Canadian Bijuralism at a Crossroad? Impact of Section 8.1 of the Interpretation Act

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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 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 accordance with these rules and concepts.
Prior to the enactment of this section 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 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 emphasizes that section 8.1 has the potential to promote exchanges between Quebec civil law and Canadian common law and submits proposals in this regard.

Keywords:
bijuralism, federal legislation, Québec civil law, statutory interpretation

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This article will be published in the next issue of the Osgoode Hall Law Journal (51:2).

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Introduction

Canada is occasionally referred to as being multijural or plurijural because of the existence of variations in the law among its various 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.¹ That relationship is primarily limited to federal legislation 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.²

In 2001, sections 8.1 and 8.2 were added to the Interpretation Act³. Since section 8.1, the full text of which is set out in Part I, is by far the more important of the two, only it will be

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


³ R.S.C. 1985, c. I-21; sections 8.1 and 8.2 were added to the Interpretation Act by the Federal Law-Civil Law Harmonization Act, No. 1, S.C. 2001, c.4 [First Harmonization Act], effective on June 1, 2001. The preamble of the Act is to the following effect:

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

Attendu :

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

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;

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;
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 accordance with these rules and concepts.

How has this section fared since its enactment? Part I describes the *raison d’être* of section 8.1 and summarizes the methods proposed by three authors with respect to its application. In Part II, relevant decisions of the Supreme Court of Canada delivered since 2001 will be the subject of analysis and commentary. How has the Court made use of section 8.1? Has the Court adopted, in whole or in part, the methods proposed by the authors? In the third and final part, the author comments in more detail on the judgments of the Supreme Court and emphasizes that section 8.1 has the potential to promote ongoing exchanges at the

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;

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 . . .

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 ...
level of federal legislation, between Quebec civil law and Canadian common law. In order to encourage that potential, the author submits a number of proposals.

**Part I – Section 8.1 and the interpretation of bijural federal legislation**

Since numerous texts have dealt with the subject, only a brief explanation of the main *raison d'être* of section 8.1 of the *Interpretation Act* will be provided. All Canadian law students learn very early on that the Parliament of Canada has the power to make laws in areas that fall within its jurisdiction and that Canadian provinces have jurisdiction in the area of property and civil rights. They 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 the civil law in Quebec and on the common law in the other Canadian provinces (and the three territories). As stated in a previous article, 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 the 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. 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*). When federal legislation refers either directly or indirectly to underlying private law concepts, a “complementarity” relationship 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). It will be total if the legislation is independent from the law of all of the provinces (for example, the legislation forms a “complete code” or incorporates a rule based on international law or on some other source of law different from common and civil 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, courts may be faced with the

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6 Ibid s 92(13).


following dilemma: how to interpret the legislation if the underlying Quebec civil law and Canadian common law concepts produce different results? 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, courts often adopted uniform interpretations based on common law concepts. As stated above, 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. 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 whole-scale reform of Quebec civil law in the latter part of the 20th century provided the 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 and it was in this context that section 8.1 was enacted. These are, very briefly, the main reasons underlying the adoption of section 8.1 of the Interpretation Act. The section reads as follows:

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9 Variations can also occur among the common law provinces, although this is not as frequent.

10 For example, in ITO-Int’l Terminal Operators v. Miida Electronics, [1986] 1 SCR 752, the Supreme Court of Canada 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, 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 for example, Ordon Estate v. Grail, [1998] 3 SCR 437), but unlike the situation in Quebec, the legal concepts are at least familiar.

11 Supra note 2.


13 It also became apparent during that process that harmonization went beyond the French civil law, English common law dichotomy. 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. Harmonization of Federal Legislation, supra note 4; see also, Grenon, Interpretation, supra note 8.

14 Section 8.2, 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.
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, 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/en l’absence d’une 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, 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.\(^ {15} \)

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 most authors\(^ {16} \)

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\(^{16}\) See e.g. Peter W. Hogg, Joanne E. Magee & Jinyan Li, Principles of Canadian Income Tax Law, 7th ed (Toronto: Carswell, 2010) at 10; Philippe Denault, La recherche d’unité dans l’interprétation du droit privé fédérale – Cadre
and, (to borrow the words of André Morel) “prevailing and consistent judicial decisions” are to this effect.\textsuperscript{17} The possibility has however been raised that Parliament might have access to “an unenacted body of private law rules applicable as federal law to all matters falling within federal jurisdiction”.\textsuperscript{18} 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 law relating to property and civil rights could actually be based on hypothetical federal private law rules, the precise nature of which remains unclear. This hypothetical law would allow federal legislation to apply uniformly across the country. Whether or not such rules exist, there is however one fundamental point on which all agree: Parliament may in its legislation exclude the application of provincial private law within its own fields of jurisdiction. Moreover, section 8.1 now expressly recognizes this possibility. Accordingly, if Parliament wishes to exclude the application of provincial law, it is not necessary for it to rely on the hypothetical existence of federal private law. It need only state its intention in the enactment.\textsuperscript{19}

The essential question then is the following: in what circumstances may it be concluded that Parliament has excluded provincial private law in its legislation? This is a matter of interpretation and interpreting Canadian federal legislation is no easy task. Before the arrival on the scene of section 8.1, a number of rules were available, including those relating to the interpretation of bilingual legislation\textsuperscript{20}. But all of these rules are subject to an overarching principle, first stated 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”.\textsuperscript{21}

\begin{itemize}
\item \textit{supra} note 15. For a Supreme Court of Canada decision delivered before s. 8.1 came into effect and based on the premise that provincial private law can supplement federal legislation, see e.g. \textit{Re Giffen}, [1998] 1 SCR 91 at para 64-66 (Major J.); for a decision delivered subsequently and based on the same premise, see \textit{Innovation Credit Union, infra} note 87 at para 30-32.
\item Macdonald acknowledges this, \textit{ibid} at 190: […] even assuming the need for a distinctive federal suppletive law in certain matters, it is open to doubt whether the enactment of a federal \textit{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 \textit{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.
\item See e.g. Michel Bastarache et al, \textit{The Law of Bilingual Interpretation} (Montréal: LexisNexis, 2008).
\end{itemize}
The adoption of section 8.1 necessarily gave rise to questions relating not only to its ambit, but also to its interaction with other rules and with Driedger’s principle. Although the Supreme Court of Canada has yet to analyse section 8.1 in detail, a number of authors have done so. Three authors in particular (Sullivan, Denault and Molot) have examined section 8.1, often in great depth. They appear to have reached the following common or majority conclusions:

1. A court having to interpret federal legislation must first determine if it is necessary to refer to provincial law;
2. Only after undertaking a detailed analysis of the legislative provision, applying *inter alia* Driedger’s principle, may the court conclude that it is necessary to refer to provincial law;
3. If applicable, the court should also take into account the restrictive clause “unless otherwise provided by law/sauf règle de droit s’y opposant”;
4. Although this restrictive clause raises questions as to its reason and scope, all agree that it includes provisions that expressly exclude provincial law.

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.

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 common law and civil law concepts.

Since the adoption of section 8.1, the Supreme Court of Canada has on several occasions interpreted federal statutes involving the possible application of provincial law. Has the Court 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.

**Part II – The Supreme Court of Canada and section 8.1**

As the following analysis demonstrates, the Supreme Court of Canada appears to have an ambivalent rapport with respect to section 8.1. In particular, the section has not
yet been the subject of in-depth analysis and in some cases, the Court fails to refer to the section, although a reference would have been appropriate. Also, 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 Supreme Court considers section 8.1 – Schreiber, Wise and D.I.M.S.

Following the adoption of section 8.1, the 2002 Schreiber decision\(^\text{24}\) was the first in which the Supreme Court was called upon to interpret a bijural provision, specifically the harmonized version of section 6(a) of the State Immunity Act.\(^\text{25}\) 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 in Ontario seeking damages for personal injuries suffered as a result of his arrest and detention. Germany brought a motion requesting that the action be dismissed on the basis that it was immune from the jurisdiction of Canadian courts pursuant to the State Immunity Act. The Ontario Superior Court of Justice allowed the motion and was upheld by the Court of Appeal. Schreiber then appealed to the Supreme Court of Canada.

In a unanimous judgement delivered by LeBel J.,\(^\text{26}\) the Court dismissed Schreiber’s appeal. In the process, it also implicitly approved the harmonization process of bijural federal legislation undertaken by Parlement.\(^\text{27}\) Rather than refer specifically to section 8.1, however, the Court referred instead to the First Harmonization Act, whereby sections 8.1 and 8.2 were added to the Interpretation Act in 2001.\(^\text{28}\) In addition, the Court provided no

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\(^{25}\) RSC 1985 c S-18; section 6(a) was harmonized by means of section 121(1) of the First Harmonization Act, supra note 3 and now reads as follows:

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

(a) any death or personal or bodily injury.

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;

\(^{26}\) Concurred in by McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie and Arbour JJ.
\(^{27}\) Supra note 24 at para 66-80.
\(^{28}\) Supra note 3.
directions as to the ambit and application of section 8.1 and failed to distinguish between the interpretation of bilingual and bijural legislation. Following Schreiber, the Supreme Court applied section 8.1 expressly or by implication in two other decisions. Wise, the first decision, is significant in several respects. First, the Supreme Court does not often have the opportunity to rule on points of corporate law. Second, the Court was called upon to rule on the existence and scope of the obligations of corporate directors to certain stakeholders, specifically creditors of a corporation in financial difficulty. As the Court noted, this question has attracted the attention of courts both in Canada, the United States, the United Kingdom, Australia and New Zealand. Accordingly, the judgment was awaited with great impatience. The Court handed down a unanimous judgment, per Major and Deschamps JJ.

To determine the scope of the obligations of directors in the Canadian context, the Court had to consider subsections 122(1)(a) and (b) of the Canada Business Corporations Act (CBCA). The Court relied upon section 8.1 of the Interpretation Act to interpret section 122(1)(b) of the CBCA. The Supreme Court stated:

29 This decision was the subject of two comments relating to the harmonization process and to sections 8.1 and 8.2: Sullivan, Challenges, supra note 18 at 1045-1054; Grenon, Interpretation, supra note 8. Both authors also commented on the confusion in Schreiber between bilingual and bijural rules of interpretation; Sullivan, Challenges, ibid at 1051: “the court confounds the principles governing interpretation of bilingual legislation with the principles governing the interpretation of bijural legislation”; Grenon, ibid at 141-142: 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.


31 Ibid at para 27, 64.

32 Iacobucci, Bastarache, Binnie, LeBel and Fish JJ. were at the hearing, but Iacobucci J. took no part in the judgment.

R.S.C. 1985, c. C-44:

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.
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 ....

Later, when the Court considered the scope of section 122(1)(b) of the CBCA, it stated at paragraph 57 of its judgment: “Indeed, 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”. It is this vacuum that leads the Court 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, with the resulting application of the rules of civil liability in article 1457 C.C.Q. Section 8.1 of the Interpretation Act was not, however, the subject of careful analysis. The Court did not rely on the interpretive process described in Part I; specifically, the Court did not rely on Driedger’s principle and did not conclude, following a contextual analysis of section 122(1)(b), that it was necessary to refer to provincial law. The Court appears to have simply relied on the existence of a vacuum in the provisions (“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”). If the Court 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 Court to conclude that this duty was owed only to the corporation.

But the Court did not follow this route. It instead relied on the wording of subsection 122(1)(b) of the CBCA and of article 1457 C.C.Q. in order to conclude 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.

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. Insofar as the interpretation of section 122(1)(b) is concerned, it is tempting

34 Supra note 30 at para 29.
35 See e.g. Bruce Welling, Corporate Law in Canada – The Governing Principles, 3d ed (London, Ont.: Scribblers, 2006) at 331; Christopher C. Nicholls, Corporate Law (Toronto: Emond Montgomery, 2005) at 299.
36 See e.g. “Symposium on the Supreme Court’s Judgment in the Peoples Department Stores Case” (2005) 41 Can Bus LJ 200; see also, for an analysis of the part of the decision dealing with section 122(1)(b) of the CBCA, 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, in particular at 282-293, 306-309.
to draw a parallel between the reaction in common law Canada to the possibility that a civil law approach could apply 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.37

In the 2005 *D.I.M.S.* decision,38 the Supreme Court 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 and Insolvency Act* (BIA), dealing with the rules of set-off or, as it is known in Quebec, compensation.39 In the interests of uniformity, the Quebec Court of Appeal had adopted in a prior judgment a common law precedent according to which the concept of equitable set-off applied in Quebec, insofar as section 97(3) was concerned.40

Once again the Court handed down a unanimous judgment, this time *per Deschamps J.*41 At paragraph 34 of the judgment, 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?

Since compensation is not defined in the BIA, the Supreme Court could rely on Quebec civil law (specifically arts. 1457, 1672, 1673 and 1681 C.C.Q.) in applying section 97(3) of the BIA. The Court did not expressly refer to section 8.1; it referred only to the *First Harmonization Act*. Further, as it did in *Wise*, the Court did not rely on a contextual interpretation of section 97(3) and gave no explanation as to the reason for and purposes of section 8.1. This is unfortunate, since *D.I.M.S.* lent itself well to such an exercise. Unlike *Wise*, in which a contextual analysis might have led to a different outcome, a contextual

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39 R.S.C. 1985, c. B-3; the relevant portions of that section are the following:

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 ....


41 *Supra* note 38, concurred in by Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.
analysis of section 97(3) of the BIA would probably have reinforced the Court’s conclusion, while allowing it to clearly explain the *raison d’être* and ambit of section 8.1. Accordingly in *D.I.M.S.*, the Supreme Court of Canada did not apply the 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) between Quebec and the rest of Canada, since equitable set-off is recognized elsewhere in Canada in connection with section 97(3). In *Wise* and *D.I.M.S.*, the Supreme Court did not hesitate to apply section 8.1, expressly or by implication, when called upon to interpret bijural federal legislation. Those two cases clearly illustrate how this may lead to variations in the application of bijural federal legislation from one province to another and this will be the subject of further comment in Part III of this article.

B. The Supreme 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 Supreme Court of Canada in relation to section 8.1? The following decisions could certainly give rise to such a conclusion.

In *Canada 3000*, the Supreme Court had to interpret federal aeronautics legislation. The case involved airlines operating fleets of leased aircraft. The airlines became insolvent and defaulted 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. In particular, could the service providers 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

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42 A contextual analysis of section 97(3) 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 the concept of equitable set-off in a bankruptcy context, throughout Canada; (3) the harmonization of section 97(3) by means of section 38 of the *Harmonization Act, No. 2*, S.C. 2004, c. 25 (Second Harmonization Act); (4) the criticism of equitable set-off in connection with the *Bankruptcy and Insolvency Act* (see John A.M. Judge and Margaret E. Grottenhaler, “Legal and Equitable Set-Offs” (1991) 70 Can Bar Rev 91 at 117).


44 *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 SCR 865 (Canada 3000).

45 *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 (CANS).
appeal from judgments delivered by the Ontario\textsuperscript{46} and Quebec\textsuperscript{47} Courts of Appeal, the Supreme Court handed down a unanimous judgment \textit{per} Binnie J.\textsuperscript{48}

In its analysis, the Court stated at the outset that the case was “from first to last an exercise in statutory interpretation and the issues of interpretation are, as always, closely tied to context”.\textsuperscript{49}

In this case the Court had to consider the relevance of the \textit{Civil Code of Quebec} and sections 8.1 and 8.2 in light of \textit{inter alia} section 56 of the CANSCA.\textsuperscript{50} With regard to section 8.1, the Court stated:

\begin{quote}
78 ... with respect, there 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 \textit{Airports Act} specifically state that the remedy is to be “in addition to any other remedy”, which includes remedies under provincial law.
\end{quote}

\begin{quote}
79 The \textit{Aeronautics Act}, the \textit{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. This uniformity is especially vital since aircraft are highly mobile and move easily across jurisdictions.
\end{quote}

\textsuperscript{46}[2004] 69 OR (3d) 1, 235 DLR (4th) 618.
\textsuperscript{47}[2004] RJQ 2966, 247 DLR (4th) 503.
\textsuperscript{48}McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish and Charron JJ. were present.
\textsuperscript{49}\textit{Supra} note 44 at para. 36.
\textsuperscript{50}\textit{Supra} note 45; the relevant portion of section 56 is the following:

\texttt{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.}

\texttt{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.}
NAV Canada also relied on ss. 8.1 and 8.2 of the Interpretation Act, R.S.C. 1985, c. I-21 . . . However, neither section applies in this case. Section 8.1 states that

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\ldots \text{if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.}
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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: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, 2004 SCC 68. Here, for reasons stated, resort to provincial law is not necessary.

In Canada 3000, the Supreme Court used the interpretation process described in Part I above: 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 Court 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 section 8.1. The Supreme Court’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 Amateur Youth Soccer Association,\(^51\) 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).\(^52\) The Agency refused to register it as a charity because “the courts have not held the promotion of sport to be a charitable purpose”.\(^53\) After the Federal Court of Appeal upheld this decision, AYSA appealed to the Supreme Court of Canada. For AYSA to be successful, the Supreme Court of Canada 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. The AYSA, however, functioned exclusively in Ontario.

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\(^52\) RSC 1985 (5th Supp), c 1.

\(^53\) Supra note 51 at para. 4.
The majority judgment was delivered by Rothstein J. After concluding that the provincial rather than national status of the AYSA did not prevent it from being recognized as a charity, Rothstein J. 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. 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: “Substantial change in the definition of charity must come from the legislature rather than the courts.”

Rothstein J. dealt with section 8.1 in the context of his analysis of the common law. To properly understand his comments it must be borne in mind that in Ontario, the definition of charitable purposes in section 6(a.a) of the Charities Accounting Act has been interpreted by the Ontario High Court of Justice (Divisional Court) in Re Laidlaw Foundation, in which the Court concluded that the definition allows for the recognition of the promotion of amateur athletic sports for physical development purposes as a charitable purpose. 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.

Rothstein J. 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 in the circumstances of the case:

A.Y.S.A. further argues that s. 8.1 of the Interpretation Act, R.S.C. 1985, c. I-21, 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. [Emphasis added.]

Rothstein J. could have concluded that Laidlaw was only relevant for the purposes of a specific Ontario statute and that it did not change the common law in Ontario according to which sport as such is not charitable in nature. Unfortunately, Rothstein J. 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.” There is no basis for this statement, since section 8.1 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

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54 With McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ. concurring; Abella J. delivered a concurring judgment, but relied on reasons having nothing to do with section 8.1.
55 Supra note 51 at para. 40.
56 Ibid at para 44.
57 RSO 1980, c 65; the definition is now in s. 7 of the Charities Accounting Act, RSO 1990, c C.10.
59 Supra note 51 at para 39.
60 Ibid.
otherwise provided by law. Rothstein J. did not make that analysis. He simply brushed aside section 8.1.

A further point must be raised, since it will in due course probably be the subject of litigation. To qualify as a “charitable organization” under the ITA, an organization must satisfy the criteria in s. 149.1(l)(a) to (d) of the ITA, one of which is that the organization must devote its resources to “charitable activities”. Since “charitable activities” is not defined in the ITA, the courts have relied on the common law to determine its meaning and Rothstein J. refers to this more than once in his judgment, with reference to an earlier judgment of the Supreme Court, Vancouver Society of Immigrant and Visible Minority Women v. M.N.R. It must be noted that the judgment in Vancouver Society was delivered in 1999, before section 8.1 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 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 appears to be broader than that of equivalent common law trusts and this raises the following questions. Should a trust that satisfies the criteria set out in the C.C.Q. and that applies to become a registered charity under section 149.1 of the ITA, be subject to common law rules, rules that have given rise to criticism including criticism in the majority judgment in Vancouver Society? What will happen if the Canada 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 not be appropriate?

In short, Rothstein J.’s comment to the effect 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 and this will be the subject of further comment in the third and final part of this article.

In Saulnier, delivered in 2008, the Supreme Court had to rule on a judgment by the Nova Scotia Court of Appeal. A fisherman who held four fishing licences had given to his bank a general security interest under that province’s Personal Property Security Act (PPSA) in

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61 Ibid at para 8, 24.
64 Supra note 62 at para 201-203.
order to finance his fishing business. He subsequently made an assignment of his property under the BIA, but refused to sign an agreement for sale of the four 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 Binnie J., the Supreme Court ruled on the scope of the definitions of the words “property” in the BIA and “intangible property” and “personal property” in the PPSA. For our purposes, only the Court’s comments relating to the BIA are relevant. The definition of the word “property” in section 2 of the BIA is the following: “property” 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…

The Court reviewed in turn various approaches suggested by the courts and stated the following regarding the definition of “property” in the BIA:

- 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.

In that case, the Supreme Court seems to have adopted an approach consistent with section 8.1 of the Interpretation Act, but without referring to the section. First, the Court had to interpret 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. When the Court concluded that Parliament had clearly signalled its intention to include a variety of bankrupt’s assets not normally

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68 Supra note 39.
69 McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring; Bastarache J. did not participate in the judgment.
70 Supra note 66 at para 43.
considered ‘property’ at common law, does this mean that, if the Court had referred to section 8.1, it would have concluded that it was not necessary to have recourse to provincial common law, since the intention of Parliament was clear? Another question arises. In view of the Supreme Court’s silence about section 8.1 in Saulnier, are we to conclude that the section 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.

Finally, in Drummond71 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 Bankruptcy and Insolvency Act.72 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 ITA73 and 86(2.1) of the Employment Insurance Act74 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 of the Employment Insurance Act are similar, reference will only be made to the ITA. Section 227(4.1) states that the deemed trust shall include property held by secured creditors “as defined in subsection 224(1.3)” of the ITA, and that the trust applies “Notwithstanding any other provision of this Act . . . any other enactment of Canada, any enactment of a province or any other law”. Section 224(1.3) of the ITA is to the following effect:

| “security interest” means any interest in property that secures payment or performance of an obligation and “garantie” Droit sur un bien qui garantit l’exécution d’une obligation, notamment un paiement. Sont en |

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72 Supra note 39.

73 Supra note 52.

74 SC 1996, c 24.
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…

particulier des garanties les droits nés ou décou rant de débentures, 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.

The main issue in Drummond was the following: was the contractual right of set-off created in favour the Caisse a “security interest” within the meaning of the definition in 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 Rothstein J. for the majority and that of Deschamps J. for the minority. Not only were the judgments different, but each judge expressed in no uncertain terms, disagreement with the approach taken by the other.

Rothstein J. concluded that, for the purposes of the section 224(1.3) definition, provincial law was not relevant for three reasons: (1) the phrase “Notwithstanding any other provision of this Act… any other enactment of Canada, any enactment of a province or any other law”, was incorporated by reference in the definition of a security interest; (2) the right of the federal Parliament to adopt its own definitions in areas falling within its jurisdiction, without having to take provincial law into account; and (3) the intention of Parliament that it should be able to act uniformly throughout Canada in recovering money owed to Her Majesty. Based on these conclusions, Rothstein J. 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”), 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’”. On the question of whether this definition covers set-off, Rothstein J. 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] 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’”. A review of the terms of the contract led him to conclude 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

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75 Concluded in by McLachlin C.J. and Binnie, Fish, Charron and Rothstein JJ.
76 Concluded in by LeBel J.
77 Supra note 71 at para 8-17.
78 Ibid at para 15.
79 Ibid at para 23.
was accompanied by specific limitations in favour of the Caisse.\textsuperscript{80} 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 latter’s obligations. Rothstein J. also stated that, according to the wording of the agreements, the Caisse considered that the parties were providing security for the monies owed to it.\textsuperscript{81} He accordingly concluded that a security interest existed within the meaning of section 224(1.3) of the ITA.

Rothstein J. makes no mention of sections 8.1, despite the fact that section 8.1 allowed him to conclude that an express rule of law excluded recourse to provincial law. 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 Deschamps J. referred to the section in her judgment.

At the start of her judgment, Deschamps J. states:

> It should be noted that there is no distinct federal common law: 
> 
>\textit{Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, McNama Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654, and P. Denault, La recherche d’unité dans l’interprétation du droit privé fédéral (2008), at p. 38. 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. I-21. 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…}\textsuperscript{82}

Though indirect, this reference to sections 8.1 might lead the reader to think that the judgment was based on that particular rule of interpretation. However, the role played by section 8.1 is ambiguous, since Deschamps J. goes on to state 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”\textsuperscript{83} 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” can be established, and she 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

\textsuperscript{80} \textit{Ibid} at paras 29-30.
\textsuperscript{81} \textit{Ibid} at para 31.
\textsuperscript{82} \textit{Ibid} at para 81. It should be noted that in this paragraph, Deschamps J. 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.
\textsuperscript{83} \textit{Ibid} at para 82.
application of the taxing provision in the two legal systems”. Later, she refers directly to sections 8.1, but in the context of the shared meaning rule of interpretation.

Finally, in the part of her judgment in which she expresses disagreement with the approach taken by Rothstein J., she writes: “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”.

In short, Deschamps J. makes 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 to have proceeded immediately to the latter. If Deschamps J. had made a clear distinction between the two and had used the interpretation process described in Part I above, she would first have had to ask 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 “Notwithstanding 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 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 provided added support to the majority judgment.

Of these four decisions, only in Canada 3000 does the Supreme Court analyse section 8.1 in some detail. In the main AYSA, Saulnier and Drummond judgments, section 8.1 is either dismissed (AYSA) or ignored (Saulnier and the majority judgment of Rothstein J. in Drummond). Only Deschamps, J. and Lebel J. 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 Court is giving the section short shrift. This concern is however partially dispelled in the next three decisions.

C. The Supreme Court returns to section 8.1 – Innovation Credit Union, Radius Credit Union

In Bank of Montreal v. Innovation Credit Union and Royal Bank of Canada v. Radius Credit Union, the issue involved financing granted by the Bank of Montreal and the Royal Bank of Canada, secured pursuant to the Bank Act. The debtors defaulted and the banks seized

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84 Ibid.
85 Ibid at para 86.
86 Ibid at para 112.
87 2010 SCC 47, [2010] 3 SCR 3 (Innovation Credit Union). This was a unanimous judgment delivered by Charron J. McLachlin C.J., Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurred.
88 2010 SCC 48, [2010] 3 RCS 38 (Radius Credit Union). Once again, this was a unanimous judgment delivered by Charron J. and concurred in by the same judges.
89 SC 1991, c 46.
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\(^\text{90}\) of the province of Saskatchewan (PPSA). However, the security agreements had not been registered under the PPSA. This gave rise to a priority dispute between the banks and the credit unions.

The two unanimous judgments, delivered by Charron, J., deal 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.\(^{91}\) To resolve the dispute, the Court resorted to section 8.1 of the Interpretation Act.

In Innovation Credit Union, the Supreme Court held: 1) 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 2) the security regime contained in the Bank Act is property-based. The Court accordingly concluded that the dispute should be resolved in accordance with property law, a provincial field of jurisdiction. The Court also stated:

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\text{[...], 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 [...].} \quad \text{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.} \quad \text{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”):}
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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 [...].\(^\text{92}\)

\(^{90}\) SS 1993, c P-6.2.

\(^{91}\) The relationship between federal bank security and provincial personal property security interests has given rise to numerous conflicts (see para 1 of Innovation Credit Union, supra note 87); the Canada Law Commission has recommended the repeal of the Bank Act security (see Canada Law Commission, The Bank Act and Modernizing Canadian Securities Law, Ottawa, Commission, 2004).

\(^{92}\) Supra note 87 at para 31.
The Court added: “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’”.93

The Supreme Court 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 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, in the absence of priority rules in the Bank Act, 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 will accordingly not be subject to further comment.

In Innovation Credit Union and Radius Credit Union, the Supreme Court 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 do so when reference is made to the civil law and when this gives rise to a non-uniform application of federal legislation. The Supreme Court of Canada was not faced with this prospect in its latest decision, but it will be faced with it in due course.

**D. Latest decision - Quebec AG**

In the most recent decision of the Supreme Court, Quebec (Attorney General) v. Canada (Human Resources and Social Development)94, 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 (AIAOD)95, 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 Employment Insurance Act (EIA)96 the CEIC had the right to seek reimbursement by means of a simple notice allowing it to, in effect, garnish 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

93 *Ibid*.
94 2011 SCC 60 (Quebec AG).
95 RSQ c A-3.001.
96 SC 1996, c. 23.
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 Supreme Court.

The interpretation of the conflicting provisions of the provincial and federal statutes was in issue and in a unanimous decision delivered by Deschamps, J.,97 the Court held, based on the doctrine of federal paramountcy that the right of the CEIC to obtain reimbursement was not subject to the provincial provision respecting exemption from seizure. The Attorney General of Quebec had 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 expressed intention in section 126(4) EIA to exclude these rules.98 The Court rejected the section 8.1 argument, stating that it was not necessary to refer to provincial law because this was excluded by the wording of the EIA provision.99 In order to reach its conclusion, the Court also relied on the legislative context demonstrating Parliament’s intention.100 In particular, the Court compared the recovery mechanisms in sections 126(1) and 126(4) EIA 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.101

The Court’s conclusion with respect to section 8.1 of the Interpretation Act is warranted. In essence, the Court made use of the method described in Part I 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 it carried out a contextual analysis to determine Parliament’s intention. It would however have been useful if the Court has 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

97 Supra note 94; McLachlin C.J. and Binnie, Lebel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurred.
98 Ibid at para 27.
99 Ibid.
100 Ibid at para 28-33.
101 Supra note 94 at para 32.
the absence of an express provision excluding provincial law, for section 8.1 to apply, it must be necessary to rely on provincial law.

Although this case arose in Quebec, the Supreme Court of Canada was not faced with a situation in which a contextual analysis led to a non-uniform application of federal legislation. The Court will, however, no doubt have to deal with such a situation in due course and this will be the subject of further comment in Part III.

Part III – Impact (Past, Present and Future) of Section 8.1

A. Past and Present

The judgments of the Supreme Court of Canada commented on in Part II give rise to the following observations with respect to the impact of section 8.1 of the Interpretation Act. First, the section has not yet been the subject of in-depth analysis by the Court. In none of the decisions has section 8.1 been scrutinized carefully. None of the judges have attempted to clearly explain its underlying objectives. In some cases, there is no express mention of section 8.1 and reference is simply made to the First Harmonization Act. The unanimous judgment by LeBel J. in Schreiber and the unanimous judgment by Deschamps J. in D.I.M.S. fall into this category. When reference is made to section 8.1, whether expressly or by implication, the analysis is limited; this is apparent in the unanimous judgments of the Supreme Court in Wise, Canada 3000, Innovation Credit Union and Quebec AG and in the majority judgment of Rothstein J. in AYS. When the Court is next called upon to apply section 8.1, it should make use of the opportunity to clearly explain the underlying objectives of the section. Such an explanation would allow the Court to subsequently make more effective use of it and would also allow Canadian lawyers as a whole to gain a better understanding of the section.

Second, some of the decisions in Part II make no reference to section 8.1, although they lend themselves to such a reference: this is true of the majority judgment by Rothstein J. in Drummond and the unanimous judgment of Binnie J. in Saulnier. 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 Court from referring to it. Since it is a rule of interpretation contained in a federal statute, the Court may refer to it ex officio.102

Third, in the AYS and Drummond decisions, there seems to be an intention to minimize the importance of section 8.1. This may be due to the 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 and in the preamble to the First Harmonization Act. Additionally, when the Court, consistent with Driedger’s modern principle, undertakes a contextual analysis of the provision to be interpreted, that analysis should now take into account the importance placed by the Parliament of Canada on bijuralism and on the contribution of the common law and civil law. Quite apart from the adoption of sections 8.1 and 8.2, enormous efforts have been made by the federal government in this regard: the creation of the Department of Justice Civil Code Section in 1993 to ensure that federal legislation is consistent with the

102 Canada Evidence Act, RSC 1985, c C-5, s 18.
civil law of Quebec; the Policy on Legislative Bijuralism adopted in 1995; the Program for the Harmonization of Federal Legislation with the Civil Law of the Province of Quebec in 1997; the Cabinet Directive on Law-Making and the three harmonization acts adopted to date. Section 8.1 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 the judges must now consider, when relying on Driedger's principle.

Fourth, Driedger's principle gives judges very wide latitude and in this regard, Côté has 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 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?”. In short, it is up to the interpreter to fully weigh 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, could some judges not 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 and not substitute their own wishes for that of Parliament: their function is simply to determine what Parliament intended. 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 analysed in Part II, with the possible exception of the AYSa decision, did the Supreme Court conclude that federal legislation should be uniformly applied by means of common law concepts. In other words, the Court did not rely on the common law to achieve uniform application of the legislation and impose common law rules in Quebec. Is it possible to conclude that the Supreme Court now takes section 8.1 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 on Quebec civil law, rules derived from the common law? It is still too early to reach such a conclusion, but if that is the case,
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 and not attempt to circumvent it by relying on methods interpretation that may be of dubious application in the circumstances of the particular case.

A final observation: based on the judgments analysed in Part II of this article, it is clear that in most of the judgments, it could legitimately be concluded that section 8.1 did not apply either 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 always be reached as a result of an impartial contextual analysis conducted in light of the purposes of section 8.1. In cases where this analysis indicates that the legislative provision rests on provincial law, the courts must not attempt to circumvent this result.

B. Future

These observations give rise to the following comments and proposals. In a contextual interpretation, given the wide latitude enjoyed by judges, it is relatively easy to conclude 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, lack of uniformity makes the law more complicated, it may in the medium or long term have positive consequences. In 2008, I stated the following regarding the non-uniform result reached in D.I.M.S.:

The decision in D.I.M.S. 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. We can expect to see more decisions that will give rise to differences in how federal enactments are applied, and it is therefore in the interests of Canadian legal professionals to have a better understanding of the approaches taken in Quebec and elsewhere in Canada. In this situation, a comparison between Quebec civil law and Canadian common law will obviously be practical rather than theoretical. In cases of national significance, for example, it will be necessary to take those differences into consideration in applying federal law, and knowledge of both systems of law is essential in order to analyze and understand those decisions properly.

Obviously, a decision like D.I.M.S. puts Parliament in a difficult situation. In order to preserve the integrity of both legal systems, it can accept that the result will not be uniform, and do nothing. On the other hand, if it believes that a uniform result is desirable or perhaps even essential, the legislation in question may have to be amended. If Parliament chooses to amend the legislation, what law will it adopt? Most likely, the law will be chosen after a thorough comparative study. In the context of subsection 97(3) of the BIA, for example, Parliament will have to answer the question set out above: should set-off be subject to the principle of equality among the creditors, or a rule that allows the court to exercise discretion so as to exempt a creditor from that principle? Once again, comparative law would be of

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110 See e.g. the preamble to the First Harmonization Act, supra note 3.
undeniable practical importance. In fact, if the Supreme Court of Canada is called upon to interpret subsection 97(3) of the BIA in the context of a case arising in a common law jurisdiction, it will also have to answer [the] question of whether the law of equitable set-off applies in the context of [the BIA and] it will have to undertake the same kind of exercise.\footnote{Aline Grenon, “Setting the stage: Comparative Law in Canada at the Dawn of the XXIst Century”, in Elements of Quebec Civil Law, supra note 12 at 19-20.}

Such decisions, because they give rise to non uniform application of federal legislation, could contribute to the development of comparative law in Canada and to the growth of a hybrid law, at least at the federal level. Such an outcome is desirable: the still relatively new Quebec Civil Code was the subject of in-depth analysis and careful study prior to its adoption and its contribution could be very valuable. Access to different legal systems and cultures provides access to different legal perspectives and to a greater understanding of their respective strengths and weaknesses. The juxtaposition of the common law and civil law is 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.\footnote{Canada, 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).} In explanatory notes provided to assist in an understanding of 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.\footnote{Canada, Minister of Finance, Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and Related Legislation (Ottawa: Department of Finance Canada, October 2012) ITA 248(30) to (41), online: Department of Finance Canada http://www.fin.gc.ca/drleg-apl/nwmm-amvm-1012n-05-eng.asp} The result is hybrid law and arguably, better law.

\begin{itemize}
\item 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.
\item 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.
\end{itemize}

[...]

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
In a remarkable essay that deserves to be translated into English, Professor Gaudreault-Desbiens examines the fate that might await section 8.1 of the *Interpretation Act*. He is concerned that lawyers and judges might attempt to limit the application of section 8.1, in light of [TRANSLATION] “the traditional policy of containment of the civil law”. In his view, this traditional policy is the result of several factors: the unilingualism and unijuralism of the majority of Canadian jurists; indifference toward Quebec civil law and even a certain mistrust of it; finally, the feeling that the common law is superior to the civil law and that the latter need not be accorded real importance.

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

[TRANSLATION]

... wherever 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 ... where 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.

However, he admits that it is [TRANSLATION] “hard to anticipate exactly how the courts would give effect to the suggested rule”. 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 Supreme Court of Canada, were to limit the influence of Quebec civil law in federal matters by pursuing [TRANSLATION] “the traditional policy of containment of the civil law”, 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 harmonization process undertaken by the federal Parliament, believe that the existence of different legal traditions within the Canadian federation is an important asset, 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

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115 *Ibid* at 122.

116 *Ibid* at 120.

117 *Ibid* at 122-123.
differences of opinion arise. For example, Professor 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)."\(^\text{118}\) Professor Leckey, who has criticized the federal harmonization process as being "top-down", seems to favour legal pluralism instead, in which [TRANSLATION] "without 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".\(^\text{119}\) He goes on:

[TRANSLATION]

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.\(^\text{120}\)

In his essay, Professor Gaudreault-Desbiens has 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 expressed by certain authors, to the effect that courts, lawyers or even citizens will of their own accord move toward multijuralism or legal pluralism are unrealistic, given the systemic resistance that exists. What is required is a climate that will encourage dialogue and exchange, by making use of various tools or [TRANSLATION] "micro-strategies to ... overcome structural obstacles".\(^\text{121}\) Could it not be said these tools include section 8.1? And that if judges do not hesitate to make use of that section when circumstances allow, they will encourage such dialogue and exchange?

These comments give rise to the following proposals.

Supreme Court of Canada 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 languages”.\(^\text{122}\) Could a new amendment to these rules not be adopted whereby factums would also have to take into account the possible application of sections 8.1 and 8.2 when the interpretation of federal legislation is in issue? Since the Supreme Court may take sections 8.1 and 8.2 into account ex officio,\(^\text{123}\) would it not be better for the parties to be aware of the possible application of those sections when they are preparing their factums? This would give them the opportunity to examine the relevance of those sections in detail.

\(^{118}\) Sullivan, Challenges, supra note 18 at 1044.

\(^{119}\) Leckey, supra note 18 at 44-45.

\(^{120}\) ibid at 45-46.

\(^{121}\) Supra note 114 at 113-114.

\(^{122}\) Rules of the Supreme Court of Canada, r. 42(2)(b).

\(^{123}\) Supra note 102.
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 sessions 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 transystemic legal training in the programs offered by the Ottawa, McGill, Montreal and 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 such an approach, an important message would be sent to the 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 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 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”. The more extraordinary the place, the more important comparative legal studies become. In 2008, my colleague, Louise Bélanger-Hardy and I expressed the following opinion:

With its common law, civil law and indigenous law traditions, its two official languages and the recognition of numerous aboriginal languages in its territories, Canada is obviously one of the extraordinary places described above. [...] An enhanced knowledge of other traditions 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 21st century.

An independent federal body responsible for comparative law would be a major step in this direction. In addition to its general mandate, that of promoting study and research in the field of comparative law, such an organization could also have other tasks, including

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125 Ibid.
126 Supra note 111 at 22-23.
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 required 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 perhaps be more willing to apply section 8.1 when it is appropriate to do so.

**Conclusion**

In Part II above, ten Supreme Court of Canada cases were analyzed in order to identify trends in the application of section 8.1. Based on this relatively limited number, it is still too early to arrive at any firm conclusions. While the Court 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 Innovation Credit Union and Radius Credit Union cases, it did not hesitate to apply section 8.1 but did so in the usual context of interaction between federal legislation and the common law. In the latest case, the decision to exclude section 8.1 was warranted. It remains to be seen whether the Supreme Court will seek to exclude section 8.1 when it is next faced with a situation in which provincial law complements a federal enactment and this gives rise to non-uniform application of federal legislation. If the Court were to distance itself from section 8.1 in such circumstances, the following consequences are to be expected: a reduction of the role of Quebec civil law in interpreting federal legislation and perhaps even a return to the earlier practice whereby common law concepts are grafted unto Quebec civil law. If the Supreme Court were to adopt this approach, would it not be curtailing the intention of Parliament, as expressed in section 8.1? If on the other hand the Supreme Court of Canada applied section 8.1 as needed, this would necessarily have the effect of increasing the role of Quebec civil law at the national level. D.I.M.S. and the proposed amendments to the ITA\(^{127}\) offer a glimpse of the positive ramifications that could follow. Section 8.1 of the Interpretation Act makes it possible to interpret federal legislation by taking the civil law and the common law into account. If that section is applied as it should, the two systems will be contrasted and evaluated more often and this will encourage ongoing exchanges at the level of federal legislation between Quebec civil law and Canadian common law. This would undoubtedly contribute to the development of comparative law in Canada. Authors have frequently expressed the wish that Canada's unusual legal diversity

\(^{127}\) *Supra* note 114, 114.
might one day lead to such results or even to a partly mixed or hybridized law. There is no doubt that, if it is not sidelined, section 8.1 could contribute to the development of Canada's unique legal landscape.