec to ensure that each language version takes into account the common law and civil law traditions;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows... .

Attendu :

que tous les Canadiens doivent avoir accès à une législation fédérale conforme aux traditions de droit civil et de common law;

que la tradition de droit civil de la province de Québec, qui trouve sa principale expression dans le *Code civil du Québec*, témoigne du caractère unique de la société québécoise;

qu'une interaction harmonieuse de la législation fédérale et de la législation provinciale s'impose et passe par une interprétation de la législation fédérale qui soit compatible avec la tradition de droit civil ou de common law, selon le cas;

que le plein épanouissement de nos deux grandes traditions juridiques offre aux Canadiens des possibilités accrues de par le monde et facilite les échanges avec la grande majorité des autres pays;

que, sauf règle de droit s'y opposant, le droit provincial en matière de propriété et de droits civils est le droit supplétif pour ce qui est de l'application de la législation fédérale dans les provinces;

que le gouvernement du Canada a pour objectif de faciliter l'accès à une législation fédérale qui tienne compte, dans ses versions française et anglaise, des traditions de droit civil et de common law;

qu'en conséquence, le gouvernement du Canada a institué un programme d'harmonisation de la législation fédérale avec le droit civil de la province de Québec pour que chaque version linguistique tienne compte des traditions de droit civil et de common law,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte... .

accordance with “the rules, principles and concepts in force in the province at the time the enactment is being applied.”<sup>4</sup>

How has this section fared since its enactment? Part II describes the *raison d'être* of section 8.1 and summarizes the methods proposed by three authors with respect to its application. In Part III, relevant decisions of the Supreme Court of Canada (SCC or the Court) delivered since 2001 are the subject of analysis and commentary. How has the SCC made use of section 8.1? Has the SCC adopted, in whole or in part, the methods proposed by the authors? In Part IV, the author comments in more detail on the impact of this jurisprudence and emphasizes that section 8.1 has the potential to promote ongoing exchanges between Quebec civil law and Canadian common law at the level of federal legislation. In order to encourage that potential, the author submits a number of proposals.

## II. SECTION 8.1 AND THE INTERPRETATION OF BIJURAL FEDERAL LEGISLATION

Numerous texts have considered the *raison d'être* of section 8.1 of the *Interpretation Act*.<sup>5</sup> Accordingly, only a brief explanation is provided here. Canadian law students learn early in their studies that the Parliament of Canada and the Provincial Legislatures each have the power to make laws in areas that fall within their jurisdiction<sup>6</sup> and that Canadian provinces have jurisdiction in the area of property and civil rights.<sup>7</sup> Students also learn that for reasons related to Canada's colonial history and to its constitutional make-up, matters falling within the area of property and civil rights are based on

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4. *Ibid* at s 8.1.

5. Many texts are available online, see Department of Justice of Canada, About Bijuralism, online: Canadian Legislative Bijuralism <<http://www.justice.gc.ca/fra/bijurilex/index.html>>. Among the primary sources available on this website, see e.g. Department of Justice of Canada, ed, *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2d ed, (Ottawa: Minister of Justice and Attorney General of Canada, 2001) [DOJ, *Harmonization of Federal Legislation*] (published in nine booklets); Department of Justice of Canada, ed, *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Collection of Studies* (Ottawa: Department of Justice of Canada, 1997) [DOJ, *Collection of Studies*]; Jean-Maurice Brisson & André Morel, “Droit fédéral et droit civil: complémentarité, dissociation” (1996) 75:2 *Can Bar Rev* 297; Jean-Maurice Brisson, “L'impact du Code civil du Québec sur le droit fédéral : une problématique” (1992) 52:2 *R du B* 345.

6. See *Constitution Act*, 1867 (UK), 30 & 31 *Vict*, c 3, ss 91, 92 reprinted in RSC 1985, App II, No 5.

7. *Ibid*, s 92(13).

the civil law in Quebec and on the common law in the other Canadian provinces (and the three territories).<sup>8</sup>

As discussed in a previous article,<sup>9</sup> it often happens that federal legislation is not complete because it does not express all the applicable law. In such circumstances, underlying provincial property and civil rights concepts can serve to supplement federal legislation. For example, in the absence of a definition in a federal statute, a reference to the term “secured creditor” will constitute a reference to the term as it is understood in the provinces.<sup>10</sup> 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 federal legislation to refer to private law concepts by means of neutral or non-legal language (for example, the terms *activity/activités* or *distribute/distribuer*).<sup>11</sup>

When federal legislation refers either directly or indirectly to underlying private law concepts, a relationship of complementarity is said to exist. 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. The dissociation is partial if the legislation adopts common law concepts rather than civil law concepts (or vice versa). The dissociation is total if the legislation is independent from the law of all of the provinces. This may occur, for example, if the legislation forms a complete code or incorporates a rule based on a source other than common or civil law, such as international law.

When courts are called upon to interpret federal enactments that appear to rely on concepts derived from the field of property and civil rights, they may be faced with a dilemma: how to interpret the legislation if the underlying Quebec civil law and Canadian common law concepts produce different results.<sup>12</sup> Since the enactment is applicable to Canada as a whole, courts naturally seek to adopt a uniform interpretation. Before section 8.1 of the *Interpretation Act* was enacted,

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8. See e.g. Peter W Hogg, *Constitutional Law of Canada*, vol 1, 5th ed, loose-leaf (consulted on 15 February 2013), (Toronto: Carswell, 2007) at 2.1-2.6.
  9. See Aline Grenon, “The Interpretation of Bijural or Harmonized Federal Legislation: *Schreiber v. Canada (A.G.)*” (2005) 84:1 Can Bar Rev 131 at 134-135 [Grenon, “Interpretation”].
  10. See e.g. *Re Giffen*, [1998] 1 SCR 91 at paras 60-67, 155 DLR (4th) 322.
  11. Louise Wellington, “Bijuralism in Canada: Harmonization Methodology and Terminology” in DOJ, *Harmonization of Federal Legislation*, supra note 5, booklet 4 [Wellington, “Bijuralism in Canada”].
  12. Variations can also occur among the common law provinces, although this is not as frequent.

courts often adopted uniform interpretations based on common law concepts.<sup>13</sup> As stated in the introduction, this practice was the subject of criticism because the introduction in Quebec of common law concepts gave rise to serious reconciliation issues and impaired the integrity of Quebec civil law.<sup>14</sup> Nothing indicates that critics objected to the principle of uniform application of federal legislation; what they criticized was the systematic use of concepts drawn from the common law to achieve this result, given the problems that this created in Quebec's civil law system.

The wholesale reform of Quebec civil law in the latter part of the 20th century<sup>15</sup> provided an ideal opportunity for the federal government to review and amend federal legislation in order to facilitate harmonization, where applicable, between federal legislation and provincial law.<sup>16</sup> It was in this context that section 8.1 was enacted.

After this brief survey of the main reasons underlying the adoption of section 8.1 of the *Interpretation Act* we can turn our attention to the section itself, which reads:

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,

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13. See *e.g.* *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752, 28 DLR (4th) 641, in which the Court held that Canadian maritime law, as adopted from England, rests on common law principles, and that maritime law applied in a case involving articles carried by sea to Montreal, Quebec that were stored in a warehouse located at the Port of Montreal pending delivery, and stolen from that warehouse. Canadian maritime law has a wide reach and this has given rise to problems elsewhere in Canada. See *e.g.* *Ordon Estate v Grail*, [1998] 3 SCR 437, 40 OR (3d) 639. But unlike the situation in Quebec, the legal concepts are at least familiar.
14. See the sources in *supra* note 2.
15. See *e.g.* Sylvio Normand, "An Introduction to Quebec Civil Law" in Aline Grenon & Louise Bélanger-Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) [*Elements of Quebec Civil Law*] 25 at 42-47.
16. It also became apparent during that process that harmonization went beyond the dichotomy of French civil law and English common law. There is a large Anglophone population in Quebec that requires English civil law terminology. There are also substantial Francophone populations in the common law regions of Canada that require common law terminology in French. In order to ensure that federal legislation be accessible to these four groups, the harmonization process became more inclusive: Harmonized federal legislation now seeks to ensure that these four Canadian audiences can access federal legislation in the official language of their choice and find terminology and concepts that are appropriate to the legal system of their province or territory. See *e.g.* DOJ, *Harmonization of Federal Legislation*, *supra* note 5; see also Grenon, "Interpretation," *supra* note 9.

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.<sup>17</sup>

Section 8.1 begins with a statement affirming the equal authority of the common law and civil law in the field of property and civil rights and states that federal enactments based on rules and concepts that are part of the law of property and civil rights in the province are to be interpreted in accordance with these rules and concepts. However, section 8.1 also includes two exceptions: 1) the possibility that the law may provide otherwise (“unless otherwise provided by law/*sauf règle de droit s’y opposant*”); and 2) the requirement that reference must be made to the rules, principles and concepts forming part of the law of property and civil rights only “if . . . it is necessary/*s’il est nécessaire*” to do so.

Even before its adoption it was clear that section 8.1 of the *Interpretation Act* could give rise to a non-uniform application of federal legislation. André Morel, closely involved in the work leading up to the adoption of this legislation, commented on one of the drafts of the section as follows:

It 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 federal 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. . . .

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.<sup>18</sup>

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17. Section 8.2 of the *Interpretation Act*, *supra* note 3, to which only incidental reference is made in this article, states that if an enactment contains terms taken from the two legal traditions, the terminology suited to the civil law is to be adopted in Quebec and the common law terminology is to be adopted in the other provinces.

18. “The Revision of Federal Legislation in Light of the *Civil Code of Quebec*: Methodology and Work Plan” in DOJ, *Collection of Studies*, *supra* note 5, 267 at 304-05.

The premise that the law of each province in relation to property and civil rights supplements federal enactments relating to such matters is accepted by many authors<sup>19</sup> and (to borrow the words of Morel) “prevailing and consistent judicial decisions” are to this effect.<sup>20</sup> The possibility has been raised, however, that Parliament might have access to “an unenacted body of private law rules applicable as federal law to all matters falling within federal jurisdiction.”<sup>21</sup> Such jurisdiction would allow Parliament to oust provincial law in favour of federal law. Accordingly, federal legislation that at first sight appears to be based on provincial laws of property and civil rights could actually be based on hypothetical federal private law rules, the precise nature of which remains unclear. This hypothetical federal private law would allow federal legislation to apply uniformly across Canada.

Whether or not such rules exist, one fundamental point is uncontroversial: Parliament may by legislation exclude the application of provincial private law within its own fields of jurisdiction. The inclusion of the “unless otherwise provided by law/*sauf règle droit s’y opposant*” exception in section 8.1 of the *Interpretation Act* expressly recognizes this possibility. Accordingly, if Parliament wishes to exclude the application of provincial law, it is not necessary for it to rely

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19. See e.g. Peter W Hogg, Joanne E Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 8th ed (Toronto: Carswell, 2013) at 9-10; Philippe Denault, *La recherche d'unité dans l'interprétation du droit privé fédérale: Cadre juridique et fragments du discours judiciaire* (Montréal: Éditions Thémis, 2008) at 1-62; Leclair, “L’interface entre le droit,” *supra* note 2 at 37-38; Jean Leclair, “Réflexions sur les problèmes constitutionnels soulevés par l’abrogation du Code civil du Bas Canada” (1996-97) 99:2 R du N 155 at 185-97; Jacob S Ziegel, “Personal Property Security and Bankruptcy: There is no War!” (1993) 72 Can Bar Rev 44:1 at 46-47, 50.
  20. *Supra* note 18. See e.g. Re Giffen, *supra* note 10 at paras 64-66. An SCC decision delivered before section 8.1 of the *Interpretation Act*, *supra* note 3 came into effect and based on the premise that provincial private law can supplement federal legislation. See also *Bank of Montreal v Innovation Credit Union*, 2010 SCC 47 at paras 30-32, [2010] 3 SCR 3 [*Innovation Credit Union*]. A decision delivered subsequently and based on the same premise.
  21. Roderick A Macdonald, “Encoding Canadian Civil Law” in DOJ, *Collection of Studies*, *supra* note 5 at 173-90; see also Robert Leckey, “Rhapsodie sur la forme et le fond de l’harmonisation juridique” (2010) 51:1 C de D 3 at 28-34. Sullivan also seeks to distance herself, at least partly, from the premise that federal legislation should be supplemented by provincial private law. See Ruth Sullivan, “The Challenges of Interpreting Multilingual, Multijural Legislation” (2004) 29:3 Brook J Int’l L 985 at 1042-43 [Sullivan, “Challenges”].

on the hypothetical existence of federal private law. It need only state its intention in the enactment.<sup>22</sup>

The essential question then is: In what circumstances may one conclude that the Parliament of Canada excluded provincial private law in federal legislation? This is a matter of interpretation, and interpreting Canadian federal legislation is no easy task. Before the enactment of section 8.1 of the *Interpretation Act*, a number of rules were available, including those relating to the interpretation of bilingual legislation.<sup>23</sup> But all of these rules are subject to an overarching principle of statutory interpretation, summarized famously by Driedger in 1983: “Today there is only one principle or approach, namely, the words of an Act are to be read 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.”<sup>24</sup>

The adoption of section 8.1 necessarily gave rise to questions relating not only to the section’s ambit, but also to its interaction with other rules and with Driedger’s principle. Although the SCC has yet to analyze section 8.1 in detail, a number of authors have done so.<sup>25</sup> Three authors in particular (Sullivan, Denault, and Molot) have examined section 8.1 in great depth,<sup>26</sup> reaching the following conclusions:

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22. See Macdonald, *supra* note 21 at 190. Macdonald acknowledges that:

[E]ven assuming the need for a distinctive federal suppletive law in certain matters, it is open to doubt whether the enactment of a federal *ius commune* is the best way to achieve this end. Should the federal Parliament truly wish to insulate certain fields of law, certain statutes or even certain sections of statutes from the provincial *ius commune*, experience suggests that it will be most successful if it precisely identifies, for each circumstance, the legal regime it seeks to make applicable.

23. See *e.g.* The Honourable Mr. Justice Michel Bastarache et al, *The Law of Bilingual Interpretation* (Montréal: LexisNexis, 2008).

24. Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87; see also Stéphane Beaulac & Pierre-André Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006) 40:1 RJT 131.

25. Sections 8.1 and 8.2 of the *Interpretation Act*, have been the subject of comment in numerous texts. See *e.g.* Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) [*Interpretation of Legislation*]; Leckey, *supra* note 21; Aline Grenon, “Le bijuridisme canadien à la croisée des chemins? Réflexions sur l’incidence de l’article 8.1 de la *Loi d’interprétation*” (2011) 56:4 McGill LJ 775 [Grenon, “Bijuridisme canadien”]; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Canada: LexisNexis, 2008) at 121-42 [Sullivan, *Construction of Statutes*]; Denault, *supra* note 19; Grenon, “Interpretation,” *supra* note 9; Sullivan, “Challenges,” *supra* note 21 at 1045-54; Henry L Molot, “Clause 8 of Bill S-4: Amending the *Interpretation Act*” in DOJ, *Harmonization of Federal Legislation*, *supra* note 5, booklet 6 at 12-19.

26. See Grenon, “Bijuridisme canadien,” *supra* note 25 at 781-90 (for a detailed review of the analysis adopted by these authors; an English translation is available on request).

1. a court having to interpret federal legislation must first determine *if it is necessary* to refer to provincial law;<sup>27</sup>
2. the court may conclude that it is necessary to refer to provincial law only after undertaking a detailed analysis of the legislative provision, applying *inter alia* Driedger's principle;<sup>28</sup>
3. if applicable, the court should also take into account the exception "unless otherwise provided by law/*sauf règle de droit s'y opposant*";<sup>29</sup>
4. although there are questions about the purpose and scope of this exception, all three authors agree that it includes provisions that expressly exclude provincial law.<sup>30</sup>

In short, absent an express legislative provision excluding the application of provincial law, a court must determine, using a contextual analysis, whether or not the enactment to be interpreted necessarily relies on property and civil rights concepts. If the answer is no, the court need not rely on provincial law. If, however, the court concludes that the enactment relies on property and civil rights concepts, it then becomes necessary to take into consideration the relevant concepts. The interaction between rules of interpretation relating to bilingual statutes and rules relating to bijural legislation has not, however, been the subject of extensive comment by these authors.

Since the adoption of section 8.1, the SCC has on several occasions interpreted federal statutes involving the possible application of provincial law. Has the SCC reached conclusions similar to those of the authors, regarding section 8.1 of the *Interpretation Act*? Has section 8.1 checked the tendency of the courts to adopt an interpretation that results in a uniform application of federal legislation based on common law concepts? Is it possible to identify certain trends in the application of this section? The following section attempts to answer these questions.

### III. THE SUPREME COURT OF CANADA AND SECTION 8.1

Analysis of relevant SCC decisions since 2001 demonstrates that the Court has an ambivalent rapport with section 8.1. In particular, the section has not yet been the subject of in-depth jurisprudential analysis. In some cases the SCC failed to refer to the section altogether, even though a reference would

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27. Denault, *supra* note 19 at 77-78; Sullivan, *Construction of Statutes*, *supra* note 25 at 137; *ibid* at 782-84 [emphasis added].

28. Denault, *supra* note 19 at 77-78; Sullivan, *Construction of Statutes*, *supra* note 25 at 137; *ibid* at 782-84.

29. *Interpretation Act*, *supra* note 3, s 8.1; Denault, *supra* note 19 at 93-94; Molot, *supra* note 25 at 18-19; Sullivan, *Construction of Statutes*, *supra* note 25 at 142; *ibid* at 786-88.

30. *Ibid* at 786-90.

have been appropriate. Additionally, Anglophone judges appear more prone to ignore or minimize the importance of the section, whereas Francophone judges (irrespective of their civil law or common law backgrounds) are more likely to refer to it.

#### A. THE COURT CONSIDERS SECTION 8.1—*SCHREIBER, WISE, AND DIMS*

Following the adoption of section 8.1, the SCC's decision in *Schreiber v Canada (AG)*<sup>31</sup> was the first in which the Court was called upon to interpret a bijural provision, specifically the harmonized version of section 6(a) of the *State Immunity Act*.<sup>32</sup> A German court had issued a warrant for the arrest of Schreiber, a Canadian citizen, for tax evasion and other offences, and Germany requested that Canada extradite him under the provisions of the extradition treaty between the two countries. Schreiber was arrested and spent several days in prison until released on bail. He commenced an action against Germany and the federal government in Ontario seeking damages for personal injuries suffered as a result of his arrest and detention. Germany brought a motion to dismiss the action against it on the basis that it was immune from the jurisdiction of Canadian courts pursuant to the *State Immunity Act*. The Ontario Superior Court of Justice allowed the motion and its decision was upheld by the Ontario Court of Appeal. Schreiber then appealed to the SCC.

In a unanimous judgement delivered by Justice LeBel,<sup>33</sup> the SCC dismissed Schreiber's appeal. In the process, it also implicitly approved the Parliament of Canada's bijural federal legislation harmonization process.<sup>34</sup> Rather than refer specifically to section 8.1, however, the SCC referred instead to the *First Harmonization Act*, whereby sections 8.1 and 8.2 were added to the *Interpretation*

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31. 2002 SCC 62, [2002] 3 SCR 269 [*Schreiber*].

32. RSC 1985, c S-18, as harmonized by *First Harmonization Act*, *supra* note 3, s 12(1). The harmonized section 6(a) provides that:

6. A foreign state is not immune from the jurisdiction of a court in any proceeding that relates to

(a) any death or personal or bodily injury... .

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... .

33. Concurred in by Chief Justice McLachlin and Justices Gonthier, Iacobucci, Bastarache, Binnie, and Arbour.

34. *Schreiber*, *supra* note 31 at paras 66-80.

*Act* in 2001.<sup>35</sup> In addition, the SCC provided no directions as to the ambit and application of section 8.1 and failed to distinguish between the interpretation of bilingual and bijural legislation.<sup>36</sup>

Following *Schreiber*, the SCC applied section 8.1 expressly or by implication in two other decisions. In *Peoples Departments Stores Inc (Trustee of) v Wise*,<sup>37</sup> the SCC had to consider subsections 122(1)(a) and (b) of the *Canada Business Corporations Act (CBCA)*.<sup>38</sup> The decision is significant in several respects. First, the SCC does not often have the opportunity to rule on points of corporate law.

35. See *supra* note 3.

36. This decision was the subject of two comments relating to the harmonization process and to sections 8.1 and 8.2 of the *Interpretation Act*. See Grenon, "Interpretation," *supra* note 9; Sullivan, "Challenges," *supra* note 21 at 1045-54. Both authors also commented on the confusion in *Schreiber* between bilingual and bijural rules of interpretation. Sullivan notes that "the court confounds the principles governing interpretation of bilingual legislation with the principles governing the interpretation of bijural legislation." (*Ibid* at 1051). Grenon further observes that:

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 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 also one of the main rules used to interpret federal legislation that either does not refer to private law concepts or that 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* precisely to facilitate the interpretation of bijural and harmonized federal legislation.

*Ibid* at 141-42.

37. 2004 SCC 68, [2004] 3 SCR 461 [*Wise*].

38. RSC 1985, c C-44 [*CBCA*]:

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and  
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

122. (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir :

a) avec intégrité et de bonne foi au mieux des intérêts de la société;  
b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

Second, the issue in *Wise* concerned the existence and scope of the obligations of corporate directors to certain stakeholders, specifically creditors of a corporation in financial difficulty. As the SCC noted, this question has attracted the attention of courts in Canada, the United States, the United Kingdom, Australia, and New Zealand.<sup>39</sup> Accordingly, the judgment was awaited with great impatience. The Court handed down a unanimous judgment, with reasons written by Justices Major and Deschamps.<sup>40</sup>

The SCC relied upon section 8.1 of the *Interpretation Act* to interpret section 122(1)(b) of the *CBCA*, and stated:

At the outset, it should be acknowledged that according to art. 300 C.C.Q. and s. 8.1 ... the civil law serves as a supplementary source of law to federal legislation such as the *CBCA*. Since the *CBCA* does not entitle creditors to sue directors directly for breach of their duties, it is appropriate to have recourse to the C.C.Q. to determine how rights grounded in a federal statute should be addressed in Quebec, and more specifically how s. 122(1) of the *CBCA* can be harmonized with the principles of civil liability...<sup>41</sup>

Later, when the SCC further considered the scope of section 122(1)(b) of the *CBCA*, it noted that:

unlike the statement of the fiduciary duty in s. 122(1)(a) of the *CBCA*, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(b) of the *CBCA* does not specifically refer to an identifiable party as the beneficiary of the duty.<sup>42</sup>

This vacuum led the SCC to conclude, on the basis of section 8.1 of the *Interpretation Act*, that there is complementarity between section 122(1)(b) and Quebec civil law. The SCC then applied the rules of civil liability in article 1457 of the *Civil Code of Quebec (CCQ)* in defining the ambit of section 122(1)(b) of the *CBCA*.

Section 8.1 of the *Interpretation Act* was not, however, the subject of careful analysis in *Wise*. The SCC did not rely on the interpretive process described in Part II of this article. Specifically, the Court did not rely on Driedger's principle and did not conclude, following a contextual analysis of section 122(1)(b) of the *CBCA*, that it was *necessary* to refer to provincial law. The SCC appears to

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39. *Wise*, *supra* note 37 at paras 27, 64.

40. *Ibid* (Justices Iacobucci, Bastarache, Binnie, LeBel, and Fish were at the hearing, but Justice Iacobucci took no part in the judgment).

41. *Wise*, *supra* note 37 at para 29.

42. *Ibid* at para 57.

have simply relied on the existence of a vacuum in the provision to justify the applicability of Quebec civil law in interpreting section 112(1)(b) of the *CBCA*. In this author's view, if the SCC had undertaken a comprehensive analysis of this provision and examined, among other things, the intention of Parliament, the outcome might have been different and might have led the SCC to conclude that this duty was owed only to the corporation.

But the SCC did not follow this route. It instead concluded, based on subsection 122(1)(b) of the *CBCA* and article 1457 of the *CCQ*, that, in certain circumstances, the directors of a public corporation created under federal legislation may *in Quebec* have obligations to the corporation's creditors. Since it is not possible to transpose this result elsewhere in Canada, this created uncertainty in the common law provinces and territories as to the existence and scope, if any, of the liability of the directors to the creditors of the corporation.<sup>43</sup>

The entire judgment, not just the part relating to section 122(1)(b) of the *CBCA*, had the effect of a bombshell and produced a negative reaction, especially in the common law provinces.<sup>44</sup> Insofar as the interpretation of section 122(1)(b) is concerned, it is tempting to draw a parallel between the reaction in common law Canada to the possibility that a civil law approach could apply outside Quebec, and the reaction in Quebec when a common law rule is imposed on it. Even today, *Wise* is not clearly understood in the common law provinces, insofar as the reference to section 8.1 is concerned.<sup>45</sup>

In *DIMS Construction inc (Trustee of) v Quebec (AG)*,<sup>46</sup> the SCC once again had recourse to section 8.1, albeit indirectly, by reference to the *First Harmonization Act*. In that case, the issue was the interpretation of section 97(3) of the *Bankruptcy*

43. See e.g. Bruce Welling, *Corporate Law in Canada – The Governing Principles*, 3d ed (London, Ont: Scribblers, 2006) at 330-31; Christopher C Nicholls, *Corporate Law* (Toronto: Emond Montgomery, 2005) at 299.

44. See e.g. "Symposium on the Supreme Court's Judgment in the *Peoples Department Stores Case*" (2004-2005) 41 Can Bus LJ 167-246; see also Paul Martel, "L'harmonisation de la Loi canadienne sur les sociétés par actions avec le droit civil québécois – Proposition de révision. Les devoirs de prudence, de diligence et de compétence des administrateurs de sociétés par actions fédérales – impact du Code civil du Québec" (2008) 42 RJT 235 at 282-93, 306-09 (for an analysis of the part of *Wise*, *supra* note 37 that dealt with section 122(1)(b) of the *CBCA*, *supra* note 38).

45. See e.g. Darcy L MacPherson, "The Legislature Strikes Back: The Effect of Ontario's Bill 152 on the Beneficiaries of the Statutory Duty of Care in the *Peoples* Decision" (2009-2010) 47:1 Alta L Rev 37; Mohamed F Khimji, "*Peoples v. Wise* – Conflating Directors' Duties, Oppression and Stakeholder Protection" (2006) UBC L Rev 209 at 217-25. In both of these articles the writers appear not to have understood the role section 8.1 of the *Interpretation Act*, *supra* note 3 played in *Wise*, *supra* note 37.

46. 2005 SCC 52, [2005] 2 SCR 564 [*DIMS*].

and *Insolvency Act (BIA)*, dealing with the rules of set-off or, as it is known in Quebec, compensation.<sup>47</sup> Favouring uniformity, the Quebec Court of Appeal had in a prior judgment adopted a common law precedent according to which the concept of equitable set-off applied in Quebec, insofar as section 97(3) of the *BIA* was concerned.<sup>48</sup> In *DIMS* the SCC considered this approach and handed down a unanimous judgment, authored by Justice Deschamps.<sup>49</sup> In interpreting section 97(3) of the *BIA*, the Court stated:

The BIA thus incorporates, although without defining it, a compensation mechanism. To delimit this mechanism, it is necessary to refer not only to the BIA itself, but also to provincial law. Since the enactment of the *Federal Law–Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, it has been clear that in the province of Quebec, the civil law of Quebec is the suppletive law in bankruptcy matters. This means that in respect of aspects not governed by the BIA, the civil law rules of compensation apply. What are those rules?<sup>50</sup>

Since compensation is not defined in the *BIA*, the SCC relied on Quebec civil law (specifically articles 1457, 1672, 1673, and 1681 of the *CCQ*) in applying section 97(3) of the *BIA*. The SCC did not expressly refer to section 8.1 of the *Interpretation Act*, however; it referred only to the *First Harmonization Act*. Further, as in *Wise*, the SCC did not rely on a contextual interpretation of the provision at issue and gave no explanation as to the reason for and purposes of section 8.1 of the *Interpretation Act*. This is unfortunate, since *DIMS* lent itself well to such an exercise. Unlike *Wise*, in which a contextual analysis might have led to a different outcome, a contextual analysis of section 97(3) of the *BIA*

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47. RSC 1985, c B3 [*BIA*]. The relevant portions of section 97(3) are as follows:

97. (3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be...

97. (3) Les règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli, et aussi à toutes les actions intentées par le syndic pour le recouvrement des créances dues au failli, de la même manière et dans la même mesure que si le failli était demandeur ou défendeur, selon le cas...

48. *Structal (1982) Inc v Fernand Gilbert liéé*, [1998] RJQ 2686 (QCCA). The Quebec Court of Appeal in *DIMS* resolved the issue on other grounds. See *DIMS Construction Inc (Trustee of) v Quebec (AG)*, [2003] RJQ 1104, 227 DLR (4th) 629 (QCCA).

49. *Supra* note 46 (concurring in by Justices Bastarache, Binnie, LeBel, Fish, Abella and Charron).

50. *DIMS*, *supra* note 46 at para 34.

would probably have reinforced the SCC's conclusion, while allowing it to clearly explain the *raison d'être* and ambit of section 8.1.<sup>51</sup>

Accordingly in *DIMS*, the SCC did not apply the common law concept of equitable set-off in Quebec in connection with section 97(3) of the *BIA* and instead applied Quebec civil law rules. This has led to a variation in the application of section 97(3) of the *BIA* between Quebec and the rest of Canada, since equitable set-off is recognized elsewhere in Canada in connection with section 97(3) of the *BIA*.<sup>52</sup>

In *Wise* and *DIMS* the SCC did not hesitate to apply section 8.1, expressly or by implication, when called upon to interpret bijural federal legislation. This approach may lead to variations in the application of bijural federal legislation from one province to another, an issue that is the subject of further comment in Part IV of this article.

#### B. THE COURT MOVES AWAY FROM SECTION 8.1—CANADA 3000, AYSA, SAULNIER, AND DRUMMOND

Did the spectre of a non-uniform application of federal legislation, together with the very negative reaction to the *Wise* decision, dampen the enthusiasm of the SCC in relation to section 8.1 of the *Interpretation Act*? The following decisions could certainly give rise to such a conclusion.

In *Canada 3000 Inc (Re); InterCanadian (1991) Inc (Trustee of)*,<sup>53</sup> the SCC had to interpret federal aeronautics legislation.<sup>54</sup> The case involved airlines operating fleets of leased aircraft. The airlines became insolvent and defaulted

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51. A contextual analysis might have taken the following into consideration: (1) the lack of any definition of the term "set-off or compensation" in the *BIA*; (2) the fact it was unlikely, in view of the British origins of *BIA*, that the Parliament of Canada specifically intended to rely on the concept of equitable set-off in a bankruptcy context, throughout Canada; (3) the harmonization of section 97(3) of the *BIA* (see *Harmonization Act, No 2*, SC 2004, c 25, s 38 [*Second Harmonization Act*]); (4) the criticism of equitable set-off in connection with the *BIA*. See John AM Judge & Margaret E Grottenhaler, "Legal and Equitable Set-Offs" (1991) 70:1 Can Bar Rev 91 at 117.
52. See e.g. *Holt v Telford*, [1987] 2 SCR 193; *Husky Oil Operations Ltd v MNR of Canada*, [1995] 3 SCR 453. See also *Ontario (Worker's Compensation Board) v Mandelbaum, Spergel Inc* (1993), 12 OR (3d) 385 (Ont CA); *Olympia & York Developments Ltd v Royal Trust Co* (1993), 14 OR (3d) 1, 103 DLR (4th) 129 (Ont Sup Ct); *PIA Investments Inc v Deerbust Ltd Partnership* (2000), 20 CBR (4th) 116 (Ont CA).
53. 2006 SCC 24, [2006] 1 SCR 865 [*Canada 3000*].
54. *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5, s 9 [*ATMMA*]; *Civil Air Navigation Services Commercialization Act*, SC 1996, c 20, ss 55-56 [*CANSCA*]; *Aeronautics Act*, RSC 1985, c A2.

on the payment of charges for airport and civil air navigation services. In two separate proceedings, one in Ontario and the other in Quebec, the service providers sought authorization to seize and detain the aircraft. The seizures raised a number of questions, including whether the service providers could seize the aircraft when it was the airlines, not the aircraft owners, who had defaulted. In other words, could the owners retake possession of the leased aircraft without having to pay the sums owed to the service providers? On appeal from judgments delivered by the Ontario<sup>55</sup> and Quebec<sup>56</sup> Courts of Appeal, the SCC handed down a unanimous judgment authored by Justice Binnie.<sup>57</sup>

The SCC had to consider the relevance of the *CCQ* and sections 8.1 and 8.2 in light of *inter alia* section 56 of the *Civil Air Navigation Services Commercialization Act (CANSCA)*.<sup>58</sup> At the outset of its analysis, the SCC noted that the case was “from first to last an exercise in statutory interpretation and [that] issues of interpretation are, as always, closely tied to context.”<sup>59</sup> With regard to section 8.1, the SCC stated:

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55. *Greater Toronto Airports Authority v International Lease Finance Corp* (2004), 69 OR (3d) 1, 235 DLR (4th) 618 (Ont CA).

56. *Wilmington Trust Co v Inter-Canadien* (1991), [2004] RJQ 2966, 247 DLR (4th) 503 (QCCA).

57. *Canada 3000*, *supra* note 53 (Chief Justice McLachlin and Justices Bastarache, LeBel, Deschamps, Fish and Charron were present).

58. *Supra* note 54. The relevant portion of section 56 is as follows:

56(1) In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

56(1) À défaut de paiement ou en cas de retard de paiement des redevances qu'elle impose pour les services de navigation aérienne, la société peut, en sus de tout autre recours visant leur recouvrement et indépendamment d'une décision judiciaire à cet égard, demander à la juridiction supérieure de la province où se trouve l'aéronef dont le défaillant est propriétaire ou usager de rendre, aux conditions que la juridiction estime indiquées, une ordonnance l'autorisant à saisir et à retenir l'aéronef jusqu'au paiement des redevances ou jusqu'au dépôt d'une sûreté — cautionnement ou autre garantie qu'elle juge satisfaisante — équivalente aux sommes dues.

59. *Canada 3000*, *supra* note 53 at para 36.

[T]here is no need to make reference to provincial law ... and to do so here is inappropriate. Section 56 of *CANSCA* and s. 9 of the *Airports Act* specifically state that the remedy is to be “in addition to any other remedy[.]” which includes remedies under provincial law. The *Aeronautics Act*, the *Airports Act* and *CANSCA* are federal statutes that create a unified aeronautics regime. Parliament endeavoured to create a comprehensive code applicable across the country and not to vary from one province to another. ... NAV Canada also relied on ss. 8.1 and 8.2 of the *Interpretation Act*. ... However, neither section applies in this case. ... If it were necessary to resort to provincial law, then the provincial law to be used is that of the province in which the provision is being applied... . Here, for reasons stated, resort to provincial law is not necessary.<sup>60</sup>

In *Canada 3000*, the SCC used the interpretation process described in Part II of this article: It first considered whether it was necessary to refer to provincial law, and in order to answer that question it undertook a contextual analysis of the provisions. In paragraph 78 of its judgment, the SCC also relied on another element of this interpretation process, namely, the existence of a rule of law excluding the application of provincial law, although the Court did not specifically refer to the related exception in section 8.1 of the *Interpretation Act*. The SCC’s conclusions are not surprising. They are based on a careful reading of section 8.1 and of the relevant legislation, and on contextual analysis.

The same cannot be said for *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*,<sup>61</sup> a decision delivered in 2007. This case arose out of an application made by the Amateur Youth Soccer Association (AYSA) to the Canada Revenue Agency. The AYSA wished to become a “registered charity” within the meaning of section 248(1) of the *Income Tax Act (ITA)*.<sup>62</sup> The Agency refused to register it as a charity because “the courts have not held the promotion of sport to be a charitable purpose.”<sup>63</sup> After the Federal Court of Appeal upheld the Agency’s decision, AYSA appealed to the SCC. For AYSA to be successful, the SCC had to reconsider and overturn precedents. Further, AYSA was faced with a major dilemma: Section 248(1) of the *ITA* gives registered amateur sport associations in Canada treatment similar to that of charities, but only if they carry on their activities nationally.<sup>64</sup> The AYSA, however, functioned exclusively in Ontario.

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60. *Ibid* at paras 78-80 [emphasis in original].

61. 2007 SCC 42, [2007] 3 SCR 217 [AYSA].

62. RSC 1985, c 1 (5th Supp) [ITA].

63. *Supra* note 61 at para 4.

64. *Supra* note 62.

Justice Rothstein delivered the majority judgment.<sup>65</sup> After concluding that the provincial, rather than national, status of the AYSA did not prevent it from being recognized as a charity, Justice Rothstein then considered common law precedents to determine whether the AYSA could qualify for charitable status. Based on these precedents, he concluded that sport was not as such charitable in nature.<sup>66</sup> He also refused to extend charitable status to amateur youth sports organizations because he considered that such recognition would amount not to a gradual modification of precedent, but rather to wholesale revision: “[S]ubstantial change in the definition of charity must come from the legislature rather than the courts.”<sup>67</sup>

Justice Rothstein dealt with section 8.1 of the *Interpretation Act* in the context of his analysis of the common law. To properly understand his comments it must be borne in mind that the Ontario High Court of Justice (Divisional Court) in *Re Laidlaw Foundation*<sup>68</sup> had concluded that the promotion of amateur athletic sports for physical development purposes fell within the definition of charitable purposes in section 6a(a) (now section 7) of the Ontario *Charities Accounting Act*.<sup>69</sup> It was on this basis that the AYSA relied on section 8.1 of the *Interpretation Act* and argued that the relevant provincial law in Ontario was found in the *Laidlaw* decision.

Justice Rothstein distinguished *Laidlaw* from decisions holding that sport was not a charitable purpose. Perhaps because of this conclusion he also held, in a single paragraph and without analysis, that there was no reason to refer to section 8.1 of the *Interpretation Act* in the circumstances of the case:

A.Y.S.A. further argues that s. 8.1 of the *Interpretation Act* ... requires the application of provincial law to the determination of what is charitable under the *ITA* and that the relevant provincial law in this case can be found in the *Laidlaw* decision. However, specific statutory definitions of charity in provincial legislation and decisions dealing with that definition do not dictate the meaning of charity under the *ITA*.<sup>70</sup>

Justice Rothstein could have concluded that *Laidlaw* was only relevant for the purposes of a specific Ontario statute and that it did not change the common

65. *Ibid* (Chief Justice McLachlin and Justices Bastarache, Binnie, LeBel, Deschamps, Fish, and Charron concurring; Justice Abella delivered a concurring judgment, but relied on reasons having nothing to do with section 8.1 of the *Interpretation Act*).

66. *Supra* note 61 at para 40.

67. *Ibid* at para 44.

68. (1984) 13 DLR (4th) 491 at 523, 48 OR (2d) 549 [*Laidlaw*].

69. RSO 1980, c 65. The definition of charitable purposes is now in *Charities Accounting Act* (RSO 1990, c C.10, s 7).

70. *Supra* note 61 at para 39 [emphasis added].

law in Ontario according to which sport as such is not charitable in nature. Unfortunately, Justice Rothstein went much further. According to him, “specific statutory definitions of charity in provincial legislation and decisions dealing with that definition do not dictate the meaning of charity under the *ITA*.”<sup>71</sup> There is no basis for this statement, since section 8.1 of the *Interpretation Act* does not distinguish between the *ITA* and other federal statutes. Under section 8.1, if it is necessary to refer to the private law of the provinces in order to interpret legislation, the provincial law applies, unless otherwise provided by law. Justice Rothstein did not make that analysis. He simply brushed aside section 8.1.

A further point must be raised, since it will likely be the subject of future litigation. To qualify as a “charitable organization” under the *ITA*, an organization must satisfy the criteria in section 149.1(l)(a) to (d) of the *ITA*, one of which is that the organization must devote its resources to “charitable activities.”<sup>72</sup> Since the term “charitable activities” is not defined in the *ITA*, the courts have relied on the common law to determine its meaning. Justice Rothstein refers to this fact more than once in his judgment,<sup>73</sup> with reference to the Court’s earlier decision in *Vancouver Society of Immigrant and Visible Minority Women v MNR*<sup>74</sup> It must be noted that the judgment in *Vancouver Society* was delivered in 1999, before section 8.1 of the *Interpretation Act* came into effect, and that the case arose in British Columbia, a common law jurisdiction. In Quebec, however, where the social utility trust is the equivalent of the common law charitable trust, article 1270 of the *CCQ* defines a social utility trust as “a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose.”

The scope of the Quebec social utility trust is likely broader than that of equivalent common law trusts and this raises several questions. Should a trust that satisfies the criteria set out in article 1270 of the *CCQ* and that applies to become a registered charity under section 149.1 of the *ITA*<sup>75</sup> be subject to common law rules, rules that have given rise to criticism<sup>76</sup> including criticism in the majority judgment in *Vancouver Society*?<sup>77</sup> What will happen if the Canada

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71. *Ibid.*

72. *ITA*, *supra* note 62.

73. *Ibid.* at paras 8, 24.

74. [1999] 1 SCR 10, 169 DLR (4th) 34 [*Vancouver Society*].

75. *ITA*, *supra* note 62.

76. See e.g. Blake Bromley, “Contemporary Philanthropy – Is the Legal Concept of ‘Charity’ Any Longer Adequate?” in Donovan W M Waters, ed, *Equity, Fiduciaries and Trusts – 1993* (Toronto: Carswell, 1993) at 59.

77. *Supra* note 74 at paras 201-03.

Revenue Agency concludes that a Quebec social trust that satisfies Quebec criteria does not satisfy common law criteria? In that situation, would recourse to section 8.1 of the *Interpretation Act* not be appropriate?<sup>78</sup>

In short, Justice Rothstein's comment that section 8.1 does not apply because provincial law cannot "dictate the meaning of charity" under the *ITA* does not end the matter. Furthermore, it is not desirable to minimize the importance of section 8.1 of the *Interpretation Act*, an issue that is the subject of further comment in Part IV of this article.

In the 2008 case of *Saulnier v Royal Bank of Canada*,<sup>79</sup> the SCC ruled on a judgment of the Nova Scotia Court of Appeal. A fisherman who held four fishing licences had given to his bank a general security interest under Nova Scotia's *Personal Property Security Act (PPSA)*<sup>80</sup> in order to finance his fishing business. The fisherman subsequently made an assignment of his property under the *BIA*,<sup>81</sup> but refused to sign an agreement for sale of the four fishing licences, arguing that they were not "property" within the meaning of section 2 of the *BIA* and section 2(w) of the *PPSA*. Since such licences have great value, it is not surprising that the bankruptcy trustee and the bank turned to the courts.

In a unanimous judgment by Justice Binnie,<sup>82</sup> the SCC ruled on the scope of the defined terms "property" in the *BIA* and "intangible property" and "personal property" in the *PPSA*. For the purposes of this article, only the comments relating to the *BIA* are relevant. The *BIA* defines "property" as follows:

"[P]roperty" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property... .

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78. See the excellent analysis in Kathryn Chan, "Charitable According to Whom? The Clash between Quebec's Societal Values and the Law Governing the Registration of Charities" (2008) 49:2 C de D 277; Kathryn Chan "Taxing Charities / Imposer les organismes de bienfaisance: Harmonization and Dissonance in Canadian Charity Law" (2007) 55:3 Can Tax J 481 at 489-98.

79. 2008 SCC 58, [2008] 3 SCR 166 [*Saulnier*].

80. SNS 1995-96, c 13 [*PPSA*].

81. *Supra* note 47.

82. *Saulnier*, *supra* note 79 (Chief Justice McLachlin and Justices LeBel, Deschamps, Fish, Abella, Charron and Rothstein concurring; Justice Bastarache did not participate in the judgment).

« bien » Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant...<sup>83</sup>

Justice Binnie reviewed various interpretive approaches from Canadian jurisprudence. Turning to the definition of “property” in section 2 of the *BIA*, he wrote:

The terms of the definition are very wide. Parliament unambiguously signalled an intention to sweep up a variety of assets of the bankrupt not normally considered “property” at common law. This intention should be respected if the purposes of the *BIA* are to be achieved.

...

I prefer to look at the substance of what was conferred, namely a licence to participate in the fishery coupled with a proprietary interest in the fish caught according to its terms and subject to the Minister's regulation. As noted earlier, the *BIA* is intended to fulfill certain objectives in the event of a bankruptcy which require, in general, that non-exempt assets be made available to creditors. The s. 2 definition of property should be construed accordingly to include a s. 7(1) fishing licence.<sup>84</sup>

The SCC thus seems to have adopted an approach consistent with section 8.1 of the *Interpretation Act*, but without referring to the section. First, the SCC interpreted a provision in a federal statute applicable in a common law province. Second, the wording of the provision did not provide a solution to the dispute and, in addition, the provision clearly referred to property and civil rights concepts. Third, there was no express rule of law against the use of such concepts. The SCC concluded that Parliament had clearly signalled its intention to include a variety of the bankrupt's assets not normally considered “property” at common law. Does this mean that, if the SCC had referred to section 8.1 in *Saulnier*, it would have concluded that it was *not necessary* to have recourse to provincial common law, since the intention of Parliament in section 2 of the *BIA* was clear? Another question also arises. In view of the SCC's silence regarding section 8.1 in *Saulnier*, are we to conclude that section 8.1 only applies when the case rests on Quebec civil law and that there is no need to refer to it when the case rests on Canadian common law? Nothing in the wording of section 8.1 indicates this—quite the contrary.

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83. *BIA*, *supra* note 47, s 2.

84. *Saulnier*, *supra* note 79 at paras 44, 46.

Finally, in *Caisse populaire Desjardins de l'Est de Drummond v Canada*<sup>85</sup> a secured creditor, the Caisse Populaire Desjardins de l'Est de Drummond, granted a line of credit to a debtor. A few days later, the debtor deposited a sum of money with the Caisse in the form of term savings. The agreements between the Caisse and the debtor stipulated that in the event of a failure by the debtor to repay the Caisse, there would be set-off between the sums owing to the Caisse and the deposit. The debtor defaulted and subsequently made an assignment of his property under the *BIA*.<sup>86</sup> The Caisse retained the deposit.

Litigation arose between the Caisse and the Crown because the debtor had not remitted income tax and employment insurance premiums deducted from its employees' salaries to the Crown. Sections 227(4.1) of the *ITA*<sup>87</sup> and 86(2.1) of the *Employment Insurance Act (EIA)*<sup>88</sup> create deemed trusts in favour of the Crown over the property of an employer who makes such deductions, up to the amount of the unremitted deductions. These trusts apply to the employer's property and also to property held by a secured creditor that, but for the security interest, would be property of the employer. By means of these trusts, the Crown sought to reach the money deposited with the Caisse.

Since the relevant provisions of the *ITA* and the *EIA* are similar, this analysis will focus only on the *ITA*. Section 227(4.1) of the *ITA* states that the deemed trust shall include property held by secured creditors "as defined in subsection 224(1.3)" of the *ITA* that "but for a security interest (as defined in subsection 224(1.3) [of the *ITA*] would be property" of the employer, and that the deemed trust applies "[n]otwithstanding any other provision of this Act ... any other enactment of Canada, any enactment of a province or any other law...".<sup>89</sup> Section 224(1.3) of the *ITA* defines "security interest/*garantie*":

"[S]ecurity interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for... .

« garantie » Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de dében-

85. 2009 SCC 29, [2009] 2 SCR 94 [*Drummond*].

86. *Supra* note 47.

87. *Supra* note 62.

88. SC 1996, c 24 [*EIA*].

89. *ITA*, *supra* note 62.

tures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.<sup>90</sup>

The main issue in *Drummond* was whether the contractual right of set-off created in favour of the Caisse was a “security interest” within the meaning of section 224(1.3) of the *ITA*. If so, the Crown could reach the deposit. This issue gave rise to two dramatically different judgments, that of Justice Rothstein for the majority<sup>91</sup> and that of Justice Deschamps for the minority.<sup>92</sup> Not only were the judgments different, but each judge expressed in no uncertain terms disagreement with the approach taken by the other.

Justice Rothstein concluded that, for the purposes of the definition of “security interest” under section 224(1.3) of the *ITA*, provincial law regarding property and civil rights was not relevant for three reasons: (1) the phrase “[n]otwithstanding any other provision of this Act . . . any other enactment of Canada, any enactment of a province or any other law” in section 227(4.1) of the *ITA*, was incorporated by reference in the definition of a security interest; (2) federal Parliament has a right to adopt its own definitions in areas falling within its jurisdiction, without having to take provincial law into account; and (3) Parliament’s intention that it should be able to act uniformly throughout Canada in recovering money owed to Her Majesty.<sup>93</sup> Based on these conclusions, Justice Rothstein then discussed the meaning of the definition of “security interest/ *garantie*” in section 224(1.3) of the *ITA*. Relying on the first part of the definition (“interest in property that secures payment or performance of an obligation”<sup>94</sup>), he opined that:

so long as the creditor’s interest in the debtor’s property secures payment or performance of an obligation, there is a “security interest” within the meaning of this section. While Parliament has provided a list of “included” examples, these examples do not diminish the broad scope of the words “any interest in property.”<sup>95</sup>

On the question of whether this definition covers set-off, Justice Rothstein stated that a contractual right of set-off can in some circumstances fall within this definition: In his opinion, one should carefully consider the terms of the contract

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90. *Ibid.*

91. *Supra* note 85 (concurrent in by Chief Justice McLachlin and Justices Binnie, Fish, Charron, and Rothstein).

92. *Ibid* (concurrent in by Justice LeBel).

93. *Ibid* at paras 8-17.

94. *ITA*, *supra* note 62, s 224(1.3).

95. *Drummond*, *supra* note 85 at para 15.

“to determine whether the parties intended to confer on one party or the other ‘any interest in property [of the other party] that secures payment or performance of an obligation.’”<sup>96</sup> After reviewing the terms of the contract, Justice Rothstein concluded that they expressly gave the Caisse a right over the debtor’s deposit as security for the repayment of the money owed by the debtor and that the right was accompanied by specific limitations in favour of the Caisse.<sup>97</sup> The combined effect of the right of set-off and of the limitations was that the Caisse had a right over the debtor’s deposit that secured performance of the debtor’s obligations. Justice Rothstein also stated that, according to the wording of the agreements, the Caisse had considered that the debtor was providing security for the monies owed to the Caisse.<sup>98</sup> He accordingly concluded that a security interest existed within the meaning of section 224(1.3) of the *ITA*.

Justice Rothstein made no mention of section 8.1 of the *Interpretation Act*, despite the fact that section 8.1 allowed him to conclude that an express rule of law excluded recourse to provincial law in determining the scope of a “security interest” under section 224(1.3) of the *ITA*. The application of section 8.1 would also have allowed him to conclude, following a contextual analysis, that it was not necessary to have recourse to Quebec civil law. The absence of any reference to section 8.1 is all the more surprising, given that Justice Deschamps referred to the section in her judgment.

At the start of her minority judgment, Justice Deschamps stated:

It should be noted that there is no distinct federal common law... . Where the suppletive law must be applied to interpret a concept incorporated into a federal rule, the law of the province is the relevant source: *Federal Law—Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 8, amending the *Interpretation Act*, R.S.C. 1985, c. I21. As a result, absent an express provision to the contrary, federal legislation must be interpreted in a manner consistent with the concepts and institutions of the legal system of the province in which it is to be applied... .<sup>99</sup>

Though indirect, this reference to section 8.1 of the *Interpretation Act* might lead the reader to think that Justice Deschamps’ judgment was based on that particular rule of interpretation. However, section 8.1’s role was ambiguous, since

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96. *Ibid* at para 23.

97. *Ibid* at paras 29-30.

98. *Ibid* at para 31.

99. *Ibid* at para 81. It should be noted that in this paragraph, Justice Deschamps fails to refer to the possibility that it might not be necessary for a court to rely upon property and civil law concepts; she only refers to the possibility that there could be an express provision in the enactment excluding such concepts. She does however refer very briefly to the question of necessity in the following paragraph.

Justice Deschamps later stated that “not only must reference be made—when necessary to interpret federal legislation—to the law of the province in which it is to be applied, but both the English and French versions must be taken into consideration.”<sup>100</sup> She opined that an analysis of the French and English versions is necessary to determine whether a common meaning of the words “security interest” and “*garantie*” under section 224(1.3) of the *ITA* can be established. Justice Deschamps added that in the case at bar, this analysis leads to a notion common to the civil and the common law that “makes it possible to harmonize the application of the taxing provision in the two legal systems.”<sup>101</sup> Later, she referred directly to sections 8.1, but in the context of the shared meaning rule of interpretation.<sup>102</sup>

Finally, in the part of her judgment in which she expressed disagreement with Justice Rothstein’s approach, Justice Deschamps wrote: “Since his approach does not correspond at all to the shared meaning, its effect is to disregard both the principles applicable to the interpretation of bilingual legislation and those applicable to the harmonization of federal law and provincial law.”<sup>103</sup>

In short, Justice Deschamps made no clear distinction between the rules of interpretation relating to bijural legislation and those relating to bilingual legislation. She appears to have skipped over the former and proceeded immediately to the latter. If Justice Deschamps had made a clear distinction between the two and had used the interpretation process described in Part II of this article, she would have first asked the following two questions: Is it *necessary* to make use of section 8.1? Does a rule of law exist against applying section 8.1? In view of the phrase “[n]otwithstanding any other provision of this Act, ... any other enactment of Canada, any enactment of a province or any other law...” contained in section 227(4.1) of the *ITA*, a section that specifically refers to section 224(1.3), there appears to be at the very least a rule against applying section 8.1 of the *Interpretation Act* and provincial law. Since the crucial point is to interpret section 224(1.3) of the *ITA*, the phrase is of utmost importance. The absence in the minority judgment of any reference to the phrase is puzzling, as is the absence in the majority judgment of any reference to section 8.1, particularly since such a reference would have supported the majority judgment.

Of these four decisions, only in *Canada 3000* does the SCC analyze section 8.1 of the *Interpretation Act* in some detail. In the main *AYSA*, *Saulnier*, and *Drummond* judgments, section 8.1 is either dismissed (*AYSA*) or ignored

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100. *Ibid* at para 82.

101. *Ibid*.

102. *Ibid* at para 86.

103. *Ibid* at para 112.

(*Saulnier* and the majority judgment of Justice Rothstein in *Drummond*). Only Justice Deschamps and Justice LeBel consider section 8.1 in passing in their minority judgment in *Drummond*. In none of these three cases is section 8.1 applied or carefully analyzed, giving rise to the concern that the SCC is giving the section short shrift. This concern is, however, partially dispelled in three subsequent decisions.

### C. THE COURT RETURNS TO SECTION 8.1—*INNOVATION CREDIT UNION, RADIUS CREDIT UNION*

*Bank of Montreal v Innovation Credit Union*<sup>104</sup> and *Royal Bank of Canada v Radius Credit Union*<sup>105</sup> involved financing granted by the Bank of Montreal and the Royal Bank of Canada, secured pursuant to the *Bank Act*.<sup>106</sup> The debtors defaulted and the banks seized the secured property, only to discover that Innovation Credit Union and Radius Credit Union had obtained prior security on the same property pursuant to *The Personal Property Security Act, 1993 (PPSA, 1993)*<sup>107</sup> of the province of Saskatchewan. However, the security agreements had not been registered under the *PPSA, 1993*. This gave rise to a priority dispute between the banks and the credit unions.

The two unanimous judgments, delivered by Justice Charron, dealt with the thorny and controversial relationship between *Bank Act* security on the one hand, and on the other, security interests obtained in accordance with personal property legislation in effect in the common law provinces.<sup>108</sup> To resolve the dispute, the Court resorted to section 8.1 of the *Interpretation Act*.

In *Innovation Credit Union*, the SCC held firstly, that the *Bank Act* contained no priority rules to resolve the conflict arising when an interest in property is acquired by a third party *before* the property becomes subject to the bank's security; and secondly, that the security regime contained in the *Bank Act* is

104. *Supra* note 20 (this was a unanimous judgment delivered by Justice Charron; Chief Justice McLachlin and Justices Binnie, LeBel, Deschamps, Fish, Abella, Rothstein, and Cromwell concurred).

105. 2010 SCC 48, [2010] 3 SCR 38 [*Radius Credit Union*] (once again, this was a unanimous judgment delivered by Justice Charron and concurred in by the same judges as *ibid*).

106. SC 1991, c 46.

107. SS 1993, c P-6.2 [*PPSA, 1993*].

108. *Supra* note 106. The relationship between federal bank security and provincial personal property security interests has given rise to numerous conflicts. See *Innovation Credit Union*, *supra* note 20, at para 1. The Law Commission of Canada has recommended the repeal of the *Bank Act* security regime. See Law Commission of Canada, *Modernizing Canada's Secured Transactions Law: The Bank Act Security Provisions* (Ottawa: Law Commission of Canada, 2004) at 30.

property-based. The SCC accordingly concluded that the dispute should be resolved in accordance with property law, a provincial field of jurisdiction.<sup>109</sup> The Court also stated:

While the provinces cannot legislate in order to oust the bank's rights, they can alter the law as it relates to property and civil rights in each province. ... Thus in determining the nature of any competing provincial security interest, resort has to be made to the relevant provincial statute and the *Bank Act* has to be read in harmony with it. This approach is reflected in the preamble of the *Federal Law – Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 (the “*Harmonization Act*”):

WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

...

WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

Section 8.1 of the *Interpretation Act* ... as amended by s. 8 of the *Harmonization Act* specifically provides for the application of the “rules, principles and concepts in force in the province at the time the enactment is being applied.”<sup>110</sup>

The SCC accordingly concluded that the security interest acquired by the credit union, despite not having been registered, nonetheless corresponded to a provincial common law proprietary right. The Bank of Montreal also had a proprietary right in accordance with the *Bank Act* security regime. Since the issue was a conflict between proprietary rights over the same property, and the *Bank Act* contained no priority rules, common law priority rules applied and the proprietary right first obtained, that of the credit union, prevailed.

In *Innovation Credit Union*, all the secured property belonged to the debtor *before* he granted security to the credit union. In *Radius Credit Union*, however, the debtor acquired some of the secured property *after* granting security to the bank. However, the first judgment remains the leading case as it was used as a basis for the second; the second judgment is accordingly not considered at length in this article.

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109. *Supra* note 20 at para 30.

110. *Ibid* at para 31. See the full text of the preamble in *supra* note 3.

In *Innovation Credit Union* and *Radius Credit Union*, the SCC did not hesitate to make use of section 8.1 of the *Interpretation Act*. It is, however, simple to rely on the common law to fill gaps in federal legislation, as the Court did in these two judgments. It is much more difficult to rely similarly on civil law, particularly when doing so gives rise to a non-uniform application of federal legislation. The SCC was not faced with this prospect in its latest decision, discussed below, but is likely to face it in due course.

#### D. THE COURT'S LATEST DECISION—*QUEBEC AG*

The most recent decision in which the SCC considered Section 8.1 was *Quebec (AG) v Canada (Human Resources and Social Development)*.<sup>111</sup> “B” began receiving income replacement benefits from the Quebec Commission de la santé et de la sécurité du travail (CSST) following an industrial accident. Pursuant to section 144 of *An Act respecting Industrial Accidents and Occupational Diseases*,<sup>112</sup> such benefits could not be seized. However, B owed sums to the Canada Employment Insurance Commission (CEIC) and pursuant to section 126(4) of the *EIA*,<sup>113</sup> the CEIC had the right to seek reimbursement through a simple notice that allowed it to, in effect, seize amounts owed to B by third parties. The CEIC sent a notice requiring the CSST to pay the income replacement benefits to it, rather than to B, and the CSST complied. B challenged the process and the Quebec Superior Court ruled in his favour, but was overruled by the Quebec Court of Appeal. The Attorney General of Quebec, who appeared in the Court of Appeal as an intervener, appealed to the SCC.

A key issue was the interpretation of conflicting and relevant provincial and federal statutory provisions. In a unanimous decision delivered by Justice Deschamps<sup>114</sup> the SCC held, based on the doctrine of federal paramountcy, that the CEIC’s right to obtain reimbursement was not subject to the provincial provision respecting exemption from seizure.

The Attorney General of Quebec argued that federal legislation generally favours the application of provincial legislation. Relying on section 8.1 of the *Interpretation Act*, he argued that Parliament had consented to the application of the provincial rules respecting exemption from seizure, since there was no

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111. 2011 SCC 60, [2011] 3 SCR 635 [*Quebec AG*].

112. CQLR, c A-3.001.

113. *Supra* note 88.

114. *Quebec AG*, *supra* note 111 (Chief Justice McLachlin and Justices Binnie, Lebel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell concurred).

expressed intention in section 126(4) of the *EIA* to exclude these rules.<sup>115</sup> The SCC stated that it was not necessary to refer to provincial law because the wording of the *EIA* provision excluded it, and rejected the section 8.1 argument.<sup>116</sup> In order to reach its conclusion, the SCC also relied on the legislative context demonstrating Parliament's intention.<sup>117</sup> In particular, the SCC compared the recovery mechanisms in sections 126(1) and 126(4) of the *EIA*<sup>118</sup> and concluded that, while the mechanism in section 126(1) was expressly subject to provincial law, the mechanism in section 126(4) was not. The Court stated:

The differences between the procedures provided for in s. 126(1) and s. 126(4) *EIA* become apparent when the two procedures are compared. The procedure under s. 126(4) is autonomous... . It requires nothing more than the issuance of a notice by the Commission, and that notice is sufficient to effect what amounts to garnishment. If Parliament has created two separate procedures, one of which is subject to provincial law while the other is not, it must be understood to have intended the second procedure to be independent of provincial law. The Commission has been granted a freestanding positive right to proceed by way of a requirement to pay rather than by way of seizure.<sup>119</sup>

The SCC's conclusion regarding section 8.1 of the *Interpretation Act* was warranted. In essence, the Court used the method described in Part II of this article: It considered whether it was necessary to refer to provincial law. For this purpose, it examined the wording of the relevant provisions and carried out a contextual analysis to determine Parliament's intention. It would however have been useful if the SCC had stated clearly that the absence of an express intention to exclude provincial law does not, as the Quebec Attorney General had argued, imply consent to the application of provincial law. Even in the absence of an express provision excluding provincial law, for section 8.1 of the *Interpretation Act* to apply, it must be *necessary* to rely on provincial law.

Although this case arose in Quebec, it was not a situation in which a contextual analysis led to a non-uniform application of federal legislation. The SCC is likely, however, to encounter such a situation in due course and this prospect is the subject of further comment in the next Part of this article.

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115. *Ibid* at para 27; *EIA*, *supra* note 88.

116. *Quebec AG*, *supra* note 111 at para 27.

117. *Ibid* at paras 28-33.

118. *Supra* note 88.

119. *Ibid* at para 32.

## IV. IMPACT (PAST, PRESENT AND FUTURE) OF SECTION 8.1

### A. PAST AND PRESENT: OBSERVATIONS ACROSS THE SECTION 8.1 JURISPRUDENCE

The judgments of the SCC commented on in Part III of this article give rise to several observations regarding the impact of section 8.1 of the *Interpretation Act*. First, the SCC has not yet subjected section 8.1 to in-depth analysis. Section 8.1 was not scrutinized carefully in any of the decisions discussed in Part III, and none of the judges has attempted to explain clearly its underlying objectives. In some cases, there is no express mention of section 8.1 of the *Interpretation Act* and reference is simply made to the *First Harmonization Act*. The unanimous judgment of Justice LeBel in *Schreiber* and the unanimous judgment of Justice Deschamps in *DIMS* fall into this category.<sup>120</sup> In other cases where express or implied reference was made to section 8.1, the Court's analysis was limited; this is apparent in the SCC's unanimous judgments in *Wise*, *Canada 3000*, *Innovation Credit Union*, *Quebec AG*, and in the majority judgment of Justice Rothstein in *AYSA*.<sup>121</sup> When the SCC is next called upon to apply section 8.1 of the *Interpretation Act*, it should make use of the opportunity to explain clearly the underlying objectives of the section. Such an explanation would allow the SCC subsequently to make more effective use of section 8.1 and would also allow Canadian lawyers as a whole to gain a better understanding of the section.

Second, some of the decisions in Part III of this article make no reference to section 8.1 of the *Interpretation Act*, although they lend themselves to such a reference. This is true of the majority judgment in *Drummond* and the unanimous judgment in *Saulnier*.<sup>122</sup> Section 8.1 was undoubtedly argued in *Drummond*, although it may not have been in *Saulnier*. However, the fact that the section was not argued should not prevent the SCC from referring to it. Since it is a rule of interpretation contained in a federal statute, the SCC may refer to it *ex officio*.<sup>123</sup>

Third, the SCC appears intent on minimizing the importance of section 8.1 in the *AYSA* and *Drummond* decisions. For example, in the *AYSA* decision section 8.1 was brushed aside in a two sentence paragraph.<sup>124</sup> This may be due

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120. See *Schreiber*, *supra* note 31; *DIMS*, *supra* note 46.

121. See *Wise*, *supra* note 37; *Canada 3000*, *supra* note 53; *Innovation Credit Union*, *supra* note 20; *Quebec AG*, *supra* note 111; *AYSA*, *supra* note 61.

122. See *Drummond*, *supra* note 85 per Rothstein J; *Saulnier*, *supra* note 79 per Binnie J.

123. *Canada Evidence Act*, RSC 1985, c C-5, s 18.

124. *Supra* note 61 at para 39.

to the Court's valid desire to ensure uniform application of federal legislation throughout Canada. But no matter how desirable a uniform result might be, judges must take into consideration Parliament's intention as expressed in section 8.1 of the *Interpretation Act* and in the preamble to the *First Harmonization Act*.<sup>125</sup> Additionally, when the SCC, consistent with Driedger's modern principle of statutory interpretation,<sup>126</sup> undertakes a contextual analysis of the provision it is interpreting, that analysis should take into account the importance that the Parliament of Canada has placed on bijuralism and on the equal authority of the common law and civil law respecting property and civil rights. Quite apart from the adoption of sections 8.1 and 8.2 of the *Interpretation Act*, the federal government has made enormous efforts in this regard. Examples include the creation of the Department of Justice Civil Code Section in 1993 to ensure that federal legislation is consistent with the civil law of Quebec;<sup>127</sup> the Policy on Legislative Bijuralism adopted in 1995;<sup>128</sup> the Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec in 1997;<sup>129</sup> the Cabinet Directive on Law-Making;<sup>130</sup> and the three harmonization acts adopted to date.<sup>131</sup> Section 8.1 of the *Interpretation Act* is now clearly part of Canada's legal landscape and must form part of any contextual analysis. It seems fair to say that section 8.1 is an additional factor judges must now consider when relying on Driedger's principle of statutory interpretation.

Fourth, Driedger's principle gives judges very wide latitude. In this regard, Côté, Beaulac, and Devinat have written:

At the present time, it can be said that any element relevant to the establishment of the meaning of a statute may be taken into consideration. ... The main question

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125. *Supra* note 3.

126. *Construction of Statutes*, *supra* note 24 at 87.

127. Wellington, "Bijuralism in Canada," *supra* note 11 at 2, App II.

128. *Ibid* at 3, App III. The policy is also available online. See Department of Justice, *Policies and Directives*, online: Canadian Legislative Bijuralism <<http://www.justice.gc.ca>>.

129. *Ibid* at 3.

130. Canada, *Guide to Making Federal Acts and Regulations*, 2d ed (Ottawa: Department of Justice of Canada, 2000), online: Privy Council Office <<http://www.pco-bcp.gc.ca>>. The guide states:

It is equally important that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.

131. *First Harmonization Act*, *supra* note 3; *Second Harmonization Act*, *supra* note 51; *Federal Law–Civil Law Harmonization Act, No. 3*, SC 2011, c 21.

which remains, and to which there is no general answer, is: What weight, what authority, what value should the interpreter attribute to the various factors which can or must be taken into account?<sup>132</sup>

In short, it is up to the interpreter to measure and assess these various factors. When dealing however with a provision that might be based on provincial law and that could give rise to non-uniform application of a federal enactment, might some judges be tempted to give more importance to one factor than another? By doing this, it might be possible to conclude that the provision for interpretation is *not* based on provincial law. When judges are called upon to interpret legislation, they must act impartially. They may not substitute their own wishes for that of Parliament: their function is simply to determine what Parliament intended.<sup>133</sup> If following an impartial contextual analysis there is no intention that the provision should have a uniform application, judges have no power to conclude that it should.

Fifth, in none of the judgments analyzed in Part III, with the possible exception of the *AYSA* decision,<sup>134</sup> did the SCC rely on common law concepts to conclude that federal legislation applied uniformly. In other words, the SCC did not rely on the common law to achieve uniform application of federal legislation and impose common law rules in Quebec. Is it possible to conclude that the SCC now takes section 8.1 of the *Interpretation Act* into consideration even when it does not refer to the section in its judgments, and that it will use every available means to avoid imposing common law rules on Quebec civil law? It is still too early to reach this conclusion, but if it proves true, section 8.1 will at least have had a beneficial effect. However, it must be borne in mind that section 8.1 clearly gives rise to the possibility that some legislation will not have uniform application, and judges must take this into consideration. Each time this possibility arises, judges should resort to section 8.1 of the *Interpretation Act* and not attempt to circumvent it by relying on interpretation methods that may be of dubious applicability in the circumstances of the particular case.

A final observation: It could be legitimate to conclude that section 8.1 of the *Interpretation Act* did not apply in most of the judgments analyzed in Part III of this article because, following a contextual analysis, it was not necessary to do so or because a rule of law excluded its application. However, such a conclusion should be reached as a result of an impartial contextual analysis conducted in light of the purposes of section 8.1.<sup>135</sup> In cases where this analysis indicates that

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132. *Interpretation of Legislation*, *supra* note 25 at 47.

133. See *e.g. ibid* at 5-6, 90; Denault, *supra* note 19 at 88-90; Sullivan, *Construction of Statutes*, *supra* note 25 at 2.

134. *AYSA*, *supra* note 61.

135. See *e.g.* the preamble to the *First Harmonization Act*, *supra* note 3.

the legislative provision rests on provincial law, the courts must not attempt to circumvent this result.

## B. FUTURE: COMMENTS AND PROPOSALS TO FOSTER HYBRID LAW

These observations give rise to several comments and proposals. Given the wide latitude that judges enjoy, it is relatively easy for them to conclude, based on a contextual interpretation, that federal legislation applies uniformly, particularly since the advantages of uniform application are obvious. It is more difficult to conclude that there is a lack of uniformity. However, such a conclusion can give rise to advantages. Although initially a lack of uniformity makes the law more complicated, in the medium- or long-term it may have positive consequences.

In 2008, I stated that “*DIMS* clearly illustrates that differences may arise in how federal legislation applies in different provinces as a result of sections 8.1 and 8.2 of the *Interpretation Act*.”<sup>136</sup> I expect that similar decisions will arise in the future. Knowledge of both Quebec civil law and Canadian common law is essential to analyze and understand such decisions properly. In these circumstances, comparison of both legal systems is obviously of practical rather than theoretical importance. Obviously, decisions such as *DIMS* place Parliament in a difficult situation.<sup>137</sup> In order to preserve the integrity of both legal systems, Parliament can simply accept that its legislation will not have uniform application. On the other hand, if it believes that a uniform result is desirable or perhaps even essential, it can amend the legislation in question. If Parliament chooses to amend the legislation, what approach will it adopt? Most likely, the approach will be chosen after a thorough comparative study that considers the impact on both legal systems. Once again, comparative law will be of undeniable practical importance.

In short, decisions giving rise to non-uniform application of federal legislation could contribute to the development of comparative law in Canada and to the growth of hybrid law, at least at the federal level. Such an outcome is desirable: The still relatively new *CCQ* was the subject of in-depth analysis and careful study prior to its adoption, and its contribution to a hybrid law could be very valuable. Access to different legal systems and cultures provides exposure to different legal perspectives and fosters greater understanding of their respective strengths and weaknesses. The juxtaposition of the common law and civil law is

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136. Aline Grenon, “Setting the Stage: Comparative Law in Canada at the Dawn of the XXIst Century” in Grenon & Bélanger-Hardy, eds, *Elements of Quebec Civil Law*, *supra* note 15 at 19-20 [Grenon, “Setting the Stage”].

137. *Ibid.*

thought-provoking and in the federal context, this juxtaposition could lead not only to a hybrid law but also to better law.

For example, in 2012, the Minister of Finance proposed amendments to a number of acts, including the *ITA*.<sup>138</sup> In explanatory notes provided to assist in understanding the proposed amendments, the Minister referred to differences in the common law and the civil law relating to gifts. He proposed a modification to the *ITA* that is more in keeping with the civil law approach but that will no doubt be received favourably in Canadian common law jurisdictions.<sup>139</sup> The result is hybrid law and, arguably, better law.

In a remarkable essay that deserves to be translated into English, Jean-François Gaudreault-Desbiens<sup>140</sup> examines the fate that might await section 8.1 of the

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138. Bill C-48, *An Act to amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and related legislation*, 1st Sess, 41st Parl, 2012 (first reading 21 November 2012); *ITA*, *supra* note 62.

139. Minister of Finance of Canada, "Gifts and Contributions – *ITA* 248(30) to (41)" in *Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and Related Legislation* (Ottawa: Department of Finance Canada, October 2012), online: <<http://www.fin.gc.ca/drlcg-apl/nwmm-amvm-1012n-05-eng.asp>>. The Minister states:

At common law, it is generally the view that a gift includes only a property transferred voluntarily, without any contractual obligation and with no advantage of a material character returned to the transferor.

In contrast, under section 1806 of the *Civil Code of Quebec* ("CCQ"), a gift in Quebec is a contract by which ownership of property is transferred by gratuitous title. However, it may be possible for a transferor to transfer property, partly by gratuitous title, without any material advantage returned (as a gift) and partly by onerous title (for consideration). It is therefore possible, in Quebec, to sell a property to a charity at a price below fair market value, resulting in a gift of the difference.

...

For the transfer of property to qualify as a gift, it is necessary that the transfer be voluntary and with the intention to make a gift. At common law, where the transferor of the property has received any form of consideration or benefit, it is generally presumed that such an intention is not present. New subsection 248(30) of the Act, which applies in respect of transfers of property after December 20, 2002 to qualified donees (such as registered charities), allows the opportunity to rebut this presumption. New paragraph 248(30)(a) provides that the existence of an amount of an advantage to the transferor will not necessarily disqualify the transfer from being a gift if the amount of the advantage does not exceed 80% of the fair market value of the transferred property.

140. Jean-François Gaudreault-Desbiens, *Les solitudes du bijuridisme au Canada – Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Montreal: Éditions Thémis, 2007).

*Interpretation Act*. He is concerned that lawyers and judges might attempt to limit the application of section 8.1, in light of “the traditional policy of containment of the civil law.”<sup>141</sup> In his view, this traditional policy is the result of several factors: the unilingualism and unijuralism of the majority of Canadian jurists;<sup>142</sup> indifference towards Quebec civil law<sup>143</sup> and even a certain mistrust of it;<sup>144</sup> and finally, the feeling that the common law is superior to the civil law and that the latter need not be accorded real importance.<sup>145</sup>

To avoid this fate, Gaudreault-Desbiens suggests the following amendment to the *Interpretation Act*:

[W]herever federal legislation cannot be interpreted as referring to some provincial *jus commune* and the meaning of the provision is still ambiguous after using the ordinary rules of interpretation, the provision should be interpreted in the way that is the most inter-subjectively legitimate from the common law as well as civil law perspective. ...[W]here applicable, the best interpretation would be the one that does the least injury to the civil law and common law, which would inevitably lead to the development of a separate and partially mixed or hybrid federal law.<sup>146</sup>

However, he admits that it is “hard to anticipate exactly how the courts would give effect to the suggested rule.”<sup>147</sup> In short, he is concerned that the courts might continue to limit the role played by Quebec civil law. I also share his concern. If the courts, and in particular the SCC, limit the influence of Quebec civil law in federal matters by pursuing “the traditional policy of containment of the civil law,”<sup>148</sup> they are likely to reject solutions and approaches that could enrich Canadian law as a whole. The courts would in effect reject diversity in favour of uniformity based on just one legal system. The interaction of legal cultures, indeed the collision of those cultures, in particular through judgments recognizing the contributions of the civil law and the common law, could make a powerful contribution to the development of the law in Canada.

It is probably fair to say that authors who have examined the question of harmonization in the Canadian context, including those who have been most critical of the federal Parliament’s harmonization process, believe that the existence of different legal traditions within the Canadian federation is an important asset,

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141. *Ibid* at 122 [translated by author].

142. *Ibid* at 23, 28-29.

143. *Ibid* at 19, 25.

144. *Ibid* at 44.

145. *Ibid* at 57.

146. *Ibid* at 120 [translated by author].

147. *Ibid* at 122-23 [translated by author].

148. *Ibid* at 122 [translated by author].

one that could give rise to dialogue and to productive exchanges. It is primarily with respect to the meeting-point of these traditions and the manner in which dialogue and exchanges could take place that differences of opinion arise. For example, Ruth Sullivan favours “derivative bijuralism or multijuralism in which federal legislation is routinely interpreted in light of all relevant legal systems (e.g., common law, civil law, aboriginal law, Islamic law, international law).”<sup>149</sup> Robert Leckey, who has criticized the federal harmonization process as being “top-down,” seems to favour legal pluralism instead, in which:

[W]ithout any idea of a permanent hierarchy or ordered structure, one legal order may well complement or complete another in particular circumstances. If in a particular context it is religious law that supplements the civil law, in another it may be the civil law supplementing religious law.<sup>150</sup>

Leckey goes on:

However, it would be wrong to limit our viewpoint to duly constituted authorities: we should also keep in mind citizens who interpret or even oppose the law... . In legal pluralism, the subjects of law comply with the law, interpret it, but also create it... . While such reciprocity is part of any bottom-up operation, it is excluded from any top-down operation such as harmonization orchestrated by the federal government. The pluralism of the citizen body—whose languages and legal identities go beyond the two official languages and two Western traditions—reflects back on the practice of harmonization.<sup>151</sup>

In his essay, however, Gaudreault-Desbiens demonstrated that there are powerful forces in the Canadian federation working against dialogue and exchange. Those forces seek instead to silence and contain. The views of Sullivan and Leckey, to the effect that courts, lawyers, or even citizens will of their own accord move towards multijuralism or legal pluralism, are unrealistic given the systemic resistance that exists. What is required is a climate that will encourage dialogue and exchange, through making use of various tools or “micro-strategies to ... overcome structural obstacles.”<sup>152</sup> Could it not be said that these tools include section 8.1 of the *Interpretation Act*, and that if judges make use of that section when circumstances allow, they will encourage such dialogue and exchange?

These comments give rise to three proposals.

SCC rules require that factums contain a reproduction of the legislation “in both official languages if they are required by law to be published in both official

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149. Sullivan, “Challenges,” *supra* note 21 at 1044.

150. Leckey, *supra* note 21 at 44-45 [translated by author].

151. *Ibid* at 45-46 [translated by author].

152. Gaudreault-Desbiens, *supra* note 140 at 113-14 [translated by author].

languages.”<sup>153</sup> A new amendment to these rules should be adopted whereby factums would also have to take into account the possible application of sections 8.1 and 8.2 of the *Interpretation Act* when the interpretation of federal legislation is in issue. Since the SCC may take sections 8.1 and 8.2 into account *ex officio*,<sup>154</sup> it is likely better for the parties to be aware of the possible application of those sections when they are preparing their factums. This would give the parties the opportunity to examine the relevance of those sections in detail.

A second proposal involves legal education. It could play a vital role by providing all law students with the following:

1. a compulsory course introducing students to *all* the systems and traditions that form the Canadian legal landscape;
2. a compulsory course on legislation or statutory interpretation, including references to sections 8.1 and 8.2 of the *Interpretation Act* and to the rules relating to the interpretation of bilingual legislation; and
3. a program designed to foster one- or two-semester exchanges in Canadian law schools that emphasize other legal systems or traditions.

Relatively minor adjustments to law school curricula would suffice: making two courses compulsory and fostering pan-Canadian exchanges. It is true that graduates who have obtained dual or transsystemic legal training in the programs offered by the University of Ottawa, McGill University, Université de Montréal, and Université de Sherbrooke law schools are deeply aware of the special features of Canadian law, but this knowledge should not be limited to that group. All law students must develop this awareness. The adjustments to law school curricula described above would in the medium term lead to greater openness by lawyers and the courts. Even if only a few faculties adopt this approach, they will send an important message to the Canadian legal community.

One final proposal: the creation of an independent federal body responsible for comparative law. There is no doubt that Canada is an “extraordinary place” in terms of comparative law. According to Esin Örüçü, the comparative law scholar who coined the expression, an extraordinary place exhibits at least one of the following characteristics: (1) a place that is not a territory of civil law or of common law; (2) a place in which extraordinary things are happening; or (3) “a place where there has been transmigration of laws between legal systems

153. *Rules of the Supreme Court of Canada*, SOR/2002-156, r 42(2)(g).

154. *Canada Evidence Act*, *supra* note 123, s 18.

characterized by both a legal and socio-cultural diversity creating either legal pluralism, a mixed jurisdiction, a hybrid system or unexpected results under pressure from a dominant elite.”<sup>155</sup> Özücü argues that “the more ‘extraordinary’ the place, the more important comparative legal studies becomes.”<sup>156</sup> In 2008, my colleague Louise Bélanger-Hardy and I argued that Canada, with its common, civil and indigenous law traditions, its two official languages and numerous recognized aboriginal languages, is obviously one such extraordinary place.<sup>157</sup> “An enhanced knowledge of other traditions,” we argued,

will make it possible for legal professionals to begin or to pursue a critical examination of certain elements of their own traditions, to identify strengths and weaknesses, and perhaps change certain components in order to remedy problems that emerge from that examination. We believe that this is the direction that Canadian comparative law will take in the 21<sup>st</sup> century.<sup>158</sup>

An independent federal body responsible for comparative law would be a major step in this direction. In addition to its general mandate to promote education and research in the field of comparative law, such an organization could also have other tasks, including analysis of the impact of decisions that, pursuant to the application of section 8.1 of the *Interpretation Act*, give rise to a non-uniform application of federal legislation. If, following this analysis, the organization concluded that uniform application was desirable, it could then suggest a legislative solution to Parliament that would be consistent with civil law and common law and that would avoid transposing inappropriate concepts onto either system. Such an organization would clearly demonstrate the intention of Parliament to take the contribution of Quebec civil law and Canadian common law into account in drafting and interpreting its legislation. Such an organization would probably minimize the tendency of judges to rely on sometimes dubious methods in order to achieve uniform application of federal legislation. This tendency is particularly harmful since few judges have the knowledge of comparative law required to assess the full impact of such decisions. Only Parliament, with the contribution of such an organization, is in a position to do so. Secure in the knowledge that remedial measures would be taken if necessary, judges would

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155. Esin Özücü, “Comparatists and extraordinary places” in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Translations* (Cambridge: Cambridge University Press, 2003) 467 at 469.

156. *Ibid* at 470.

157. “Setting the Stage,” *supra* note 136 at 22-23.

158. *Ibid*.

perhaps be more willing to apply section 8.1 of the *Interpretation Act* when it is appropriate to do so.

## V. CONCLUSION

This article analyzed ten SCC cases in order to identify trends in the application of section 8.1 of the *Interpretation Act*. Based on this relatively limited number of cases, it is still too early to arrive at any firm conclusions. While the SCC did not hesitate to apply section 8.1 in the first three cases, it appeared to move away from the section in the next four. In the more recent *Innovation Credit Union* and *Radius Credit Union* cases, the SCC applied section 8.1, but did so in the familiar context of interaction between federal legislation and the common law. In the latest case, *Quebec AG*, the decision to exclude section 8.1 was warranted.

It remains to be seen whether the SCC will exclude section 8.1 of the *Interpretation Act* when it is next faced with a situation in which provincial law complements a federal enactment and may give rise to non-uniform application of federal legislation. If the SCC distances itself from section 8.1 in such circumstances, we can expect a reduction of the role of Quebec civil law in interpreting federal legislation, and perhaps a return to the earlier practice whereby common law concepts were grafted onto Quebec civil law. If the SCC adopted this approach, would it not be curtailing Parliament's intentions as expressed in section 8.1? If on the other hand the SCC applied section 8.1 as needed, this would necessarily increase the national role of Quebec civil law. *DIMS*<sup>159</sup> and the proposed amendments to the *ITA*<sup>160</sup> offer a glimpse of the positive ramifications that could follow.

Section 8.1 of the *Interpretation Act* makes it possible to interpret federal legislation while taking into account both Quebec civil law and Canadian common law. If section 8.1 is applied as it should be, courts will contrast and evaluate the two systems more often and encourage ongoing exchanges at the level of federal legislation between the civil and the common law. There is no doubt that, if it is not sidelined, section 8.1 of the *Interpretation Act* could contribute to the development of comparative and hybrid law in Canada.

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159. *Supra* note 46.

160. See *supra* note 139.

