

# Bijuralism

Of National Interest And Global Reach



Department of Justice  
Canada

Ministère de la Justice  
Canada

Canada



# Reflecting Our World

*Bijuralism includes the simple coexistence of two legal traditions, the interaction between two legal traditions, the formal integration of two legal traditions within a given context or, on a more general level, the recognition of and respect for the cultures and identities of two legal traditions.*<sup>[1]</sup>

In a world where cultural borders have become increasingly fluid and permeable, where intellectual discourse exceeds the bounds of nationhood, bijuralism is an expression of both national interest and global purpose.

While bijuralism is as much a part of Canada's historical fabric as multiculturalism, it is also an eloquent example of the very nature of globalization: bijuralism, by definition and in practice, demands that we set aside the boundaries of language and tradition to embrace an intellectual, yet pragmatic philosophy where divergent and complementary ideas, cultures and traditions coexist and interact.

Bijuralism includes the simple coexistence of two legal traditions, the interaction between two traditions, the formal integration of two traditions within a given context or, on a more general level, the recognition of and respect for the cultures and identities of two legal traditions. In a Canadian context, however, bijuralism also integrates, in the country's two linguistic traditions, common law and civil law.

Canadian bijuralism therefore implies more than the coexistence of divergent traditions—philosophical, legal and cultural—it also presupposes cohesive, coherent discourse.

*In close to 100 countries throughout the world, more than one system of law is applied: in the United Kingdom, for example, English common law and Scottish civil law coexist.*



<sup>[1]</sup> Allard, France. "The Supreme Court of Canada and its Impact on the Expression of Bijuralism", *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, Second Publication, Booklet 3, Minister of Justice and Attorney General of Canada, 2001, p. 1.





# From Theory To Practice

*Our commitment is to reach Canadians directly and ensure that their values are reflected in the work we do. To this end, we will also develop stronger communications and public legal education programs that are better resourced. We will also establish mechanisms to ensure that the public interest, the bijural nature of the legal system and the cultural diversity of Canada are taken into account when legal services are provided and laws are developed.*

*Department of Justice Canada  
Strategic Plan 2001-2005*

As documented in its five-year strategic plan, the Department of Justice believes in the importance of bijuralism. Indeed, it has implemented several policies to facilitate understanding and ease integration of Canada's two legal traditions.

Following are five examples of initiatives that have been underway since the beginning of the 1990s. These are examples of the Department's commitment to the practical application of bijuralism both within the Department and the Canadian legal system.

## 1. The Policy On Legislative Bijuralism

Adopted in 1995, this policy seeks to ensure drafting of federal legislative texts that respect both official languages as well as the two legal traditions that coexist in Canada. The policy formally recognizes that the Department of Justice believes it essential that the four Canadian audiences—common law anglophones, civil law anglophones, common law francophones and civil law francophones—be able to read federal legislation in the official language of their choice and find its terminology and phrasing consistent with the concepts and institutions of the legal system in effect in their province<sup>[2]</sup>.

## 2. The Program To Harmonize Federal Legislation With The Civil Law Of Quebec

The adoption in 1994 of the Civil Code of Quebec marked an additional step in the natural evolution of the drafting of federal Canadian legislation.

Since 1993, the Program to harmonize federal legislation with the civil law of Quebec ensures that all federal statutes and regulations that refer to provincial private law concepts are systematically adapted to reflect the civil law—in both English and French—all the while respecting common law concepts, which are also expressed in both languages.

<sup>[2]</sup> The policy on legislative bijuralism, Department of Justice Canada



### 3. Private International Law

Issues raised by private international law often fall within provincial jurisdiction. It is critical therefore that the Department's Private International Law Team not only work closely with the provinces and territories, but also with other members of the legal profession, business and private sector groups.

The Private International Law Team ensures a Canadian presence at all meetings of private international law organizations such as the Hague Conference on Private International Law; the United Nations Commission on International Trade Law (UNCITRAL); the International Institute for the Unification of Private Law (UNIDROIT); and the Specialized Inter-American Conference on Private International Law (CIDIP) of the Organization of American States (OAS)—and actively participates in negotiations on the subject. It also works on the development of private international law in the areas of commercial law, judicial co-operation, the enforcement of judgments, family law and child protection law.

### 4. The Office Of La Francophonie, Justice In Official Languages And Bijuralism

The purpose of the Office of La Francophonie, Justice In Official Languages And Bijuralism is to sensitize members of Canada's

legal community, working in both the public and private sectors, to the coexistence of two legal traditions; to promote the integration of bijuralism within the Department; and to co-ordinate the various bijural resources of the Department so as to encourage and foster the development of this facet of Canadian diversity.

### 5. POLAJ

In its 20 years of existence, and thanks to the efforts of its member organizations, POLAJ<sup>[3]</sup> has not only fostered dialogue between the different legal communities within Canada by creating a French vocabulary for common law that allows the writing and teaching of common law in French and the arguing of cases in French common law, it has also created a variety of essential new products and services, such as:

- 35 dictionaries, glossaries and other linguistic reference tools whose aim is to establish a French vocabulary for common law and an English vocabulary for civil law. Among them: the Canadian Common Law Dictionary - Law of Property and Estates, which has more than 4000 entries with their standard equivalent;
- 44 documents, written in English, on matters relating to civil law or in French, on issues specific to common law.

<sup>[3]</sup> National Program for the Integration of both Official Languages in the Administration of Justice





# Rooted In History

Complementarity is the basis of the relationship between common law and civil law on the one hand, and federal legislation, on the other.

The relationship of complementarity of legal traditions is historical, rooted in both the *Quebec Act*, 1774, and the *Constitution Act*, 1867.

The *Quebec Act*, 1774, specifically stated that civil law would apply to matters of property and civil rights and common law, to matters of public and criminal law. The *Constitution Act*, 1867, upheld this division of legislative powers.

Common law is seen as the work of judges, the law applicable in the absence of rules, and thus derives from the activity of the courts. On the other hand, it has been said that what characterizes civil law is "its way of conceiving, expressing and applying a legal rule, which transcends legislative policies that shift periodically in the history of a people."<sup>[4]</sup>

The two legal systems have clearly delineated functions and parameters. Nonetheless there exist grey areas where private and public law interact within a single legal system. It is the distinction between private and public law that makes it possible to determine which system of

law to apply to a legal relationship: the common law in public law, the civil law in Quebec private

law or the common law in private law elsewhere in the country. It is when the application of a federal statute requires recourse to private law that the presence of bijuralism is most felt.

*The method of civil law is rational, that of common law, empirical.*<sup>[5]</sup>

<sup>[4]</sup> R. David cited in P.-A. Crépeau, "Préface", in Office de révision du Code civil, *Rapport sur le Code civil du Québec*, Vol.1, *Projet de Code civil* (Québec: Éditeur officiel du Québec, 1978) at XXIX.

<sup>[5]</sup> Allard, France. "The Supreme Court of Canada and its Impact on the Expression of Bijuralism", *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, Second Publication, Booklet 3, Minister of Justice and Attorney General of Canada, 2001.



# Federal Judicial Tribunals

To ensure a more effective administration of Canada's laws, Parliament created two pan-Canadian judicial tribunals: the Supreme Court of Canada and the Federal Court of Canada.

## THE SUPREME COURT OF CANADA

Nine judges make up the Supreme Court Of Canada. It is the country's highest court and serves as the final court of appeal. Operating in both official languages, the Supreme Court's jurisdiction encompasses both legal traditions—common law and civil law. The mandatory appointment of three judges from the province of Quebec ensures the civil law tradition is represented.

## THE FEDERAL COURT OF CANADA

A bilingual court where legal proceedings can take place in both English and French, the Federal Court is also a bijural court that applies both common law and civil law principles.

The jurisdiction of the Federal Court includes specialized areas such as intellectual property law and maritime law. It also reviews decisions of federally appointed administrative tribunals.

*It is the Constitution of Canada itself, which provides that some federal laws have differing effects according to whether they are applied in Quebec or in the other provinces. By guaranteeing the perpetuity of the civil law in Quebec and encouraging in section 94 the uniformization of the laws of provinces other than Quebec relative to property and civil rights, the Constitution Act, 1867 enshrines in Canada the federal principle that a federal law that resorts to an external source of private law will not necessarily apply uniformly throughout the country. To associate systematically all federal legislation with common law is to ignore the Constitution.<sup>[6]</sup>*

<sup>[6]</sup> *St-Hilaire v. Canada (Attorney General)*, [2001] A.C.F. no. 444 (E.C.A.) Décary J.A.



# Some Concrete Examples

The legal framework for bijuralism has existed for close to three centuries. Yet true interaction between common law and civil law is relatively new. Following are examples of this interrelationship at work in three areas:

- Development And Application Of Policies
- Provision Of Legal Advice And Drafting Of Contracts
- Preparation And Determination Of Cases

## 1. Development And Application Of Policies

Policy development has far-reaching consequences as it must respect the cultural, historical, social and political realities as well as the legal imperatives of provincial legal regimes.

The areas of family law and tax law provide strong examples of why it is important to keep in mind provincial private law in the development of federal legislative policies.

### FAMILY LAW

The notions of custody, visitation rights and support have been the subjects of consultations from one end of the country to the other. The overriding objective of such consultations must be to avoid confusion and uncertainty and achieve harmony in the legislative provisions of both common law and civil law.

### TAX LAW

The Income Tax Act has its own definitions of "child", "spouse" and "common-law partner". Parliament developed these definitions to acknowledge the significant differences between legal traditions in each province and to ensure no disparity exists in tax treatments among tax payers.



## 2. Provision Of Legal Advice And Drafting Of Contracts

When drafting legal advice or a contract, legal counsel must determine not only the applicable legal norm, but also the applicable provincial private law. The following example clearly demonstrates that even the leasing of land is a complex issue, one that calls public and private laws into play.

*Example:*

### ***Leasing Of Federal Crown Land In Quebec***

*An individual leases federal Crown land in Quebec, from Transport Canada. The lease is drafted in accordance with common law rules and so contains a vesting clause.*

*However, the vesting clause has no equivalent in Quebec civil law; the rule of law that applies to transfers of land is conceptually different between common law and civil law.*

*It is therefore important to take the civil law into account to ensure that the will of the parties is carried out. The clause must be re-drafted so that the rules of Quebec civil law may indeed apply.*

## 3. Preparation And Determination Of Cases

Knowledge is power in any field. And in the field of law, this dictum finds true resonance, especially within the context of a bijural system such as Canada's. Familiarity with a second legal tradition not only helps jurists serve the interests of clients, it also gives judges the opportunity to render more informed judgments that have a greater degree of nuance.

*Example:*

### ***Modifying And Terminating An Employment Contract***

*In the case of Farber v. Compagnie Trust Royal, [1997] 1 S.C.R. 846, the Supreme Court of Canada reiterates the need to consult judgments rendered in both legal traditions—not only the one that applies to the case—when the rule of law that applies is similar to both, as in labour law.*

*In rendering his judgment in a constructive dismissal case, Justice Gonthier underlines the advantages of consulting applicable principles of the other system:*

*"The common law rule is therefore similar to that applicable in Quebec civil law when it comes to the concept of constructive dismissal. Thus, although decisions from the common law provinces are not authoritative, it may be helpful to refer to them to see what types of changes the courts have considered fundamental changes to an employment contract resulting in the termination of that contract." [page 865]*



# Understanding Our World

The world's borders are becoming increasingly blurred and the need to embrace and understand so-called foreign traditions has become apparent to all professionals. Where the practice of law is concerned, this need becomes manifest in the means we adopt to serve our clients. The more we know and are aware of, the better the professional services we can offer.

We are already a step ahead in Canada, one of the few world leaders that integrates diversity, at all levels.

We already understand and embrace the concepts of coexistence, interaction and respect for multicultural traditions. They are part of our cultural and historical heritage. They permeate all professional levels of society and all areas of our lives.

When these concepts are applied to the law, they can improve our practice of it. Conversely, by keeping these concepts at a distance, knowingly or through omission, then we no longer represent the best interests either of our clients or our fellow citizens.

Canadian bijuralism embraces the country's divergent legal traditions. As members of that legal tradition, we are privileged. Our heritage, our national diversity and our bijural tradition enable us to better communicate with clients and colleagues, here and abroad.

## *To Contact Us*

To discuss the ideas presented in this brochure or to address your questions about bijuralism, contact us at one of the numbers or addresses below:

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