CANADA

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INTRODUCTION

Canada is a complex country that could perhaps best be described as an accident of colonial history. In order to understand its legal structure and the forces for and against unification that coexist within the country, an overview of Canada's historical, political and social situation is required.

Beginning in 1534, France colonized the eastern and all of the central parts of the territory that now form part of Canada, then populated by various indigenous peoples. Civil law, the law of the colonial power, thus applied in this territory as a matter of course. In the Treaty of Paris, 1763, the colony was ceded to Great Britain and following this transfer of power, Great Britain attempted to impose English common law on the territory. However, this change of legal regime gave rise to numerous grievances and Great Britain finally agreed to restore, with certain exceptions, the French civil law tradition, insofar as it related to the "Property and Civil Rights" of the population.[1]

Less than thirty years later, the *Constitution Act, 1791*[2] divided the territory into two provinces, predominantly English-speaking Upper Canada and predominantly French-speaking Lower Canada, separated by the present boundary between the provinces of Ontario and Quebec. The Legislature of Upper Canada immediately abandoned the civil law in favor of the common law.[3] As for Lower Canada, not only did it retain the civil law but it also, in due course, codified it.[4]

A year after the codification of Quebec civil law, the *Constitution Act, 1867*[5] created the Dominion of Canada, composed of the provinces of Nova Scotia, New Brunswick, Ontario (formerly Upper Canada) and Quebec (formerly Lower Canada). Legislative powers were distributed between the federal Parliament on the one hand and the four new provincial Legislatures on the other, and it was expressly provided that the provinces could legislate with respect to property and civil rights, thereby ensuring that Quebec retained the French civil law tradition in the sphere of private law. Ontario, Nova Scotia and New Brunswick retained the English common law tradition. The other six provinces that subsequently joined the federation (Prince Edward Island, Manitoba, British-Columbia, Saskatchewan, Alberta, and Newfoundland) also received or opted for the common law.

In addition to these ten provinces, present-day Canada also includes three territories, Yukon, Northwest Territories and Nunavut.

Based on its 2006 Census, Canada has a population of over 31,000,000. Of that number, the mother tongue of approximately 18,000,000 is English; the mother tongue of approximately 7,000,000 is French

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[1] Section VIII of the *Quebec Act, 1774* (U.K.), 14 George III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2. For more detailed descriptions of the legal upheavals during this period, see Henri Brun, "Le territoire du Québec: à la jonction de l'histoire et du droit constitutionnel" (1992) 33 C. de. D. 927; Michel Morin, "Les changements de régimes juridiques consécutifs à la Conquête de 1760" (1997) 57 R. du B. 689; see also Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, 5th ed. (Toronto: Carswell, 2007) at 2.1-2.10 [Hogg].

[2] (U.K.), 31 George III, c. 31, reprinted in R.S.C. 1985, App. II, No. 3.

[3] Upper Canada Statutes, 1792, 32 Geo. III, c. I, s. III.

[4] The civil law of Quebec was first codified in 1866; see *An Act respecting the Civil Code of Lower Canada*, S. Prov. C. 1865 (29 Vict.), c. 41.

[5] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 ["*Constitution Act, 1867*"].

and approximately 6,000,000 have a mother tongue other than English or French. There are approximately 1,200,000 aboriginal people in Canada - Inuit, Métis and First Nations people.

Francophones constitute the majority in Quebec. Elsewhere in Canada, the majority is anglophone although there are also important francophone minorities in Ontario and New Brunswick and an important anglophone minority in Quebec, primarily in the City of Montreal. In the territory of Nunavut, the majority of the population is Inuit and there are important aboriginal populations in the other two Territories together with smaller aboriginal populations elsewhere in Canada.[6]

These ethnic and linguistic differences give rise to cleavages in the federation. No doubt the most important is the cleavage between francophones and anglophones, the two main linguistic groups in the country. Between 1980 and 1995, two unsuccessful referenda were held in the Province of Quebec with a view to obtaining the secession of the province from the federation.[7] In addition, since the early 1990s, the Bloc Québécois, a sovereignist party at the federal level, has received substantial support from the Québec population. For example, in the federal election on October 14, 2008, the Bloc secured 49 of 75 seats from Quebec (there are 308 seats in the House of Commons). The advent of this strong regional political party had the effect of reducing the importance of the Liberal and Conservative parties nationally since it became very difficult for these two parties to obtain coast to coast mandates. Following the last federal election, the country was essentially divided between the Conservative party representing the West and the Liberals representing the Center and the East, subject of course to the strong presence of the Bloc in Quebec. The election on May 2, 2011 took everyone off-guard. The Liberal and the Bloc parties were decimated and the Conservative party, a right-of-center party, obtained a majority. However, Quebec maintained its tendency to surprise and muddy the waters by voting massively in favour of the New Democratic Party, a left-of-center party. As a result, the NDP became the official opposition party for the first time in its history and the majority of the NDP members of Parliament now come from Quebec. The NDP, a federalist party, will now have to give serious consideration to Quebec interests. How the francophone-anglophone cleavage plays out within the NDP caucus and within Canada in the next few years remains to be seen.

A cleavage also exists between white and aboriginal communities. The latter must deal with substantial issues relating to health and welfare, education, unemployment and prison incarceration.[8] Despite efforts by aboriginal leaders, the issues are very complex and political will at both the federal and provincial levels leaves something to be desired. As a result, progress in dealing with these issues has been slow.

Finally, there has also been considerable asymmetry arising from the advanced economic development of central provinces (Ontario and Quebec) and the relative under-development of western and especially eastern provinces. Recently, however, the manufacturing base of central Canada has weakened, while the resource-based economies of the east and especially the west have begun to strengthen rapidly and to diversify. In addition, equalization payments to less well-off provinces have enabled them to maintain reasonable levels of education, health and social services.

Such is, very briefly, the historical, political and social background against which Canada's unique approach to harmonization and unification of laws has developed.

I. THE DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

[6] Statistics Canada, online: www.statcan.ca.
[7] See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.
[8] For a detailed analysis of these issues, see Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa : The Commission, 1996); see also *People to People, Nation to Nation. Highlights from the Report of the Royal Commission on Aboriginal Peoples*, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ch/rcap/rpt/index_e.html>.

1. *Exclusive Powers*

As is the case with all federations, law-making power is distributed between the central or federal government and the state or provincial governments that form part of the federation. In Canada, these powers are essentially distributed pursuant to sections 91 and 92 of the *Constitution Act, 1867*.[9]

On the basis of section 91 of the *Constitution Act, 1867*, the exclusive legislative authority of the Parliament of Canada extends to the following thirty subjects:

1. Repealed.
1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.

[9] For more information relating to the distribution of legislative power in Canada, see Hogg, *supra* note 1 and Patrick J. Monahan, *Constitutional Law*, 3d ed. (Toronto: Irwin Law, 2006).

25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Among the thirty subjects, the most important and frequently used are trade and commerce, employment insurance, taxation, defence, currency and banking, bankruptcy and insolvency, patents, copyrights, Indian affairs, citizenship, marriage, divorce and criminal law. In addition, the opening words of section 91 of the *Constitution Act, 1867* allocate residual power to the central government. It is there stated that the Parliament of Canada can "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

Pursuant to section 92 of the *Constitution Act, 1867,* each province may exclusively make laws in relation to the matters enumerated in that section. Specifically, the exclusive legislative authority of the provinces extends to the following fifteen subjects:

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as

> are of the following Classes:
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> *(a)* Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
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> *(b)* Lines of Steam Ships between the Province and any British or Foreign Country:
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> *(c)* Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
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> 11. The Incorporation of Companies with Provincial Objects.
> 12. The Solemnization of Marriage in the Province.
> 13. Property and Civil Rights in the Province.
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
> 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
> 16. Generally all Matters of a merely local or private Nature in the Province.

In addition to these exclusive powers, section 92A, added to the *Constitution Act, 1867* in 1982,[10] grants the provinces exclusive legislative power over non-renewable natural resources, forestry resources and electrical energy within a province. Finally, pursuant to section 93 of the *Constitution Act, 1867*, the provinces "may exclusively make Laws in relation to Education".

It must be noted that it is only the provinces that receive their legislative authority from the *Constitution Act, 1867*. The three territories, by contrast, merely have the powers that the Parliament of Canada has chosen to delegate to them, since Parliament has plenary legislative powers over the territories.[11]

In practice, the most important areas of exclusive or predominant provincial government regulation are those relating to : 1) property and civil rights (in essence, rights relating to private law, thereby allowing the provinces to enact legislation in relation to property law, commercial law, labour law, wills and estates and family law, for example); 2) education; 3) health and welfare; and 4) the administration of justice in the province (including civil procedure and the constitution, along with maintenance and organization of courts having both civil and criminal jurisdiction).

[10] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, reprinted in R.S.C. 1985, App. II, No. 44.
[11] *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c.28, reprinted in R.S.C. 1985, App. II, No. 11.

In addition, based on the provinces' ability to make laws pursuant to section 92(13) (property and civil rights) and section 92(16) (matters of a merely local or private nature), it can be argued that there exists a provincial residuary power comparable to the federal power.[12]

As stated earlier, the enumerated powers granted pursuant to section 91 are "exclusive" to the Parliament of Canada and the same is true of the powers granted to the provinces pursuant to section 92. Yet some of the provincial powers, of which the most important is the power to legislate in relation to property and civil rights, come into conflict with the exclusive powers granted to the Parliament of Canada. Since 1867, this has been the subject of numerous decisions by the Judicial Committee of the Privy Council in England, and by the Supreme Court of Canada when it became the court of last resort in 1949.

Although there is clear historical evidence to demonstrate that the *Constitution Act, 1867* was intended to create a strong federal government, judicial interpretation of sections 91 and 92 has had the opposite effect. In particular, the provincial power over property and civil rights in section 92(13) has been very broadly interpreted and federal powers that might potentially overlap with section 92(13) have been given a more limited interpretation. For example, the Judicial Committee of the Privy Council held that anything relating to property and civil rights within a province was excluded from the federal power over the regulation of trade and commerce granted pursuant to section 91(2).[13] This obviously had the effect of dramatically reducing the ambit of federal power in this field.

It must be noted, however, that where validly anchored federal legislation and validly anchored provincial legislation contradict each other, courts will recognize federal legislation as paramount. This will be discussed in more detail below.

Because of the judicial interpretation of sections 91 and 92 of the *Constitution Act, 1867*, there is today considerable overlap between federal and provincial laws, with the result that federal and provincial legislation coexists in many areas (for example, corporate law, securities regulation, highways and ports). According to an article published in 2000, "[t]he only exclusively federal areas are military defence, veterans' affairs, postal service, and monetary policy"; as for the provinces, the only exclusive areas are "municipal institutions, lands and forests, roads, liquor licensing, and elementary and secondary education".[14]

2. *Concurrent Powers*

Section 92A, added to the *Constitution Act, 1867* in 1982, grants to the provinces the non-exclusive or concurrent power to enact laws relating to the export of non-renewable natural resources, forestry resources and electrical energy from a province to another part of Canada.

In 1951, section 94A was added to the *Constitution Act, 1867*, granting Parliament concurrent power to enact laws in relation to old-age pensions and supplementary benefits.[15] Federal legislation enacted

[12] See Peter W. Hogg, Q.C. & Wade K. Wright ″Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism″ (2005) 38 U.B.C. L. Rev. 329 at para. 22; see also Lord Watson in *Ontario (A.-G.) v. Canada (A.-G.)*, [1896] A.C. 348 at 365 (often described as the *Local Prohibitions Case*).
[13] The leading case is *Citizens Insurance Co. v. Parsons* (1881), 8 App. Cas. 406.
[14] Garth Stevenson, "Federalism and Intergovernmental Relations" in Michael Whittington & Glen Williams, eds., *Canadian Politics in the 21st Century* (Scarborough: Nelson, 2000) 79 at 88. However, this statement is now less accurate with respect to municipal institutions; for example, the 2004 federal budget provided municipalities with a goods and services tax rebate worth $7 billion over 10 years for their areas of greatest need and the 2005 budget provided $5 billion over five years in gas tax funds, together with a commitment of up to $800 million for transit funding (see http://www.infc.gc.ca/media/news-nouvelles/gtf-fte/2005/20050823saskatoon-eng.html).
[15] See the *British North America Act, 1951* (U.K.), 14 & 15 Geo. VI, c. 32 and the *Constitution Act, 1964* (U.K.), 1964, c. 73.

pursuant to this section is, however, subject to provincial laws, which take precedence in case of conflict. To date, only Quebec has enacted such a law.[16]

Finally, section 95 of the *Constitution Act, 1867* grants Parliament and the provinces concurrent power over agriculture and immigration but provides that, in the event of a conflict between a federal and a provincial law, federal law takes precedence.

Since the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*, the Supreme Court of Canada has held that it is an area of concurrent jurisdiction. Specifically, the jurisdiction of the Parliament of Canada in this area can be inferred from various powers, including its criminal law power and its general power to legislate for peace, order and good government in situations of national concern; provincial jurisdiction, by contrast, can be inferred from various subsections in section 92 of the *Constitution Act, 1867*.[17]

Administrative procedure is clearly an area of concurrent jurisdiction, although this is not explicitly stated in the *Constitution Act, 1867*.[18] The expression "administrative procedure" is very broad and necessarily includes the numerous regulations and safeguards put in place by the Parliament of Canada or by the provinces in the exercise of their respective jurisdictions. For example, section 91(2) of the *Constitution Act, 1867* (regulation of trade and commerce) clearly allows the Parliament of Canada to establish procedures of an administrative nature in the exercise of this jurisdiction. The same is true for the provinces: section 92(4) of the *Constitution Act, 1867* (establishment and tenure of provincial offices and the appointment and payment of provincial officers) is one of many possible areas of provincial jurisdiction which obviously create a need for procedures of an administrative nature. It should also be noted that although a number of provinces have enacted legislation relating to administrative procedure, to date, federal administrative agencies are not subject to any such legislation.[19]

Finally, matters relating to culture are also areas of concurrent jurisdiction. The Supreme Court of Canada has stated:

> The Constitution of Canada does not include an express grant of power with respect to "culture" as such. Most constitutional litigation on cultural issues has arisen in the context of language and education rights. However, provinces are also concerned with broader and more diverse cultural problems and interests. In addition, the federal government affects cultural activity in this country through the exercise of its broad powers over communications and through the establishment of federally funded cultural institutions. Consequently, particular cultural issues must be analyzed in their context, in relation to the relevant sources of legislative power.[20]

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[16] *Quebec Pension Plan*, S.Q. 1965, c. 24.

[17] The leading case is *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. See also *A.G. Canada v. Hydro Quebec*, [1997] 3 S.C.R. 213; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 at para. 33.

[18] It must, however, be noted that the *Constitution Act, 1867* refers specifically to criminal and civil procedure. Section 92(14) of [the Constitution] gives jurisdiction to the provinces with respect to the "Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, *and including Procedure in Civil Matters in those Courts*" [emphasis added]. Section 91(27) gives jurisdiction to the Parliament of Canada with respect to " […] Procedure in Criminal Matters".

[19] With regard to the absence of federal legislation in this area, see Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf (Scarborough, Ont.: Carswell, 2004) at 9-20. With regard to provincial legislation, see for example, *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22; see also the model administrative procedure code proposed by the Uniform Law Conference of Canada at <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1m3>.

[20] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146 at para. 51.

3. *Taxing Powers*

Both the federal and provincial governments have the power to tax. Pursuant to subsection 91(3) of the *Constitution Act, 1867*, the Parliament of Canada has the power to raise money "by any Mode or System of Taxation". As for the provinces, subsection 92(2) grants them a power of direct taxation in order to raise revenue for provincial purposes. Section 92A also allows the provinces to indirectly tax non-renewable natural resources, forestry resources, and electric energy.

The constitutional rules just mentioned ensure that there is no multiple, indirect taxation. Yet, federal and provincial powers overlap in the area of direct taxation. This has not been the subject of major conflict, because Parliament and the provinces have entered into agreements relating to the definition, collection and sharing of such taxes.

In addition, there are constitutional and legislative rules on revenue sharing between the federal government and the provinces. Specifically, section 36 of the Constitution commits Canada to providing "equalization payments" in order to ensure that all provinces have sufficient revenues to provide comparable levels of public services at comparable levels of provincial taxation. Yet attempts by the federal and provincial governments to establish acceptable revenue sharing criteria has led to lengthy, complex, ongoing, and sometimes acrimonious debate.[21]

4. *Resolution of Conflicts between Federal and Provincial Legislation*

The constitutional principle according to which conflicts between federal and provincial laws relating to the same matter are resolved is that of federal paramountcy - in cases of conflict, federal law prevails. This principle is not contained in the *Constitution Act, 1867* but once again is the result of judicial decisions. As a rule, however, it is only when there is express contradiction between federal and provincial legislation, or contradiction with the purpose of federal legislation, that the courts will rely on the principle of paramountcy.[22]

II. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *At the Federal Level*

A. *Unification of Provincial Legislation*

Certain sections of the *Constitution Act, 1867* were initially enacted with a view to ensuring federal oversight relating to provincial legislation[23] and could have been used to ensure its unification; however, there is now a clear understanding to the effect that Parliament will never resort to these sections.

[21] On December 5, 2003, the Council of the Federation was created. The Premiers of Canada's ten provinces and three territories are members of the Council. As stated on its website (www.councilofthefederation.ca), the objectives of the Council are to: "promote interprovincial-territorial cooperation and closer ties between members of the Council, to ultimately strengthen Canada; foster meaningful relations between governments based on respect for the Constitution and recognition of the diversity within the federation; [and] show leadership on issues important to all Canadians". Such an institution will, it is hoped, prove useful in resolving the many conflicts that arise between the provinces or between the federal and provincial governments.

[22] *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall,* [1990] 1 S.C.R. 121.

[23] Sections 55-58 & 90 allow the Parliament of Canada to 1) disallow or nullify any law passed by a province within two years of its enactment; 2) disallow provincial laws relating to education and even enact remedial legislation; 3) instruct the lieutenant governors of the provinces to withhold consent to provincial bills or to reserve them for the consideration of Parliament. In addition, section 94 of the *Constitution Act, 1867* granted to Parliament the power to enact laws providing for the uniformity of laws dealing with property and civil rights in Ontario, New Brunswick and Nova Scotia (Quebec was excluded). However, such a federal law could only take effect if the provinces in question adopted and enacted it and no such law has ever been enacted.

Although the federal government is not in a position to force the provinces to legislate, it can certainly attempt to persuade the provinces to do so by various means, including ratification of treaties to be implemented by the provinces and use of its spending power.

The latter is of major importance since the federal government has in fact induced the provinces to adopt uniform legislation by this means.[24] The *Canada Health Act*[25] is an example of federal legislation conditioning the allocation of central money to the provinces in compliance with central standards; it requires provinces to satisfy certain federal conditions, such as universal access to required medical treatment, in order to receive health care funding from the federal government.

The spending power thus provides the federal government with considerable influence in numerous areas of provincial jurisdiction, including post-secondary education. In addition, huge federal budget surpluses during a portion of the last decade provided the federal government with the funding required to engage in this exercise, despite protests from provincial governments, particularly Quebec.[26]

Apart from the ratification of treaties and the use of the spending power, there are also occasional threats by the federal government to take over certain fields in order to establish a uniform system in certain areas, but so far, the government has been reluctant to act on its threats. For example, to date, corporate securities have been regulated primarily at the provincial level. The possibility has been raised of the federal government creating a single securities regulator, replacing the existing checkerboard system. This led to skirmishes between the federal government and the provinces in the past and became full-scale conflict once the federal government signalled its intention to push ahead with such a proposal.[27]

B. *Harmonization of Bijural Federal Legislation*

The limited power of the federal government to promote unification of provincial law must be contrasted with its much more tangible power to harmonize its "bijural" legislation, that is, federal enactments relying on underlying provincial law for their meaning and effect.[28] In this regard, on June 1, 2001,

[24] Since the Constitution is silent in this regard, the federal spending power is inferred from other powers (to levy taxes, to legislate in relation to "public property" and to appropriate federal funds). See *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 567; Hogg, *supra* note 1 at 6.8 "Spending Power".

[25] R.S.C. 1985, c. C-6.

[26] See *A new division of Canada's financial resources: report* (Quebec, Commission sur le déséquilibre fiscal, 2002), online: Commission sur le déséquilibre fiscal <http://www.desequilibrefiscal.gouv.qc.ca/en/document/rapport_final.htm>; see also Alain Noël, Nicolas Marceau, Andrée Lajoie, Luc Godbout, "Déséquilibre fiscal – Le problème demeure entier" *Le Devoir* (17 June 2008) A7.

[27] The Supreme Court of Canada heard this matter on April 13-14, 2011 but has not yet rendered judgement; see In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council P.C. 2010-667, dated May 26, 2010 (Can.) (Civil) (Reference) (33718). To date, the Quebec and Alberta courts of appeal have concluded that the proposed act is unconstitutional, in whole or in part; see Québec (Procureure générale) c. Canada (Procureure générale), 2011 QCCA 591(March 31, 2011) and Reference re Securities Act (Can.), 2011 ABCA 77 (March 8, 2011).

[28] The terms "bijural" and "bijuralism" are Canadian neologisms coined to reflect the co-existence of civil law in Quebec and the common law elsewhere in Canada with respect to matters of private law ("property and civil rights"). Given the growing importance of aboriginal law in Canada and the existence of variations in the law from one province to the other (not only between Quebec and the other provinces, but also among the common law provinces), Canada is occasionally referred to as being multijural or plurijural. In that particular context, use of the terms "multijural" and "plurijural" is accurate. Although it can be argued that there are three legal traditions in Canada (aboriginal, civil law, and common law) and perhaps more than three if the aboriginal tradition is subdivided into different components, only two legal traditions have primary relevance in the context of property and civil rights, which fall within the jurisdiction of the Canadian provinces. These matters are regulated by the civil law applicable in Quebec, and by the common law applicable elsewhere in Canada. In these circumstances, the term "bijural" and its companion term "bijuralism" are appropriate, since they refer to the two legal traditions that form the basis of provincial jurisdiction in matters relating to property and civil rights.

sections 8.1 and 8.2 of the *Interpretation Act* of Canada came into force.[29] These sections, set out below, contain the principles which underlie the interpretation of bijural federal legislation.

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.
8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.	8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un ou l'autre de ces systèmes.

Section 8.1 first recognizes the authority of both the common law and the civil law, by confirming that they are both sources of the law of property and civil rights. It clearly states that 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", then "unless otherwise provided by law" the rules, principles and concepts in force in the province at the time the enactment is being applied provide the backdrop for the federal legislation.

Section 8.2 deals with the terminology used in a federal enactment to describe a private law rule. That terminology must be understood to have a meaning that is compatible with the legal system of the province in which the enactment is applied, unless "otherwise provided by law". For example, depending on the province or territory in question, as a general rule, if a federal enactment uses the expression "trust", it refers either to the trust developed by Equity, in the common law provinces and territories of Canada, or to the trust described in articles 1260-1298 of the *Civil Code of Québec*. By thus confirming that the common law and the civil law are equally authoritative, the federal government recognizes the importance of both traditions: both are clearly placed on an equal footing for the purpose of interpreting bijural federal legislation.

The federal government is in the process of reviewing its legislation in order to ensure that bijural federal legislation uses the concepts and terminology that are true to both the common law and civil law traditions. It is in this sense that federal legislation is said to be "harmonized".[30]

[29] R.S.C. 1985, c. I-21; ss. 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, s. 8.

[30] For more information relating to bijural federal legislation and the harmonization process, see *Canadian Legislative Bijuralism Site*, online: Department of Justice Canada <http://www.bijurilex.gc.ca>; see also, Aline Grenon, "*The Interpretation of Bijural or Harmonized Federal Legislation: Schreiber v. Canada (A.G.)*", Case Comment, (2005) 84 Can. Bar Rev. 131 at 134-149.

As a result, in Canada, the terms "harmonization" and "unification" are used differently in the federal and provincial contexts.

> *Federal Conception of Harmonization*: federal legislation that relies, for its meaning and effect, on underlying provincial law in relation to property and civil rights is described as "bijural". Since provincial law in relation to property and civil rights is based on civil law in Quebec and on the common law elsewhere in Canada, bijural federal legislation is said to be "harmonized" when it has been drafted, reviewed or modified to ensure that it takes both legal traditions into consideration.
>
> *Provincial Conception of Harmonization and Unification*: as will be seen below, in the provincial context, the terms "unification" and "harmonization", or their variants, appear to be viewed as synonymous: they refer to proposals that seek to ensure that provincial laws dealing with similar subject matter are similar or identical. There may, however, be a slight difference in degree between the two terms: "unification" is perhaps more likely to describe identical legislation whereas "harmonization" describes legislation that is similar but not identical. As a result, in the provincial context, the meaning of the word "harmonization" is very different from its meaning in the federal context

Accordingly, in this report, the term "harmonization" refers only to federal efforts relating to bijural federal legislation, whereas the term "unification" refers to proposals seeking to ensure that provincial laws dealing with similar subject matter are similar or identical.

As will be illustrated in section III below, bijural federal legislation can be interpreted differently in Quebec and in the common law parts of Canada as a result of sections 8.1 and 8.2, and this can be said to fly in the face of unification. Yet, in the particular context of the Canadian federation, these sections, whose primary purpose is to set out the principles for interpreting bijural federal legislation, also seek to respect legal diversity by recognizing the authority in Canada of both the common law and the civil law in matters relating to property and civil rights. Although these sections will inevitably give rise to variations in the application of bijural federal legislation, they will also foster, in this writer's opinion, a heightened awareness of the strengths and weaknesses inherent in both legal traditions and may in certain circumstances produce a measure of uniformity. This will be discussed in more detail in section III.

With respect to unification (rather than harmonization) initiatives, the Law Reform Commission of Canada (1971-1993) and its successor, the relatively short-lived Law Commission of Canada (1997-2006), did play a role.. With the unfortunate demise of the latter, due to lack of funding from the federal government, representatives of the federal government now remain involved in unification initiatives primarily through the work of the Uniform Law Conference of Canada, discussed below.

2. *At the Provincial Level*

Representatives of the provincial governments are primarily involved in unification initiatives via the work carried out by the Uniform Law Conference of Canada, whose role is discussed in more detail below. In addition, provincial premiers meet often, and these meetings can result in agreements, among some or all of the premiers, relating to uniform legislation.

3. *The Role of the Courts*

The Supreme Court of Canada was created pursuant to section 101 of the *Constitution Act, 1867*, which authorized Parliament to establish "a General Court of Appeal for Canada". This section also gave rise to the creation of the Federal Court of Canada, composed of trial and appellate courts (final appeals are to

the Supreme Court). Finally, each province has trial and appellate courts, pursuant to section 92(14) of the *Constitution Act, 1867*.

The Supreme Court of Canada plays a role with respect to both harmonization and unification of law. When the Court was initially established, it was viewed as a means of developing a unified legal system. Although this is now less often the case, at least insofar as bijural federal legislation is concerned, the Court can and does create uniform norms when called upon to interpret other federal legislation. In addition, since it is the "General Court of Appeal for Canada", it hears appeals from provincial courts and can also establish uniform norms in respect of provincial law.[31]

It has been held that section 92(14) gives full jurisdiction to provincial courts over federal, provincial or constitutional matters.[32] This is, however, subject to the following caveats:

1) appeals from all provincial courts of appeal are to the Supreme Court of Canada, thereby ensuring a measure of uniformity at the national level;
2) with respect to matters under federal jurisdiction, if federal law is silent with respect to the forum of adjudication, provincial courts will have jurisdiction unless Parliament has stipulated the forum; in some cases (for example, criminal law, divorce, bankruptcy and insolvency) Parliament has specifically granted jurisdiction to provincial courts;
3) certain federal matters must be brought before the Federal Court of Canada;
4) pursuant to section 96 of the Constitution, the federal government appoints the judges "of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick", thereby granting the federal government a certain degree of control over these courts.

Courts in the common law provinces and territories of Canada will almost invariably consider legislative or judicial practice of other common law provinces and will occasionally consider those of Quebec. As for Quebec courts, they will consider legislative or judicial practice of common law provinces if the issues involve federal legislation or provincial legislation similar to that found in the other provinces (for example, insurance law or company law). Decisions by these courts can give rise to uniform interpretation of similar provincial enactments. Yet, the reverse can also occur and in these circumstances, the Supreme Court of Canada may be called upon to resolve conflicting decisions rendered by provincial court of appeals, thereby contributing to uniform interpretation of provincial law.[33]

Finally, although the Supreme Court of Canada will normally resolve differences in legal interpretation among courts, legislation will occasionally be adopted at the federal, provincial or territorial levels with a view to resolving such differences. For example, the Supreme Court of Canada recently missed a rare opportunity to unify, in conformity with civil law concepts, Quebec personal property security rules with similar rules applicable elsewhere in Canada[34] but a degree of unification could still be achieved if the Quebec or the federal government were to modify existing federal or provincial legislation.[35]

4. *Other Means of Achieving Unification*

[31] But see *infra* notes 33 & 34 and accompanying text.
[32] *Valin v. Langlois* (1879), [1880] 3 S.C.R. 1 at 19; *Ontario (A.G.) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206 at 217.
[33] See e.g. *Re Giffen*, [1998] 1 S.C.R. 91, where the Supreme Court resolved conflicting approaches of the Ontario and Saskatchewan court of appeals, relating to personal property security.
[34] See *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326; *Ouellet (Trustee of)*, 2004 SCC 64, [2004] 3 S.C.R. 348.
[35] In this regard, see Aline Grenon, "La problématique entourant les « sûretés-propriétés » au Québec : *Lefebvre* (*Syndic de*)*; Tremblay* (*Syndic de*) et *Ouellet* (*Syndic de*)" (2005) 35 R.G.D. 285.

A. *Uniform Law Conference of Canada*

The Uniform Law Conference of Canada (ULCC) was "founded in 1918 to harmonize the laws of the provinces and territories of Canada, and where appropriate the federal laws as well".[36] It is composed of two sections: the Criminal Section and the Civil Section. Its work is carried out by delegates appointed by the member governments.

> Criminal Section: although criminal laws fall mainly under federal jurisdiction in Canada (section 91(27) of the *Constitution Act, 1867*), the administration of criminal justice is largely provincial, pursuant to section 92(14). The Criminal Section accordingly allows representatives from both levels of government, together with other interested parties such as defence counsel and judges, to meet and discuss proposals to improve the criminal justice system.
>
> Civil Section: as stated on the ULCC website, the Civil Section "assembles government policy lawyers and analysts, private lawyers and law reformers to consider areas in which provincial and territorial laws would benefit from harmonization. Sometimes the federal government has related responsibilities, and it participates in the appropriate discussions in such cases. The main work of the Civil Section is reflected in 'uniform statutes', which the Section adopts and recommends for enactment by all relevant governments in Canada. On occasion the Section adopts a 'model statute', on which it expresses no opinion as a matter of policy, but which it offers as a method of harmonization where member governments want to use it". Since 1990, all uniform statutes are drafted in both English and French.

In an article published in 1997, it was stated that as of 1995, the ULCC "had adopted 93 uniform acts, of which 77 were still current".[37] It was also pointed out that this record compared favourably with that of the National Conference of Commissioners on Uniform State Laws (NCCUSL): as of 1989, the NCCUSL had approved 135 uniform acts which remained current.[38]

Overly modest funding and the lack of a strong commitment on the part of governments have constituted major problems for the ULCC in the past. However, following consultations with many stakeholders, including government representatives, the ULCC adopted an ambitious project, i.e., the Commercial Law Strategy, in order to modernize and harmonize commercial law in Canada. The Strategy was approved by all Ministers of Justice in December 1999 with a commitment to provide funding to permit it to move forward.

The Strategy encompasses areas such as sale of goods, international sale of goods, secured transactions, federal secured transactions, commercial liens, documents of title, the holding and transfer of investment securities, electronic commerce, leases, licensing of intellectual property, negotiable instruments and cost of credit disclosure. Of these elements, priority has been given to promoting the speedy enactment of uniform acts pertaining to e-commerce, commercial liens and cost of credit disclosure (including uniform regulations relating to the latter), and to actively press forward with other important initiatives relating to e-commerce and federal secured transactions.

According to the ULCC website, since the adoption of the Commercial Law Strategy, CLS initiatives have been generally accepted and many Uniform Acts or amendments have been adopted or are under

[36] See online: Uniform Law Conference of Canada <http://www.ulcc.ca>; for a recent article relating to the ULCC, see Arthur Close, "The Uniform Law Conference and the Harmonization of Law in Canada" (2007) 40 U.B.C. L. Rev. 535 [Close].
[37] Jacob S. Ziegel, "Harmonization of Private Laws in Federal Systems of Government: Canada, the USA, and Australia" in Ross Cranston, ed., *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford: Clarendon Press, 1997) 131 at 145.
[38] *Ibid*.at 154-155.

consideration.[39] Specifically, the ULCC has had resounding success with its *Electronic Commerce Act* (enacted in all ten provinces and two of the three territories) as well as its *International Commercial Arbitration Act* and its *International Sale of Goods Act*, both of which have been enacted in all of Canada.[40]

B. *The Legal Profession and Law Schools*

The role of the legal profession, including law schools, in promoting unification is difficult to evaluate. Although the conservatism of the legal profession constitutes an obstacle to unification, there exist many committed jurists willing to push forward with such initiatives. As for Canadian law schools, although they draw students from throughout the federal system, the tendency is for students who have been raised in common law provinces to attend one of the law schools in those provinces. In a similar vein, students raised in Quebec attend law school there.

Legal education invariably focuses on both federal and provincial law. Insofar as the latter is concerned, however, most law schools in the common law parts of Canada focus on the common law and on statute law that is relevant to the province in which they are located. Quebec law schools, by contrast, focus on the *Civil Code of Québec*, provincial statutes and Quebec doctrine and court decisions. As a result, apart from federal law, most law graduates are knowledgeable in only common law or civil law.

Still, a limited number of graduates acquire knowledge of both systems, since the law schools of the University of Ottawa, McGill University, *Université de Montréal* and *Université de Sherbrooke* provide students with the opportunity to acquire a bijural legal education.[41] Although such knowledge cannot be said to promote unification of law, it does allow a small group of jurists to acquire a better understanding of the strengths and weaknesses inherent in both systems. In conjunction with the possible effects of sections 8.1 and 8.2 of the *Interpretation Act* of Canada, discussed in more detail in section III below, this could generate positive results in years to come.

Students who have obtained their degree from a Canadian law school and who wish to practice must first be admitted to the bar of a specific province, since admission to the bar is not system-wide. As a rule, those admitted to one bar will set up their practice or take employment in the province or territory in which they have been admitted. But once a lawyer has been admitted to the bar of one province or territory, mobility between provinces and territories is now facilitated as a result of the efforts of the Federation of Law Societies of Canada.[42] Increased mobility may lead to increased awareness of unnecessary divergences in the laws of the various provinces and thereby promote unification.

Certain other legal institutions also play a unifying role. In addition to the law schools that provide students with the opportunity to acquire a bijural legal education (in this regard, it must be noted that many judges of the Federal and Supreme courts of Canada make a point of hiring law clerks with a bijural legal background), the National Judicial Institute, which develops and delivers educational programs for all federal, provincial and territorial judges, perhaps plays such a role, despite the fact that one of its stated objectives is to reflect Canada's diversity.[43]

C. *Restatements*

[39] See e.g. the *Status of Uniform Acts Recommended by the Commercial Law Strategy*, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/cls/CLS_Status_Acts_En.pdf>.
[40] *Ibid.*
[41] See the websites of these law schools for further information relating to these programs. Law students elsewhere in Canada who wish to acquire such an education have to transfer to another law school.
[42] See www.flsc.ca.
[43] See www.nji.ca.

In Canada, there are no restatements similar to those published by the American Law Institute. Instead, reliance is placed on compilations or digests such as *Halsbury's Laws of Canada* or the *Canadian Abridgment*, produced by commercial publishers. These compilations are less relevant in Quebec private law matters, because of the codification of civil law principles and the existence in Quebec of important works of doctrine, primarily published in French. As a result, the impetus toward unification provided by publications equivalent to the American restatements is not available in Canada.

D. *Industry, Trade and other Entities*

Industry, trade or other organizations can promote legal unification, either through lobbying or by establishing standards and practices that are subsequently reflected in uniform or harmonized legislation. Two such groups are the Canadian Council of Insurance Regulators[44] and the Canadian Securities Administrators,[45] although the role played by the latter is ambiguous. As stated on the website of the Canadian Securities Administrators, the group is "a voluntary umbrella organization of Canada's provincial and territorial securities regulators". Although its stated objective is "to improve, coordinate and harmonize regulation of the Canadian capital markets", it is clear that this is to be carried out by the provinces and territories, rather than by the federal government. The harmonization sought by this group appears to fall short of the full unification that would result if the federal government were to proceed with a single securities regulator.[46]

E. *International Factors*

Compliance with international legal obligations no doubt has an influence on legal unification, although the extent of the influence cannot be verified.

In addition, Canadian representatives are involved in various international unification projects, including those put forward by UNCITRAL, UNIDROIT and the Hague Conference on Private International Law. For example, the Canadian government and, with the help and encouragement of the ULCC, all the provincial and territorial governments, have adopted legislation based on the Model Law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985.[47] Canada is also a party to the Hague Conference *Convention on the Law Applicable to Trusts and on their Recognition*[48], the UNCITRAL *United Nations Convention on Contracts for the International Sale of Goods*[49] and the UNIDROIT *Convention Providing a Uniform Law on the Form of an International Will.*[50]

Involvement in such international unification projects could eventually give rise to domestic unification initiatives.

III. THE STATE OF UNIFICATION IN CANADA

Because federal and provincial objectives with respect to unification are not the same, the state of unification in Canada has to be discussed separately, at both the federal and provincial levels.

[44] See www.ccir-ccrra.org.
[45] See www.csa-acvm.ca.
[46] See *supra* note 26 and accompanying text.
[47] See *Selected Uniform Statutes in alphabetical order*, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1i6>; see also Close, *supra* note 36 at 553, n. 44.
[48] 1 July 1985, Can. T.S. 1993 No. 2, (entered into force in Canada1 January 1993).
[49] 11 April 1980, Can. T.S. 1992 No. 2, (Also known as the Vienna Convention of 1980, entered into force in Canada 1 May 1992).
[50] 26 October 1973, Can. T.S. 1978 No. 34, (entered into force in Canada 9 February 1978).

1. *Unification and Harmonization at the Federal Level*[51]

At the federal level, *with the exception of bijural legislation*, the predominant state is full unification: that is, legislation is applied uniformly throughout the country. *Insofar as bijural federal legislation is concerned*, however, the predominant state appears to be diversity of law. As discussed previously, pursuant to sections 8.1 and 8.2 of the *Interpretation Act*, bijural federal legislation relies on underlying provincial law for its meaning and effect. Since this law can vary from one province to the other, bijural legislation can vary in its application.[52]

Since the coming into force of sections 8.1 and 8.2 of the *Interpretation Act*, the Supreme Court of Canada and the Federal Court of Appeal have not hesitated to cite and apply these sections when called upon to interpret bijural federal legislation. *D.I.M.S. Construction Inc. (Trustee of) v. Quebec (A.G.)*[53] is an excellent illustration of the effects of these sections.

One of the issues in that case was the application of section 97(3) of the *Bankruptcy and Insolvency Act*,[54] ("BIA"), to the effect that the law of set-off applies to all claims against the estate of the bankrupt. Depending on how broad the rules of set-off are (in Quebec civil law, the equivalent term is "compensation"), they can have a significant effect in a bankruptcy context. With respect to set-off, Quebec civil law and Canadian common law take two very different approaches. On the one hand, Canadian common law, via the principle of equity, permits set-off even where it might be prejudicial to the interests of third parties, including creditors.[55] On the other hand, Quebec civil law places great importance on the acquired rights of third parties and the law of compensation reflects that concern.[56]

The BIA does not specify what law applies to set-off in the bankruptcy and insolvency context. The Supreme Court of Canada was therefore of the opinion that section 97(3) was based on underlying provincial law. Since *D.I.M.S.* arose in Quebec, the Court refused to apply the equitable concept of set-off and applied the Civil Code provisions instead. As a result, the law in Quebec and the law elsewhere in Canada relating to set-off in the context of bankruptcy law are now different, the law in the rest of Canada having a broader effect than the civil law rules.

A decision such as *D.I.M.S.* places Parliament in a difficult situation. Given the imperative wording of sections 8.1 and 8.2, it can be expected that Parliament will as a rule accept the absence of a uniform result in the application of its bijural legislation in order to preserve the integrity of both legal systems underlying this legislation. Yet, if Parliament believes that a uniform result is desirable or perhaps even essential, the legislation will have to be amended. If, for example, Parliament decides to amend the BIA with respect to set-off, what rule would it adopt? Most likely, the rule would be chosen after a through comparative study, in the process of which Parliament would have to answer the following policy question: in the context of the BIA, should set-off be subject to the rule that preserves the principle of equality among the creditors, or the rule that allows the court to exercise discretion so as to exempt a creditor from that principle?

[51] Much of the information in this section is contained in the preliminary chapter of the following book: Aline Grenon & Louise Bélanger-Hardy, eds., *ELEMENTS OF QUEBEC CIVIL LAW – A Comparison with the Common Law of Canada* (Toronto, Thomson Carswell, 2008) at 10-21.
[52] In this regard, it must be noted that provincial law can vary not only between Quebec and the common law provinces, but also among the common law provinces.
[53] 2005 SCC 52, [2005]2 S.C.R. 564 [*D.I.M.S.*].
[54] R.C.S. 1985, c. B-3.
[55] See John A.M. Judge & Margaret E. Grottenthaler, "Legal and Equitable Set-Offs" (1991) 70 Can. Bar Rev. 91 at 117.
[56] See arts. 1672-1682, 2644 C.C.Q.

Parliament may never have to deal with that question, however, since the Supreme Court of Canada has not yet had the opportunity to examine the issue of common law set-off in the context of section 97(3) of the *Bankruptcy and Insolvency Act.* If or when the Court is given this opportunity, it might decide to overturn existing common law cases and opt for an approach similar to the one in Quebec, thereby re-establishing uniformity in this area.

Before sections 8.1 and 8.2 were enacted, it often happened when interpreting bijural federal legislation that courts opted for a construction derived from the common law, and the result was applied to the country as a whole. Little if any thought was given to the inherent strength or weakness of the underlying common law or to the impact of the legislation on the civil law of Quebec. That approach no longer applies and comparison between Quebec civil law and Canadian common law has now taken on real practical importance: in cases with national ramifications (for example, the bankruptcy of a corporation having places of business in Quebec and elsewhere in Canada), it becomes necessary to take those differences into consideration in applying federal law. At the same time, as illustrated in *D.I.M.S.*, this comparison highlights the strengths and weaknesses of the private law on which federal legislation is based. This can be expected to contribute not only to the development of Canadian comparative law but ultimately, to better uniform federal law achieved either by means of legislative amendment or judicial interpretation.[57]

2. *Unification at the Provincial Level*

At the provincial level, unification of law is, on the whole, viewed as a desirable objective and the ULCC is actively involved in the process. The level of unification found in the common law provinces and territories is probably at least on par with the level found in American states. It may even be superior, particularly since the Supreme Court of Canada is in a position to ensure uniform interpretation of provincial law.

The civil law jurisdiction of Quebec is also involved in the ULCC initiatives. Specifically, it has enacted eight of the thirty-six uniform acts recommended by the Commercial Law Strategy of the ULCC, either through inclusion in the *Civil Code of Québec* or in specific statutes, and it has recently incorporated the uniform *Securities Transfer Act*[58] in the Civil Code of Québec as well. A paper presented at an annual meeting of the ULCC reveals that Quebec, either in the Civil Code or in various statutes, has in fact adopted provisions that track many ULCC model laws adopted (more or less faithfully) in the common law provinces.[59]

IV. CONCLUSION

In Canada, forces for and against unification coexist. On the one hand, commercial expediency and the need to simplify law help to promote unification. On the other hand, the country's relatively small population, its bijural nature and the fact that private law is under provincial jurisdiction are part of the numerous forces that hinder unification. As a result, full unification is impossible. Partial unification in

[57] For a recent article pertaining to article 8.1 of the *Interpretation Act* and its role at the Supreme Court of Canada, see Aline Grenon, "Le bijuridisme canadien à la croisée des chemins? Réflexions sur l'incidence de l'article 8.1 de la *Loi d'interprétation*", (2011) 56 McGill L. J. An English translation can be obtained from the author.

[58] *Supra* note 36.

[59] Frédérique Sabourin, "Les lois de la CHLC et le Code civil du Québec" (Paper presented to the annual meeting of the Uniform Law Conference of Canada, St. John's, Newfoundland and Labrador, 21-25 August 2005 [original French version available at <http://ulcc.ca/fr/poam2/ULCC_Acts_Quebec_Civil_Code_Fr.pdf>; English translation available at <http://ulcc.ca/en/poam2/ULCC_Acts_Quebec_Civil_Code_En[1].pdf>].

some areas is the most that can be expected and even in areas such as securities regulation, where legal uniformity would be both logical and cost-effective, unification initiatives are fraught with difficulty.