

# Thoughts on the Constitutional Problems Raised by the Repeal of the Civil Code of Lower Canada

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## INTRODUCTION

A two-year old boy has died in the big isba across from the building where Charlotte lives . . . The death of a being much younger than me throws my entire universe into disarray. I rush to Charlotte's place. Perceiving my anguish, she tells me something of astonishing simplicity.

Do you remember, in the fall, we saw a flock of migrating birds?

"Yes, they flew over the yard and then disappeared."

"That's right, but they continue to fly, somewhere in distant lands, only we, with our short-sightedness, are unable to see them. That is what happens with those who die."

Andrei Makine<sup>[1]</sup>

The *Civil Code of Québec*,<sup>[2]</sup> which came into force on January 1, 1994, replaced the old *Civil Code of Lower Canada*<sup>[3]</sup> of 1866. It could be thought, *prima facie*, that this repeal<sup>[4]</sup> put a definitive end to this keystone of Quebec civil law. As we will now attempt to demonstrate, this is only partly true, and the subject merits a closer look.

Notwithstanding its clear title, it is all too easy to forget that the Civil Code was enacted by the legislature of the province of Canada a few short months prior to the coming into force of the *British North America Act*,<sup>[5]</sup> now the *Constitution Act, 1867*.<sup>[6]</sup>

Like any pre-Confederation legal norm, this Code was continued in force under section 129 of the Constitution, but the power to amend or repeal its contents was now shared between the two levels of government, i.e. the central Parliament and, in this instance, the legislature of Quebec (A). The power to amend or repeal pre-Confederation law thus belongs to the level of government having jurisdiction under sections 91 and 92 of the Constitution to legislate in a field to which the particular pre-Confederation provision applies (A:I). In addition to the problem of identifying which level of government has the authority to repeal such law, there is also, as we will be able to see, the problem of the definition and scope of this power of repeal (A:II).

The second part of this article will focus on the special problem of the repeal of pre-Confederation provisions that are subject to the jurisdiction of both levels of government

(B). We will briefly discuss the problem of the repeal of pre-Confederation provisions of the Civil Code which, after 1867, had a double aspect (B:I). And we will review the issue of the power to repeal the Civil Code as an expression in Quebec of the *jus commune* in matters of federal private law (B:II).

This article purports to demonstrate that not everything was resolved on January 1, 1994. In reality, what was thought to be dead is only moribund. In fact, as we shall see, many provisions of the Civil Code could not be repealed unilaterally by the legislature of the province of Quebec. Still others could be repealed only in their provincial aspect, and therefore continue to exist in their federal aspect. This is a direct result of the pre-Confederation nature of some Civil Code provisions. It is not our intention to review each of the potentially problematic provisions of the Civil Code, but rather to outline the problem of the repeal by either level of government of a pre-Confederation norm.

## **A. CONSTITUTIONAL LIMITS ON THE POWER TO REPEAL PRE-CONFEDERATION LAW**

On August 1, 1866,<sup>[7]</sup> in an atmosphere of relative indifference,<sup>[8]</sup> the Civil Code came into force<sup>[9]</sup>. A much more controversial event was to occur eleven months later,<sup>[10]</sup> namely, the coming into force of the *British North America Act*.<sup>[11]</sup> This imperial act joined the provinces of Canada, Nova Scotia and New Brunswick as "One Dominion under the Name of Canada" (section 3), which, it was stated, would be divided into four provinces named Ontario, Quebec, Nova Scotia and New Brunswick (section 5). Over the years, other colonies and territories were added to Canada's initial geographical space.<sup>[12]</sup> This upheaval in the constitutional landscape of Britain's North American colonies was to have some juridical consequences.

All the territories and colonies that were to constitute the new Canadian federal state were governed, prior to becoming members of Confederation, by a multiplicity of sources of law: local laws, local judicial decisions, imperial statutes of specific application to the colony, English statutes and case law that were "received" into the colony,<sup>[13]</sup> etc.

In Quebec, the Civil Code constituted the cornerstone of this pre-Confederation law. The Fathers of Confederation had no intention, in 1867, of wiping the slate clean by cavalierly dismissing this bundle of legal norms. On the contrary, they hoped to continue in force this entire body of pre-existing law. That was precisely the object of section 129 of the B.N.A. Act<sup>[14]</sup> which provides:<sup>[15]</sup>

Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the

Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

This section clearly provides for the continuation in force of pre-Confederation law, since that law can be applied by the courts, in so far as it has not been amended or repealed by the competent legislative authority.<sup>[16]</sup> Indeed, the purpose of this provision was to provide for the continuity of the law "until the new Parliament and new legislatures were organized, assembled and able to function";<sup>[17]</sup> in short, it was designed to forestall the existence of a legal vacuum.<sup>[18]</sup> The application of pre-Confederation law of a particular colony is of course confined to the territorial space of the new province.<sup>[19]</sup> And, needless to say, the unconstitutionality of pre-Confederation legislation cannot be alleged<sup>[20]</sup> without proving that it was enacted in contravention of the constitutional order existing prior to the province's entry into Confederation.<sup>[21]</sup>

We shall now see that, by implicitly referring to sections 91 and 92 of the Constitution, section 129 also has the effect of dividing the power to amend or repeal such pre-Confederation law between the two levels of government.

### **I. A distribution of powers based on the subject matter of the pre-Confederation norm**

As far as the power to amend pre-Confederation law is concerned, the courts were quick to establish the principle that [*Translation*] "the provincial legislatures and the federal Parliament can directly and specifically amend or repeal only those statutes that they have the authority to re-enact."<sup>[22]</sup> In other words, by declaring that only the competent legislative authority under sections 91 and 92 of the Constitution is empowered to amend pre-Confederation law, section 129 refers us to the usual process of characterizing enactments.

The first important decision on the scope of section 129 of the Constitution was *Dobie v. The Temporalities Board*,<sup>[23]</sup> which was rendered by the Privy Council in 1882. At issue in the case was the constitutional validity of a Quebec statute enacted in 1875<sup>[24]</sup> that repealed a statute enacted by the province of Canada in 1858.<sup>[25]</sup> The purpose of the 1858 legislation had been to establish a corporation referred to as the "Board for the management of the Temporalities Fund of the Presbyterian Church of Canada". The purpose of the Quebec legislation that was at issue was simply to end that corporation's legal existence and substitute another for it. The issue was whether the statute was within the jurisdiction of the province of Quebec.

In a now famous passage, the Privy Council stated that the powers of the federal Parliament or the provincial legislatures to alter pre-Confederation statutes "are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867".<sup>[26]</sup> It is therefore necessary to look to sections 91 and 92 of the Constitution to determine which of the two levels of government has legislative authority to amend or repeal a given pre-Confederation legislative provision. In short, if it could have been established in *Dobie* that the Quebec

legislature could have enacted a statute identical to the 1858 statute in all respects, then the repealing statute of 1875 would have been found valid.<sup>[27]</sup> However, Lord Watson concluded that this had not been proved. He stated that the 1875 statute was not in relation to a matter that fell within the classes of subjects assigned to the province of Quebec, since it concerned civil rights outside Quebec. Indeed, the impugned statute regulated the corporation's rights and obligations in both Quebec and Ontario.<sup>[28]</sup>

His Lordship also refused to validate the repeal effected by the 1875 statute by limiting its scope to matters that fell under the legislative authority of the province of Quebec. He noted that the 1875 statute did not state that the repeal was limited to matters over which the province of Quebec had jurisdiction. He also stated that "the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority."<sup>[29]</sup> He added, on the same page:

In every case where an Act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But in the present case the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province.

If the provisions falling within the legislative jurisdiction of Quebec could have been distinguished from the provisions falling within the legislative jurisdiction of Ontario, then the Quebec legislature could have repealed the provisions within its jurisdiction.<sup>[30]</sup> Since that was impossible, only the federal Parliament had jurisdiction to repeal the 1858 statute.<sup>[31]</sup>

Up to this point, I have considered the power of a province to amend or repeal a pre-Confederation legislative provision. However, it is now essential to analyze the nature of the power that the federal Parliament can exercise in respect of a pre-Confederation norm relating to a matter that falls within its jurisdiction under section 91 of the Constitution.

*Attorney-General for Ontario v. Attorney-General for the Dominion*<sup>[32]</sup> confirms that the power to amend pre-Confederation law was distributed on the basis of sections 91 and 92 of the Constitution. The Privy Council also gave its opinion on the scope of a given level of government's power to repeal pre-Confederation norms. We will examine this second point in the following section.

One of the questions on which the Privy Council had to rule in the case was the constitutionality of Parliament's repeal of the *Temperance Act*<sup>[33]</sup> enacted in 1864 by the province of Canada and intended, according to the Privy Council,<sup>[34]</sup> to apply only in Upper Canada. Lord Watson first found that the disputed federal repealing legislation, the *Canada Temperance Act*,<sup>[35]</sup> could validly be based on Parliament's residual jurisdiction.<sup>[36]</sup> Nonetheless, he went on to state that Parliament did not have jurisdiction to repeal the 1864 pre-Confederation statute by means of that Act. Neither the federal Parliament nor the provincial legislatures, he noted, could repeal statutes that they did not

have the power to enact.[37] Since the 1864 statute applied only to Upper Canada, Parliament could not repeal it, as it was not a statute that it could have directly passed:

In the present case the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario; and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province.[38]

Although the latter conclusion is now debatable,[39] the decision confirms that the characterization, under sections 91 and 92 of the Constitution, of the matter to which a pre-Confederation provision relates will make it possible to determine whether it is the federal government or the provinces that can legislate with respect to the provision.[40] It should perhaps be pointed out that legislating means not only the power to repeal a statutory provision pre-dating Confederation, but also the power to wholly reproduce it in a new statute.[41]

In *Reference In Re Bowater's Pulp and Paper Mills Ltd.*,[42] the Supreme Court of Canada provided some clarification on the issue of the power of the respective levels of government to amend or repeal pre-Confederation laws. The facts were as follows. Prior to 1949, when Newfoundland joined Confederation, the Newfoundland government granted certain lands to Bowater's Pulp and Paper Mills Ltd. by contract. Some tax advantages were also granted to the company, including income tax deductions and exemptions from customs and excise duties. In return, the company agreed to invest several million dollars in the colony's industrial sector. The contracts were later confirmed by statutes enacted by the colony.

In the Supreme Court, the company argued that under Term 18(1) of the *Terms of Union of Newfoundland with Canada*,[43] the federal Parliament was bound by the tax exemptions recognized in the pre-Confederation statutes, despite the express repeal of the exemption provisions by a federal statute enacted in 1949.[44] According to the company, Parliament could not repeal the provisions in question without the province's agreement. The basis for the argument was that the contracts and the statutes confirming them formed a closely interwoven set of provisions that fell under both federal and Newfoundland jurisdiction. The enactments were not severable from one another and therefore could be repealed only by agreement of the federal Parliament and the provincial legislature. Furthermore, since Parliament could not have enacted the pre-Confederation statutes in question, it had to be concluded that it could not unilaterally repeal the tax exemption provisions of those statutes. This argument was, of course, based on *Dobie*.

Six of the seven Supreme Court judges rejected the company's argument. Rinfret C.J. expressed the view that the legislative body with jurisdiction to regulate the matter dealt with in the pre-Confederation provisions was the body that could repeal the provisions.[45] He was of the opinion that the federal income tax legislation had expressly and permanently repealed the pre-Confederation provisions.[46] However, he acknowledged that the tax exemptions could still be relied on by the company in its

dealings with the provincial tax authorities.<sup>[47]</sup> We will come back to this aspect of the decision in chapter B.

Kerwin J. stated that *Dobie* could be distinguished because, in that case, the provisions of the pre-Confederation statute in question were truly indivisible, which was not the case here. In any event, however - he seemed to say in a passage that is somewhat ambiguous - it was not necessary to determine whether Parliament could repeal the pre-Confederation provisions in question. Since Parliament certainly had authority to legislate concerning tax exemptions, as it did in sections 49 and 50 of the 1949 income tax legislation, those provisions superseded the pre-Confederation statutes.<sup>[48]</sup>

In my opinion, the most interesting view of this question is that of Rand J., who found that pre-Confederation law the subject matter of which comes under federal jurisdiction at the time of Union continues to apply as long as Ottawa does not intervene.<sup>[49]</sup> He then added that:

[T]he effect of . . . s. 129 of the British North America Act is to maintain *a continuity not of statutes but of laws*, in the sense of distributive provisions which take place in the one or other jurisdiction *according to their subject matter*. . .; and that modification of the continued laws may be by repeal or amendment or by way of repugnant enactment.<sup>[50]</sup>

Thus, while it was true that the provisions in question were not severable when considered as part of an indivisible contract, they were when considered as legislative subject matters.<sup>[51]</sup> According to the judge, the determination of which legislative body could amend the pre-Confederation provisions did not require that the impact of the amendment on the content of the contract be considered; in his opinion, the determining factor was the matter to which the provisions related.<sup>[52]</sup> It is important to note that the provisions in question were, in the judge's opinion, "as severable as if they were contained in another statute".<sup>[53]</sup> Federal intervention, according to him, was therefore completely valid. Locke J. shared that opinion. As he saw it, *Dobie* had to be interpreted as authorizing each level of government to legislate in respect of pre-Confederation provisions that fell within its jurisdiction. Since Parliament had jurisdiction to grant exemptions from federal taxes, it was authorized to legislate no matter what the consequences might be for the contract.<sup>[54]</sup>

Kellock J. gave similar reasons to those of his colleague Rand J. In his opinion, neither the federal Parliament nor a province can repeal, either expressly or by implication, a provision that is not within its jurisdiction.<sup>[55]</sup> Although he felt that in this case there was no express repeal,<sup>[56]</sup> the pre-Confederation provisions in question were nonetheless "altered" or "abolished" by the passage of the federal income tax legislation.<sup>[57]</sup> There was no question that the provisions in issue related to a federal matter and that Ottawa had the power to legislate.<sup>[58]</sup>

Estey J. restated the proposition that the power to repeal a pre-Confederation provision was co-extensive with that to enact an identical provision.<sup>[59]</sup> There was no doubt that the Newfoundland legislature could have repealed the portion of the pre-Confederation

statutes in question that fell within provincial jurisdiction.<sup>[60]</sup> As for the argument that the provisions were not severable, the judge stated that, in so far as a pre-Confederation statute contains provisions that fall within the jurisdiction of both levels of government, each level must intervene in relation to the provisions over which it has jurisdiction, even if that may cause some practical problems:<sup>[61]</sup>

The fact that such legislative action on the part of one or the other [levels of government] may create difficulties to be subsequently dealt with does not affect the question of jurisdiction. Whatever such difficulties may be will no doubt in due course be dealt with by the appropriate authorities, but those are not matters to be dealt with by the courts, particularly when as here, this court is called upon to determine only the question of jurisdiction. Under the scheme of Confederation and under the terms of Union even if the 'rights and obligations are inextricably interwoven into a single Newfoundland law' as here contended, that would not alter or affect the legislative classification of the various portions of Bowater's law nor the jurisdiction of either the Dominion or the province to deal therewith.

Finally, Taschereau J., in dissent, was of the opinion that the provisions in question were still in force as if the Union had not been made,<sup>[62]</sup> but that the federal Parliament could not repeal them unilaterally since they were too closely linked to the provisions that were within provincial jurisdiction.<sup>[63]</sup> He added:

[T]he Dominion cannot legislate in any way to modify these inseverable statutes in such a way that their purpose would be defeated, for the reason that it could not, in view of the divided legislative powers attributed by the B.N.A. Act, *directly enact them*.<sup>[64]</sup>

To summarize, this decision once again confirms that the provisions of pre-Confederation statutes must be repealed or amended by the level of government that has jurisdiction over the *matter* to which they relate. As Rand J. noted, section 129 provides for the continuity of the pre-Confederation normative content and not simply of pre-Confederation statutes. It is the subject matter of a rule of law that is important. The identification of the level of government that has the power to amend or repeal pre-Confederation law therefore requires a characterization of the "pith and substance", the "dominant characteristic" or, in short, the matter to which the pre-Confederation provision in question relates. *Bowater* also leads to the conclusion that it is of little importance that the general meaning of a pre-Confederation statute is altered by the unilateral action of one of the two levels of government in relation to provisions within its jurisdiction.<sup>[65]</sup>

It follows, then, that the repeal of the Civil Code by the Quebec legislature was constitutionally valid only in so far as it affected articles the normative content of which fell within the jurisdiction of the province pursuant to section 92 of the Constitution. Those pre-Confederation Civil Code norms that were continued by section 129 and deal with a federal matter under section 91 of the Constitution remain in force as long as they have not been formally repealed by Parliament.<sup>[66]</sup> It is not our objective to draw up a typology of these problematic provisions,<sup>[67]</sup> so let us simply note, by way of example,

that the repeal of those articles of the Civil Code pertaining to the basic conditions of marriage - articles 115 to 118 and articles 148, 149 and 151 (to the degree that it affects article 148) and 152 to 155 - clearly do not fall within the jurisdiction of the province, in view of Parliament's exclusive jurisdiction in such matters under section 91(26) of the Constitution.

## **II. Powers limited to the normative content of the pre-Confederation rule**

Section 129 has therefore been interpreted as conferring on the level of government having jurisdiction the power to "repeal, abolish or alter" pre-Confederation law. We will now see that while this power quite clearly implies the power to eliminate the normative content of a pre-Confederation rule, it does not necessarily include the power to eliminate its physical medium (1). Then we will examine the problems raised by the so-called implied repeal of pre-Confederation law (2).

### ***1. The need to distinguish between the norm and its physical medium***

Repeal is a particular mode of extinction of a legislative norm. It generally presupposes the [Translation] "explicit elimination of a statute".<sup>[68]</sup> Professor Côté states in this regard that [Translation] "[r]epeal attacks the very existence of the statute".<sup>[69]</sup> Does this mean that Parliament and the provincial legislatures are able to repeal, hence to eliminate the very existence of the articles in the Civil Code in so far as they deal with a matter pertaining to their respective fields of jurisdiction? There are two opposing views on this question.

Some writers<sup>[70]</sup> argue that neither Parliament nor the Quebec legislature is able to repeal, in the sense indicated above, the form and, more specifically, the text of the Civil Code. This approach is based on the following dictum of Lord Watson in the *Local Prohibition Case*:<sup>[71]</sup>

*It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion...*

After expressing this opinion, Lord Watson stated that Parliament was therefore not competent to repeal the provisions of the Act of 1864 prohibiting the sale of intoxicating beverages in Upper Canada. Professor Roderick A. Macdonald relies on this passage to argue that the power of repeal of Parliament and the Quebec legislature is limited to the elimination of the normative content of the pre-Confederation provisions falling within their respective legislative authority. As Lord Watson pointed out, a legislative body is not constitutionally authorized to repeal a statute enacted by another legislature,

irrespective of whether the rule established by the latter statute is or is not constitutionally valid. Is it necessary to recall that the Civil Code was adopted not by the Quebec legislature but by the legislature of the province of Canada, and that juridically the Quebec legislature is not the legislature of the province of Canada? Nor is the federal Parliament. If the legislative authority that enacted a statutory enactment is the only one with the power to repeal the form thereof, it must be concluded that the legislature of the province of Quebec (or the federal Parliament) cannot repeal the actual form of the pre-Confederation enactments pertaining to their own authority that were adopted by the legislature of the province of Canada.

The courts, by stating, after some hesitation,<sup>[72]</sup> that pre-Confederation law was neither federal law nor provincial law, have lent some support to this view.<sup>[73]</sup> In *Moore v. Johnson et al.*,<sup>[74]</sup> for example, the issue was whether a pre-Union Newfoundland statute prohibiting seal-hunting on Sundays could be considered federal law subject to repeal by Parliament. After clearly stating that Term 18(1) of the *Terms of Union of Newfoundland with Canada* had not transformed the pre-Union enactment into federal law, Ritchie J. approvingly<sup>[75]</sup> reproduced the following passage from the Court of Appeal decision:<sup>[76]</sup>

. . . even if Section 15 [of the pre-Confederation statute] could be termed Federal law, it is certainly not a Federal statute. Thus, the various authorities cited to support the above well-known propositions are of no assistance. More importantly, it is my view that to classify Section 15, and other such valid Newfoundland legislation which carried on after April 1, 1949, until repealed, abolished or altered, as being either Federal or Provincial legislation is a misnomer. It is *Newfoundland law placed in a special* (and presumably, temporary) *category* from the point of view of its continuing enforceability by a special provision of the *B.N.A. Act* - namely, Term 18(1). Further, in my view, the only relevant consideration for this Court is that the particular law with which we are here concerned can only be dealt with by way of repeal, abolition or alteration by the Parliament of Canada and whether such occurred.

In summary, if pre-Confederation law is distinguished from provincial law and federal law in its form, the supporters of the first school argue that the power under section 129 of the Constitution is limited to the power to eliminate the normative content of the legal rules set out in the Civil Code.

Conversely, it can be argued that section 129 does indeed allocate the power to eliminate the actual form of a pre-Confederation enactment, i.e. to repeal it in the true meaning of the word. On the one hand, Lord Watson's opinion is simply *obiter*. On the other hand, to say that a pre-Confederation enactment is not a federal or provincial enactment does not mean that in the particular context of section 129 it cannot be repealed by either level of government within the bounds of its jurisdiction. Indeed, irrespective of how the pre-Confederation enactment is characterized, it must be conceded that the wording of section 129 indicates an intention on the part of the Fathers of Confederation to give each level of government unfettered authority to eliminate the rule. The English text uses the words "repeal", "abolish" and "altered". The French version, still unofficial,<sup>[77]</sup> uses the

terms "abrogation", "modification", "suppression" and "révocation". Is it not conceivable that, in the particular context of section 129, the word "abrogation" implies the power to eliminate the actual form of a statute that either level of government did not itself initially enact?

Although it is not an easy choice, the first theory appears to me to be the more persuasive. The purpose of section 129 was to obviate a legal vacuum immediately following the coming into force of the Constitution. As Rand J. so aptly stated, in a passage we cited earlier, this section "maintain[s] *a continuity not of statutes but of laws*, in the sense of distributive provisions which take their place in the one or other jurisdiction *according to their subject matter*".<sup>[78]</sup> Consequently, the "law" as a whole - not simply the "statutes" but also, *inter alia*, the common law - was to be continued in force until the competent legislative authority altered or repealed it. Likewise, it was not so much the statutes themselves that were continued in force as their normative content. As we have seen, the old pre-Confederation statutes did not become, through the operation of section 129, federal or provincial statutes as the case might be. They never ceased, and will never cease to be, in formal terms, colonial laws. The object of section 129 is therefore to continue in force not these pre-Confederation colonial laws but rather the norms that they express. However, the level of government with jurisdiction over the "subject matter" contemplated by a pre-Confederation norm may eliminate that norm. No one denies that both levels of government are entitled to eliminate the normative existence of a pre-Confederation statute such as the Civil Code.

It should be noted that the abolition authorized by section 129 is just as definitive as abrogation achieved through repeal. Indeed, in such a situation there is an *extinction* of the norm because the norm is permanently and not merely temporarily discarded. This is what distinguishes repeal, which is a method of extinguishing a norm, from inapplicability, which simply involves suspending the effect of the norm. It is not a matter of making a given provision inoperative *pro tanto*; rather, its normative existence is ended.<sup>[79]</sup>

To summarize, although it is in my opinion beyond dispute that Parliament and even the Quebec legislature are able to eliminate the normative existence of the norms established by Civil Code articles pertaining to matters within their jurisdiction, I am not certain that they may eliminate the actual form thereof. On this latter point, however, I must concede that in actual fact Parliament has assumed that it had the power to amend and repeal not only the normative content but also the very form of the Civil Code provisions falling within its legislative authority.<sup>[80]</sup> The approach adopted by the commissioners responsible for revising Quebec's statutes in 1888 also suggests that the province did not question this authority.<sup>[81]</sup> Although these statutes were enacted prior to the Privy Council decision,<sup>[82]</sup> I find it hard to believe that the courts could question this power of both levels of government to "repeal" pre-Confederation statutes. That is why, throughout this article, I will be referring to a power to repeal and not to a power to eradicate the pre-Confederation norm.

This distinction between the power to repeal the norm and the power to destroy its form may seem pointless. However, it is not entirely irrelevant. Indeed, as we will be able to see in the course of chapter B, it can happen that one level of government has jurisdiction to eliminate a pre-Confederation norm albeit without the expression of the norm disappearing. The statute will subsist and may continue to serve as a medium for that pre-Confederation norm *in its application to the other level of government*. Once the latter has in turn explicitly repealed it, the norm will have truly ceased to exist.<sup>[83]</sup>

Before discussing this question, however, we will examine the issue of the implied repeal of a pre-Confederation norm.

## ***2. The problem of implied repeal***

There is no doubt that the federal Parliament - or the Quebec legislature - can expressly repeal a pre-Confederation norm that falls within its jurisdiction. Parliament is therefore free to repeal specifically the Civil Code articles dealing with a matter falling within section 91 of the Constitution.<sup>[84]</sup> If it does so, the norms set forth in the Civil Code articles would be permanently eradicated. Only explicit legislative intervention by Parliament could revive such provisions.

However, Parliament has sometimes adopted legislative enactments that were clearly in conflict with the object of a pre-Confederation provision, while not expressly repealing it. In this situation, it has been argued that the pre-Confederation enactment in question had been implicitly repealed and was therefore not simply inoperative *pro tanto*. For example, some writers have stated that article 2341 of the Civil Code, which makes the English law of evidence the applicable law in respect of negotiable instruments,<sup>[85]</sup> was repealed either by the enactment of the *Act respecting Witnesses and Evidence*<sup>[86]</sup>, or by section 4 of the *Act respecting the Revised Statutes, 1906*.<sup>[87]</sup> The repeal supporters have had to concede that if there was a repeal, it was only implied.<sup>[88]</sup> Other writers have concluded instead that the article in question is inoperative.<sup>[89]</sup> It is unnecessary to restate *in extenso* the respective arguments. Suffice it to note that there is still no agreement on the issue of whether there is such a thing as implied repeal.<sup>[90]</sup>

It is worth examining whether Parliament's enactment of a provision conflicting with a previous norm could constitute a true repeal or whether it means instead that the norm should be considered inoperative *for as long as the conflict subsists*. If the second approach is the right one, it would mean that some provisions of the Civil Code still survive in their application to the federal legal order, although they are temporarily eclipsed by the existence of federal statutes now in force. In other words, if the true intention was to ensure the complete repeal of the Civil Code, Parliament should expressly repeal those provisions of the Code falling within its jurisdiction.

On this issue of the definitive character of an implied repeal, two contradictory approaches co-exist. Under the first, implied repeal, like express repeal, may entail the definitive extinction of a statute. In *Bowater*, for example, Kellock J. seemed to state that a repeal could be implied. He stated:<sup>[91]</sup> "If Parliament cannot enact, *it cannot repeal, no*

*matter whether the attempted mode is by express repeal or by the enactment of repugnant legislation.*" However, he did not elaborate on this point. The question of the implied repeal of a pre-Confederation provision was, however, directly addressed in *Holmstead v. Minister of Customs and Excise*.<sup>[92]</sup> That case, like *Bowater*, concerned a pre-Confederation statute that granted a tax exemption to a taxpayer. A statute of the Province of Canada enacted in 1849 and amended in 1859, which was applicable only in Upper Canada, provided that the salary paid to the registrar of the Court of Chancery of Upper Canada was "free and clear from all taxes and deductions". The plaintiff argued that he could deduct the tax exemption granted to him by the statute from the tax he had to pay the federal government. Audette J. rejected that argument.

He stated that tax exemptions are privileges that cannot continue to exist following a change in the constitution of a political community.<sup>[93]</sup> He also said that section 129 authorizes the implied repeal of pre-Confederation provisions. Section 129 states that pre-Confederation law is continued in force "except as otherwise provided by this Act". According to the judge, since head 91(3) of the Constitution grants Parliament an exclusive taxation power and since, in compliance with that provision, Parliament passed income tax legislation in 1917, "therefore, *by necessary implication and intendment*, the enactment for exemption of that salary in Ontario has been repealed. . . That exemption became obsolete and void *by mere operation of law, under sec. 129* of the B.N.A. Act."<sup>[94]</sup> At the very end of his judgment, Audette J. stated:<sup>[95]</sup>

. . . a later Act which confers new rights such as the B.N.A. Act, repeals by necessary implication and intendment an earlier Act governing the same subject matter if the co-existence of the right which the latter gave would be productive of inconvenience, for the just inference from such a result would be that the legislature intended to take the earlier right away. Maxwell, *On the Interpretation of Statutes*, 5th ed., p. 294[:] "An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation. . ."

In my opinion, the approach taken by Audette J. is highly debatable. It would have been preferable to state that the pre-Confederation norm was *inoperative* because it was repugnant to the *purpose* of the 1917 federal income tax legislation.<sup>[96]</sup> But this leads us into a discussion of the approach that refuses to acknowledge that an implied repeal can definitively eliminate the normative existence of a statute.

Professor Côté, for example, says that there is no such thing as an implied or implicit repeal.<sup>[97]</sup> It is true that the Supreme Court has used that term at times.<sup>[98]</sup> In my opinion, however, when Parliament enacts a provision that conflicts with a previous federal norm, the norm is not implicitly repealed, but is rather *inoperative for as long as the conflict subsists*. For a pre-Confederation norm to be repealed, the legislative body must have expressly stated its intention to repeal it permanently. If it has merely enacted a provision that conflicts with a pre-Confederation norm, there is no basis for concluding that the norm has been permanently discarded. A Supreme Court decision has upheld this approach.

In *Johnson v. Seabright et al.*,<sup>[99]</sup> Gushue J.A. had concluded that the pre-Confederation statute at issue was implicitly repealed by federal legislation.<sup>[100]</sup> But it is interesting to note that on the appeal from this decision, the Supreme Court of Canada did not adopt this position.<sup>[101]</sup> After finding, as we saw earlier, that the pre-Confederation law dealing with a federal matter was not federal law, Ritchie J. stated that, although the federal statute in question "[did] not expressly repeal s. 15 [of the pre-Confederation statute], the provisions of the former enactment so alter[ed] the provisions of the latter as to make it *ineffective* as part of the law of Newfoundland."<sup>[102]</sup> The Supreme Court is clearly referring here to the notion of inapplicability and not that of repeal.

In my opinion only an explicit repeal can definitively eliminate a legal norm. Repeal, unlike inapplicability, does not make the pre-Confederation enactment simply inoperative *pro tanto*; it destroys its existence. However, I must concede that the cases are divided on this point. I conclude, nevertheless, that in order to eliminate any doubt concerning the survival of some Civil Code articles in relation to federal matters, it would be preferable, after listing these articles, to repeal them expressly. Before concluding my argument under this heading, I should point to one of the disadvantages linked to the notion of implied repeal, namely, the difficulty that lies in adequately measuring the scope of such repeal.

In *Willet v. De Grosbois*,<sup>[103]</sup> the plaintiff was seeking repayment of expenses incurred in facilitating the election of the defendant to the House of Commons. The latter replied that the agreement between him and Willet was illegal on the ground that it contravened section 6 of a pre-Confederation statute, the *Act for the more effectual prevention of corrupt practices at Elections*,<sup>[104]</sup> which declared void "[e]very contract . . . referring to . . . or depending upon any Parliamentary Election, even for the payment of lawful expenses . . .". This Act, he said, continued to apply under section 129 of the Constitution and, moreover, had not been repealed at the time of passage of the federal election act of 1871.<sup>[105]</sup> Mackay J. accepted this argument. In his opinion, the enactment of the federal legislation had not effected an implicit repeal of the disputed section since there was nothing in the Act dealing with that subject.<sup>[106]</sup> This decision illustrates the danger in resorting to the doctrine of implied repeal, since the doctrine provides no basis for accurately distinguishing those provisions that are eclipsed from those that survive.

\* \* \*

The two levels of government may therefore permanently eradicate - or repeal - the pre-Confederation norms set down in the Civil Code, in so far as they bear upon a matter that falls within their respective jurisdictions under sections 91 and 92 of the Constitution. But what happens to the pre-Confederation provisions of the Civil Code that are subject to the jurisdiction of both levels of government? That is the issue I shall now address.

## **B. THE SPECIAL PROBLEM OF THE REPEAL OF THE PRE-CONFEDERATION PROVISIONS OF THE *CIVIL CODE OF LOWER CANADA* SUBJECT TO THE JURISDICTION OF BOTH LEVELS OF GOVERNMENT**

Since 1867 some pre-Confederation provisions of the Civil Code have fallen within the jurisdiction of both levels of government. Action by both Parliament and the Quebec legislature would therefore be needed to fully eliminate the normative content of such provisions. This situation exists where, after 1867, a norm expressed in the Civil Code has both a federal aspect and a provincial aspect (I). Furthermore, some people argue that since 1867 the Civil Code has been the expression of the *jus commune* (common law) of both federal private law and provincial private law. It follows that, as a reservoir of conceptual rules of private law, the Civil Code can be repealed only by the level of government having the necessary jurisdiction, that is, the federal Parliament in respect of matters of federal private law and the legislature of Quebec in respect of provincial private law (II).

### **I. The pre-Confederation double aspect provisions of the *Civil Code of Lower Canada***

The Civil Code includes a large number of rules which, since 1867, have entailed a double aspect.<sup>[107]</sup> Some examples may be found in articles covering both bankruptcy and the civil law,<sup>[108]</sup> or negotiable instruments and evidence in civil proceedings.<sup>[109]</sup> Added to this might be all the articles in respect of the Crown and which, since the advent of Confederation, apply to both the Crown in right of Quebec and the Crown in right of Canada.<sup>[110]</sup> These provisions, as we will now see, were not definitively repealed when the *Civil Code of Québec* came into force, since they continue to exist in their federal aspect.

In *Bowater*,<sup>[111]</sup> for example, the pre-Confederation provisions at issue contemplated income tax deductions. But both levels of government have jurisdiction in this area under sections 91(3) and 92(2) of the Constitution. Thus the *same* pre-Confederation provisions might be applicable in federal and provincial areas of jurisdiction.

As we noted earlier, the majority held that Parliament could certainly repeal the legal norm concerning tax exemptions for its own purposes. The Court therefore acknowledged, at least implicitly, that there is a distinction between a legal norm and the physical medium that expresses it, namely an enactment. Parliament has jurisdiction in relation to a norm only in so far as the norm falls under a federal head of power. However, its action cannot eliminate the enactment, since the norm continues to apply in provincial matters. Chief Justice Rinfret understood this problem very well when he stated:<sup>[112]</sup>

It seems to me, therefore, abundantly clear, upon the union taking place, customs and excise duties being properly in the domain of the Parliament of Canada, that Parliament became the only competent body to legislate in regard to them throughout Canada, including Newfoundland. . . As for taxes, and amongst them, income taxes or income war taxes, the situation is somewhat different for both the Parliament and the Legislatures have been given the power to tax. *I would not doubt that the exemptions in respect of taxes remain in force for the benefit of the Bowater's Newfoundland Pulp and Paper Mills, Ltd., in so far as they apply to provincial taxes; but these exemptions, if sought to*

*be invoked as against federal taxes, can of course have no effect and they become inoperative.*

The legal norm is therefore permanently repealed as far as its application to the federal sphere is concerned, but the repeal does not have the effect of removing the enactment from the statute books, since the norm continues to apply in the provincial sphere.

An analogous situation arose in *McGee v. The King*.<sup>[113]</sup> In that case, an Upper Canada statute provided that a person could acquire a right of way over Crown lands by using the way uninterruptedly for twenty years. It was argued that the statute was enforceable against the federal Crown. When the Revised Statutes of Ontario had been enacted in 1877, the province of Ontario had repealed and replaced the statute in question.<sup>[114]</sup> However, the repealing provision in the R.S.O. expressly stated<sup>[115]</sup> that it did not apply to pre-Confederation legislative provisions that were within federal jurisdiction under the 1867 Constitution. The judge therefore held that since Parliament had not repealed the prescription provisions, they could still be enforced against the federal Crown.<sup>[116]</sup> Thus, the provincial repeal extinguished the pre-Confederation norm only in so far as it related to a provincial matter.

This would suggest, therefore, that where there is a double aspect to articles of the Civil Code, the action of both levels of government is required if the pre-Confederation norm they express is to be repealed in its entirety. The repeal of the Civil Code by the Quebec legislature in 1994 did not suffice by itself to totally destroy the existence of the norm.

## **II. The Civil Code of Lower Canada as an expression of the *jus commune***

The Civil Code was not a statute like the others. It was a code. Now, codification is a special form of legislative drafting that differs from compilation or mere classification. A Civil Code is an organized system of general rules with a host of possible applications, intended to resolve all disputes that occur from day to day in private law matters. The Civil Code, like the *Civil Code of Québec* today, laid down "the *jus commune*, expressly or by implication. In these matters, it [was] the foundation of all other laws, although other laws [might] complement the Code or make exceptions to it."<sup>[117]</sup> As we will now see, some judges and legal writers have claimed, wrongly in my opinion, that as an expression of the *jus commune* in matters of federal private law, the Civil Code could not be unilaterally repealed by the Quebec legislature.

Professor Macdonald is without a doubt the most able defender of this thesis. The Civil Code, he argues, still constitutes, notwithstanding its repeal by the Quebec legislature, the expression of the *jus commune* (ordinary law) in federal matters. This extremely subtle approach<sup>[118]</sup> rests on the following premises. First, under section 129 of the Constitution, pre-Confederation law was "received", so to speak, into the provincial and federal legal orders.<sup>[119]</sup> Second, in any private law legal system, there is a *jus commune*, understood in its utilitarian and substantive sense.<sup>[120]</sup> In its initial sense, the notion refers to that reservoir of notional rules used to fill in the conceptual vacuums left in place by a statutory private law system.<sup>[121]</sup> In its second sense, it represents instead

the backdrop of intelligibility, the conceptual horizon before which is ranged the statutory bundle of private law peculiar to a given legal order. Thirdly, and this is fundamental, since the Civil Code is neither provincial nor federal, and was received into both the provincial and federal legal order of Quebec through section 129,<sup>[122]</sup> it constituted, after 1867, the expression of the *jus commune* in Quebec provincial matters<sup>[123]</sup> and in federal matters (in federal private law proceedings instituted in Quebec).<sup>[124]</sup> Finally, since the two levels of government, under sections 91 and 92 of the Constitution, are vested with jurisdiction in matters of private law,<sup>[125]</sup> the repeal of the Civil Code by one of them does not entail its repeal as an expression of the *jus commune* in the other areas of private law falling within the jurisdiction of the other level of government. It follows that, as an expression of the federal *jus commune*, the Civil Code continues to exist, notwithstanding its repeal by the Quebec legislature.<sup>[126]</sup> Indeed, since the Civil Code is not a "provincial" statute, the Quebec legislature did not have the power to repeal it in its federal aspect.<sup>[127]</sup> Thus, only Parliament had the power to repeal it in as much as it related to federal heads of jurisdiction, and in as much as it constituted an expression of federal *jus commune*.

Does this mean that the *Civil Code of Lower Canada*, and not the *Civil Code of Québec*, will apply where, in a proceeding brought in Quebec, a federal statute is silent? Professor Macdonald answers with a flat no. He distinguishes between the concept of *jus commune* and that of "suppletive law", the latter not necessarily being a carbon copy of the former.<sup>[128]</sup> The Constitution, he acknowledges, allocates the fundamental jurisdiction in private law matters to the provinces, while Parliament's jurisdiction in such matters is exceptional. He thus concedes that the provincial private law of general application, the *Civil Code of Québec*, will apply as the suppletive law in matters of federal private law. Is there not a danger, then, of conflict between the federal *jus commune* expressed by the *Civil Code of Lower Canada* and the suppletive law laid down in the *Civil Code of Québec*? In other words, is there not reason to fear an operational conflict between a provision of the *Civil Code of Québec* (suppletive law) and the *Civil Code of Lower Canada* (federal *jus commune*)? Professor Macdonald says there is no such risk since, in his view, a pre-Confederation enactment now within Parliament's jurisdiction (in this case, the Civil Code as an expression of the federal *jus commune*) may not enjoy the paramountcy assigned to federal laws by the introductory paragraph of section 91.<sup>[129]</sup>

Although Professor Macdonald's approach differs little from the traditional approach in terms of its result, it does entail some major consequences in terms of principles. It provides a basis for giving federal private law a certain form of autonomy that the legal scholars have, as a general rule, denied it. According to the traditional view, Parliament was but a creature of statute, and had therefore not "received" one or more legal systems, as had the colonies that now make up the provinces and territories of Canada. There is therefore no federal *jus commune*, except in respect of certain matters of public law affecting the Crown.<sup>[130]</sup> In short, [Translation] "federal legislation, understood in its broadest sense, is the sole expression of what constitutes federal law, unless the competent legislative authority has expressly designated, in a particular statute or regulation, some law that is intended to serve in a suppletive capacity."<sup>[131]</sup> Macdonald, on the contrary, argues that through section 129 the entire body of law pre-dating

Confederation in each of the colonies (which would include the Civil Code) was received into the federal legal order. He therefore makes this constitutional provision a vehicle for the recognition of a federal *jus commune*.<sup>[132]</sup> And that is the reason why the norms set down in the Civil Code, for example, cannot be altered by the province of Quebec in so far as they represent the expression of the federal *jus commune*. There is a federal aspect to those norms because, he says, Parliament could, under its section 91 private law jurisdiction, enact norms affecting all general private law aspects of the law of negotiable instruments, bankruptcy, banking law, etc.<sup>[133]</sup> A similar approach was adopted in *The Queen v. Prytula*.<sup>[134]</sup>

In that case the appellant claimed in the Federal Court the amount of a guaranteed student loan received by the respondent under the *Canada Student Loans Act*.<sup>[135]</sup> The trial judge had declined jurisdiction on the ground that the action was not based on any federal rule of law. The Federal Court, it will be recalled, unlike the provincial superior courts, has no inherent jurisdiction. It is a product of Parliament's authority under section 101 of the Constitution to establish courts "for the better Administration of the Laws of Canada". The Court's jurisdiction therefore presupposes the existence of a body of federal law;<sup>[136]</sup> the mere fact that Parliament has legislative jurisdiction over a certain matter does not give the Court jurisdiction over it, even if a federal statute assigns such jurisdiction to it.<sup>[137]</sup> However, should it prove to be necessary to the resolution of certain issues in dispute, an occasional reference to the provincial law will not be prohibited.<sup>[138]</sup> The requisite federal rules of law on which to base the Court's jurisdiction may be found in statutes passed by Parliament, regulations adopted by the competent federal authority, laws that Parliament might have enacted itself but preferred to incorporate into federal legislation by reference,<sup>[139]</sup> and norms considered to be federal by virtue of their very essence.<sup>[140]</sup> What is clear is that, absent any valid federal rule of law, provincial law cannot serve to nourish the Court's jurisdiction.<sup>[141]</sup> Yet in *The Queen v. Prytula*, the trial judge thought the respondent's liability was based not on federal law but on the loan contract, which was itself governed by provincial law.

The Court of Appeal allowed the appeal, relying on an argument similar in all respects to that of Professor Macdonald, namely, that pre-Confederation law had been received into the federal legal order and could therefore constitute a source of "federal law" that could nourish the jurisdiction of the Trial Division.<sup>[142]</sup> Here is what Heald J.A. had to say on this point:<sup>[143]</sup>

It would seem to be clear that a contract whereby a banker makes a loan to a customer is a matter coming within the subject "banking". If that is correct, the concluding words of section 91 require that such a bank loan contract "shall not be deemed" to come within section 92(13) whether or not Parliament has enacted any law with regard thereto under section 91(15). In such a case, if full play be given to the concluding words of section 91, a post-Confederation provincial law of general application does not alter law continued by section 129 in so far as it applies to a matter coming within the section 91 class of subjects. In so far as a law is applicable to a matter coming within "banking", it can, therefore, only be "repealed, abolished or altered" by Parliament and it cannot be "repealed, abolished or altered" by a provincial legislature (section 129 of *The British*

*North America Act, 1867*) ; and it is, therefore, a "federal" law and not a "provincial" law for the purposes of section 101 of *The British North America Act, 1867*, even though it is part of a general law in relation to property and civil rights that was continued in the province by section 129.

In my view, the opinion of Professor Macdonald (and of Heald J.A.), attractive as it is, cannot be reconciled with the provisions of section 129. I would agree that this section continues in force pre-Confederation law and that this law can be altered only by the competent level of government. I would concede as well that this law is neither federal nor provincial, and that a norm may survive in the absence of a physical medium. However, in my opinion, this provision does not entail the reception of pre-Confederation law into the federal legal order. Professor Macdonald argues that section 129 was not merely intended to avert a legal vacuum by ensuring the continuation of the previous law. It is, he says, more analogous to a provision ensuring the reception of a legal system into a given territory.<sup>[144]</sup> Such statutory enactments exist in most Canadian provinces. Their purpose is to set a cut-off date for the reception of English statutory law of general application into a colony. Only English statutes of that nature that precede the crucial date for a particular colony are deemed to have been introduced and may be relied on in the colonial courts. As Marx and Chevrette note: [*Translation*] "it was the statutory law as it existed at that date, and not the later statutes, that was carried over."<sup>[145]</sup> As for the English common law, it is deemed to have been introduced in full in all the colonies in which English law was received.<sup>[146]</sup>

I consider Professor Macdonald's approach difficult to support in light of the difference in wording between section 129 and, for example, section 2 of the *Law and Equity Act*,<sup>[147]</sup> which governs the reception of English law into British Columbia. In my opinion, section 129 simply continues in force the pre-Confederation law and specifies that the power of amendment will no longer belong to a single level of government. It is not a provision that ensures the "reception" of pre-Confederation law at both the federal and provincial levels. The words of the provision are absolutely unequivocal:

All Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, . . . *shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively*, as if the Union had not been made; subject nevertheless . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act [emphasis added].

The ultimate purpose of section 129 is simply to ensure the continuation in force of the pre-Confederation law in the various provinces; it simply does not address the incorporation of that law into the federal legal order. In any event, in the *ITO* judgment, the Supreme Court clearly rejected the approach proposed by Professor Macdonald and Heald J.A.

In that case, it had been argued that, under section 129 of the Constitution, the Civil Code had been incorporated into federal law and that it was therefore part of the "Canadian maritime law" referred to in section 2 of the *Federal Court Act*.<sup>[148]</sup> The Federal Court,

it was submitted, therefore had jurisdiction to hear a civil liability suit brought in Quebec based on the alleged negligence of an unloading and storage company operating in the Montreal port area. McIntyre J., on behalf of the Court, dismissed this contention:[149]

Section 129 does not, in my opinion, support an argument for referential incorporation of provincial law. The effect of the section is to preserve in force after the Union the laws which existed in the various provinces before the Union, but as to future repeal or amendment of such laws after the Union, the s. 91 and s. 92 division of powers was to apply. This section has rather an opposite effect from that contended for. It separates the laws into the separate spheres of legislative competence created by the Union, rather than causing any federal incorporation.[150]

Furthermore, in my view it is impossible to concede, as Professor Macdonald argues, that section 129 transforms pre-Confederation law into a set of disembodied norms with only the slightest connection to their previous physical medium. He argues that in so far as they are not new law, "[t]he legal norms to which a Civil Code gives expression . . . exist independently of any particular codal formulation".[151] The Civil Code would then be only a formulation of pre-existing norms[152] which, under section 129, had been received into Quebec law and federal law. Hence the norms formulated in the Civil Code can constitute an expression of the *jus commune* in both federal law and provincial law. Professor Macdonald is of the opinion, therefore, that the norms established by the articles of the Civil Code, and which are part of the *jus commune*, cannot be repealed in their federal aspect by the legislature of the province of Quebec. Thus, assuming that the notion of solidarity is one of these fundamental private law concepts making up the *jus commune*, article 1108 of the Civil Code,[153] for example, would still be the expression of the federal *jus commune* in such matters, notwithstanding its repeal in 1994.

A pre-Confederation norm is not a concept so vague as to stand alone, independently of its linguistic medium and irrespective of the nature (statute or judgment) of the latter. Nevertheless, the pre-Confederation norm can continue to exist notwithstanding the disappearance of its physical medium. However, its *object* will still be a function of its initial wording (if it is a statute) or of the factual context in which it was enunciated (if it is a common law rule[154]). And it is this object that allows us to identify the constitutional head of power to which it refers and, as a corollary, to determine which level of government, federal or provincial, has the power to amend or repeal it. What this means is that pre-Confederation law does not exist in a completely disembodied state - it continues to be *contextualized* by the material and linguistic medium of the norm.[155] From this context it is possible to determine whether the norm does or does not comprise a federal aspect.

In other words, article 1108 of the Civil Code, for example, does not simply provide a linguistic medium for a formless concept of "solidarity", operating in some normative limbo and applicable as well under section 129 of the Constitution to matters of provincial law. The pre-Confederation norm established by article 1108, contextualized by the wording of this provision, never had any federal aspect. The normative existence of this rule was terminated when the Civil Code was repealed by the *Civil Code of*

*Québec*. It does not continue to exist in any way in the federal legal order, since it never comprised any object that might conceivably connect it with a federal head of jurisdiction.

The fact that Parliament, if it so wished, could adopt a provision that would be used to define the scope of the solidary liability of the signatories of a bill of exchange is no reason to conclude that it was competent to adopt or amend article 1108 of the Civil Code, as formulated. All that exists, after the repeal of the Civil Code by the Quebec legislature, is the pre-Confederation provisions with a truly federal aspect. In short, once the *Civil Code of Québec* came into force, provisions of that law applied in a suppletive capacity, to fill in any gaps in a federal private law statute.

Some serious problems could result, we are told, from a refusal to recognize the existence of this federal *jus commune*.<sup>[156]</sup> It is argued, for example, that interjurisdictional immunity might result in a legal vacuum, in so far as the provincial law of general application might not be applicable as suppletive law.<sup>[157]</sup>

It must be conceded that the problem of interjurisdictional immunity has never given rise to many problems in federal private law. This is because private law is an area that, notwithstanding the distribution of powers, is nonetheless characterized by a significant intermingling of its various components. The courts have therefore tended to promote overlapping rather than exclusion in such matters.<sup>[158]</sup> True, this approach may perhaps be subject to change in areas of private law that pertain more particularly to commercial matters;<sup>[159]</sup> indeed, in those areas the Supreme Court appears to favour the introduction of greater uniformity of standards.<sup>[160]</sup> Nevertheless, it should be kept in mind that under its exclusive and accessory legislative jurisdiction, Parliament could easily attribute to itself by statute any suppletive law whatsoever.<sup>[161]</sup> To the degree that it thought necessary, Parliament could clearly designate which law it intended to be applicable. This law would then have paramountcy over the provincial law of general application.<sup>[162]</sup>

To summarize, there is no theoretical or practical basis for concluding that section 129 of the Constitution has incorporated the Civil Code into the federal legal order as an expression of the *jus commune*.

## CONCLUSION

Admittedly, Canadian federalism will always cast its shadow over our legal problems. The repeal of the Civil Code is no exception to this rule. As we have noted, the complete repeal of our old Code calls for some federal action since some provisions of the Civil Code, by virtue of the fact that they predate Confederation, fall wholly or partly within the legislative jurisdiction of the federal Parliament under section 91 of the Constitution. Some consolation may be derived from the thought that this situation, a direct result of section 129 of the Constitution, can be a source of no satisfaction to either the Quebec legislature or the federal Parliament.

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[1] *Le testament français* (Paris: Mercure de France, 1995), at 282-83.

[2] S.Q. 1991, c. 64.

[3] Hereinafter the Civil Code.

[4] Although the first paragraph of the final provisions of the *Civil Code of Québec* says it "replaces" the *Civil Code of Lower Canada*, it is clearly a repeal. See the *Interpretation Act*, R.S.Q. c. I-4, s. 10.

[5] 1867 (U.K.), 30-31 Vict. c. 3.

[6] R.S.C. 1985, Sch. V (hereinafter the Constitution).

[7] Proclamation of 26 May 1866 fixing the date of coming into force of the Civil Code, *The Canada Gazette*, 1866, at 1824 and 1877.

[8] A. Morel, "La codification devant l'opinion publique de l'époque", in J. Boucher and A. Morel (eds.), *Le droit dans la vie familiale, Livre du centenaire du Code civil*, vol. 1 (Montreal: P.U.M., 1970), at 27-45.

[9] *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure*, S.C. 1857, c. 43; *An Act respecting the Civil Code of Lower Canada*, S.C. 1865, c. 41.

[10] On July 1, 1867.

[11] *Supra* note 5 (hereinafter B.N.A. Act).

[12] In this regard, see F. Chevrette and H. Marx, *Droit constitutionnel* (Montreal: P.U.M., 1982), at 1626-27.

[13] Concerning the reception of English law into the various colonies, see J.E. Côté, "The Reception of English Law" (1977) 15 Alta. L.R. 29.

[14] This section has never really been the focus of scholarly commentary. Nevertheless, the major works on constitutional law in the late 19th century devote greater attention to it than the current monographs; for example, see G.J. Wheeler, *Confederation Law of Canada* (London: Eyre and Spottiswoode, 1896), at 537-41; W.H.P. Clement, *The Law of the Canadian Constitution* (Toronto: Carswell, 1892), at 200 and 534-37; by the same author, 2nd ed., 1904, at 236-40 and 342-44, and 3rd ed. (Carswell: 1916), at 582-89; A.H.F. Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913), at 161-63. Only one recent work accords relatively sustained attention to section 129: L.B.Z. Davis, *Canadian Constitutional Law Handbook* (Aurora: Canada Law Book, 1985), at 357-59 and 794-98. In reality, the only real study of this section was conducted by L. Patenaude in an unpublished paper written in 1966 entitled *Le pouvoir de la législature du Québec de modifier la forme du Code civil*. To this must now be added a paper by Professor Roderick A. Macdonald entitled "Encoding Canadian Civil Law", which is to appear in a forthcoming festschrift to Professor Paul-André Crépeau.

[15] [Note in French text] We are not reproducing here the French version of the *Constitution Act, 1867*, *supra* note 6, since it is still only unofficial.

[16] Charges may even be laid pursuant to a pre-Confederation provision: *Rex v. Yaldon* (1908), 17 O.L.R. 179 (Ont. C.A.).

[17] *Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No. 9 "An Act to Amend the Supreme Court Act"*, [1940] S.C.R. 49 at 129 (Judson J.). *A.G. of Canada v. Can. Nat. Transportation, Ltd.*, [1983] 2 S.C.R. 206 at 219 and 221.

[18] *Pearce v. Kerr* (1908-09), 9 W.L.R. 504 at 506 (Sask. Dist. Ct.).

[19] *Walter v. Attorney-General of Alberta*, [1969] S.C.R. 383 at 393-94.

[20] *The Queen v. Halifax Electric Tramway Co.* (1897-98), 30 N.S.R. 469 at 477 (N.S.C.A.), *per* Graham C.J., dissenting but not on this point.

[21] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 at 413 (dissenting opinion, but not on this point).

[22] L. Patenaude, *loc. cit.* note 14 at 4. In support of this proposition, the author refers to *Attorney General for Ontario v. Attorney General for the Dominion*, [1896] A.C. 348 at 366 (hereinafter the Local Prohibition Case): ". . . neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact"; *Rinfret v. Pope* (1886), 12 Q.L.R. 303 at 311 (C.A.); *Ex parte O'Neill* (1905), 28 C.S. 304 at 309; *The Queen v. Halifax Electric Tramway Co.*, *supra* note 20 at 476; *Griffith v. Rioux* (1883), 6 L.N. 211 at 214 (S.C.): "the Legislature cannot repeal what it cannot re-enact. . .";

one could also add to this list *R. v. Mercure*, [1988] 1 S.C.R. 234 at 271; *Hellens v. Densmore*, [1957] S.C.R. 769; *Rex v. Yaldon*, *supra* note 16 at 181, and *McGee v. The King*, [1902] Ex. C.R. 309 (T.D.).

[23] (1881-82) 7 A.C. 136 (hereinafter *Dobie*).

[24] *Act to amend the Act entitled "Act to incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland"*, 38 Vict. c. 64.

[25] *Act to incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland*, 22 Vict. c. 66.

[26] *Dobie*, *supra* note 23 at 147. At page 152, Lord Watson states that "the power of the Provincial Legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed."

[27] *Ibid.* at 147-48.

[28] *Ibid.* at 150.

[29] *Ibid.* at 150. It should be noted that even if the statute had limited the scope of the repeal to matters within the jurisdiction of the province of Quebec, the judgment does not say that it would necessarily have been ruled valid. In *Ex parte O'Neill*, *supra* note 22, it was held that Quebec's jurisdiction over the regulation of local trade in intoxicating liquor did not authorize it to repeal, as provisions applying to its territory, a temperance statute adopted by the province of Canada in 1864. Albeit limited, such repeal was held to be *ultra vires*: "[T]he Temperance Act of 1864 was of a general character and applicable to both provinces indiscriminately. Now this law having been passed by the Legislature representing the people of both provinces, could not be repealed by a Legislature representing only one-half of the same body. Its general character clearly compelled its classification among the laws which fell under the control of the general legislature, the action of which was intended to extend over the whole of the Dominion" (p. 309). See, however, *infra* note 65.

[30] *Ibid.* at 150: "If, by a single Act of the Dominion Parliament [province of Canada], there had been constituted two separate corporations, for the purpose of working, the one a mine within the province of Upper Canada, and the other a mine in the province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked."

[31] *Ibid.* at 152. For an interesting case in which *Dobie* was distinguished, see *Lafferty v. Lincoln* (1907), 38 S.C.R. 620.

[32] *Supra* note 22.

[33] 27-28 Vict. c. 18.

[34] Local Prohibition Case, *supra* note 22 at 367. This conclusion is surprising in view of the fact that the 1864 Act was clearly intended to apply throughout the territory of the province of Canada.

[35] R.S.C. 1886, 49 Vict. c. 106.

[36] Local Prohibition Case, *supra* note 22 at 362.

[37] *Ibid.* at 366.

[38] *Ibid.* at 367.

[39] We now know that Parliament can enact provisions that affect only one province in particular. For example, in the area of private law one might cite the former *Divorce Act (Ontario)*, 1930, S.C. 1930, c. 14. The *Bills of Exchange Act*, 53 Vict. c. 33 also included some provisions that applied only in Quebec. Finally, the *Act respecting Bills of Exchange and Promissory Notes*, R.S.C. 1886, c. 123, which had preceded the 1890 Act, was simply a list of provisions limited in their application to certain provinces. In the area of criminal law, it has also been held that uniformity was not a precondition to validity. For example, the courts have held that the differential application among the provinces of a criminal law statute can be a legitimate means of forwarding the values of a federal system: *R. v. Sheldon S.*, [1990] 2 S.C.R. 254 at 289; see also P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 447.

Prior to the Privy Council decision, a number of courts had held that the federal Parliament was the only legislature empowered to repeal the provisions of the 1864 statute prohibiting the sale of alcohol: *Hart v. La Corporation du Comté de Missisquoi* (1876), 3 Q.L.R. 170 (Circuit Court) and *Ex parte Cooley, Jr. v. The Municipality of the County of Brome* (1877), 21 L.C.J. 182 (Circuit Court). But the grounds for these decisions are now debatable. It was said that any commercial issue, including the sale of intoxicating beverages, came within the sole jurisdiction of the Parliament of Canada. This conclusion is no longer valid. It is now clearly established that the provinces have jurisdiction over intraprovincial trade and that Parliament has exclusive jurisdiction over extraprovincial trade, including imports and exports, as well as the power to make laws in relation to the "general regulation of commerce". A more persuasive reason why the provinces lack this power was cited in *Ex parte O'Neill*, *supra* note 22, which came after the Local Prohibition Case. In *O'Neill*, it was held that Quebec's jurisdiction over the regulation of local trade in intoxicating beverages did not give it authority to repeal the 1864 legislation, even though the intention was to repeal the Act only in so far as it applied to Quebec. Such repeal was held

to be *ultra vires* on the ground that the pre-Confederation statute was intended to apply throughout the territory of what was then the province of Canada. The province of Quebec therefore lacked the power to repeal it.

[40] In the Local Prohibition Case the Privy Council also upheld the validity of an Ontario statute, the *Act to Improve the Liquor Licence Acts*, (1890) 53 Vict. c. 56. This statute reproduced some of the provisions of the 1864 statute, which restricted local trade in intoxicating beverages. Although both statutes governed the same subject matter, the provincial statute and the *Canada Temperance Act*, *supra* note 35, were nevertheless valid, it was held, since they addressed trade in intoxicating beverages from, respectively, a local and a national perspective. Finally, since both Acts required for their implementation a positive vote by a majority of the voters in a particular area, an operational conflict would likely arise only in an area that had opted for the federal statutory regime.

[41] *Johnson v. Seabright et al.* (1979), 107 D.L.R. (3d) 749 at 757 (Nfld. C.A.), *per* Gushue J.A., Morgan J.A. concurring. Furlong C.J. wrote concurring reasons. This decision was upheld on appeal in *Moore v. Johnson et al.*, [1982] 1 S.C.R. 115.

[42] [1950] S.C.R. 609 (hereinafter *Bowater*).

[43] R.S.C. 1985, Sch. XXXII. Term 18(1) is similar in all respects to section 129 of the Constitution.

[44] *Act to amend The Income Tax Act and the Income War Tax Act*, S.C. 1949, c. 25, ss. 49 and 50. The Act was said to apply "notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April nineteen hundred and forty-nine). . ."

[45] *Bowater*, *supra* note 42 at 620: "[T]he 'authority' referred to in Term 18(1) is the authority which is given jurisdiction on the respective subject-matters enumerated in Sections 91 and 92. . ."

[46] *Ibid.* at 621-22.

[47] *Ibid.* at 624.

[48] *Ibid.* at 630-31.

[49] *Ibid.* at 639.

[50] *Ibid.* at 639. (emphasis added)

[51] *Ibid.* at 640 : "Admittedly the provisions are not severable as terms of a contract, but they are clearly so as legislative subject matters."

[52] *Ibid.* at 641.

[53] *Ibid.* at 642.

[54] *Ibid.* at 663: "The question, however, is as to the right to exercise these powers and not the consequences of such exercise."

[55] *Ibid.* at 646: "If Parliament cannot enact, it cannot repeal, no matter whether the attempted mode is by express repeal or by the enactment of repugnant legislation" Kellock J. also cites the following passage from *Great West Saddlery v. The King*, [1921] 2 A.C. 91 at 117: "For neither the Parliament of Canada nor the provincial legislatures have authority under the Act to nullify, by implication any more than expressly, *statutes* which they could not enact."

[56] *Ibid.* at 646-47. This statement is rather surprising, in view of the words of the Act; see *supra* note 44.

[57] *Ibid.* at 647.

[58] *Ibid.* at 647.

[59] *Ibid.* at 651 and 655.

[60] *Ibid.* at 654.

[61] *Ibid.* at 656.

[62] *Ibid.* at 634.

[63] *Ibid.* at 635.

[64] *Id.*, 635-636. [Emphasis in original]

[65] What, then, is one to make of the conclusion of Saint-Pierre J. in *Ex parte O'Neill*, *supra* note 22 at 309-10, concerning the invalidity of the limited repeal by the Quebec legislature of the 1864 Act prohibiting the sale of alcohol?

[66] So long as Parliament does not repeal pre-Confederation provisions within its jurisdiction, the applicable rules in federal matters may vary from one province to another. In fact, the pre-Confederation law maintained in force in the various provinces by section 129 is not always identical: *In Re Storgoff*, [1945] S.C.R. 526 at 556; *Willett v. De Grosbois* (1873), 17 L.C.J. 293 at 295 (S.C.). See, for example, the situation that existed in divorce law until the enactment of the

*Divorce Act*, S.C. 1967-68, c. 24; R.S.C. 1985, c. 3 (2nd Supp.); C. Davies, *Family Law in Canada* (Toronto: Carswell, 1984).

[67] The following unpublished studies, prepared for the Department of Justice of Canada, have listed and reviewed those articles of the Civil Code that Parliament has jurisdiction to repeal: J. Auger, "Claims of the Crown" (March 27, 1996), at pp. 481-526; A. Bohémier, "Bankruptcy and Insolvency" (March 1996), at pp. 527-612; A. Braën, "The Maritime Provisions of the Civil Code of Lower Canada" (March 1996), at pp. 715-746; G. Côté, "Pre-Confederation Provisions of the Civil Code of Lower Canada Affecting the Crown and their Possible Repeal Insofar as they Deal with Matters Falling Within the Legislative Jurisdiction of the Parliament of Canada" (March 26, 1996), at pp. 449-480; P.-A. Côté, "Survival of Pre-Confederation Law: Provisions on the Interpretation and Application of Statutes in the Civil Code of Lower Canada" (March 1996), at pp. 395-428; J. Leclair, "Study of the Constitutional Legality of the Repeal by the Quebec Legislature of Pre-Confederation Provisions of the Civil Code of Lower Canada Relating to Bills of Exchange and Interest" (April 11, 1996), at pp. 613-714. A. Morel, "Pre-Confederation Provisions on Marriage in the Civil Code of Lower Canada" (March 1996), at pp. 429-448. For a synthesis of these studies, see A. Morel, "Pre-Confederation Civil Law and the Role of Parliament after the New Civil Code", a preliminary background paper submitted to the Department of Justice of Canada (November 6, 1996), at pp. 71-134.

[68] P.-A. Côté, *Interprétation des lois*, 3rd ed. (Cowansville: Yvon Blais, 1993) at 100.

[69] *Ibid.* at 99 (notes omitted).

[70] L. Patenaude, *loc. cit.* note 14, at 4 and 6; R.A. Macdonald, *loc. cit.* note 14, par. 55-56.

[71] *Supra* note 22 at 366 (emphasis added).

[72] In the following cases, it was held that pre-Confederation law should be considered federal law where it pertained to a matter of federal jurisdiction: *Hellens v. Densmore*, *supra* note 22 at 784 (*per* Rand J., albeit not on behalf of the Court); *The Queen v. Prytula*, [1979] 2 F.C. 516 at 523 (C.A., upheld on another ground: *Rhine v. The Queen*, [1980] 2 S.C.R. 442); *Associated Metals & Minerals Corp. v. L'EVIE*, [1978] 2 F.C. 710 at 713 (C.A., upheld on appeal without reference to this issue: [1980] 2 S.C.R. 322). In *Corner Brook City Council v. Bowater Newfoundland Limited* (1980), 25 Nfld. & P.E.I.R. 525 at 530-31 (Nfld. C.A.), it was held that this pre-Confederation law constituted provincial law when it fell within the jurisdiction of the provinces. See also W.H.P. Clement, *op. cit.* note 14, 1st ed. at 200.

[73] *ITO-International Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 at 779 (hereinafter *ITO*); *Moore v. Johnson et al.*, *supra* note 41 at 122-23; *Canada v. Maritime Group (Canada) Inc.*, [1995] 1 F.C. 131 at 144 (T.D., overturned on appeal, [1995] 3 F.C. 124 without reference to this issue); *Corner Brook City Council v. Bowater Newfoundland Limited* (1980), 25 Nfld. & P.E.I.R. 536 at 537 and 540 (Nfld. S.C., reversed by the Court of Appeal in *Corner Brook City Council v. Bowater Newfoundland Limited*, *supra* note 72). See also *Flexi-Coil Ltd. v. Rite Way MFG Ltd.*, [1990] 2 F.C. 244 (T.D.).

[74] *Supra* note 41.

[75] *Ibid.* at 122-123.

[76] *Johnson v. Seabright et al.*, précitée, note 41 at 754-755 (emphasis added).

[77] Translation proposed in the *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice of Canada with a draft official French version of certain Constitution enactments*, a committee established under the aegis of section 55 of the *Constitution Act, 1982*.

[78] *Bowater*, *supra* note 42 at 639 (emphasis added). W.H.P. Clement, *op. cit.* note 14, 1st ed. at 200, explains that section 129 continued in force "the whole body of existing law (in its widest sense)".

[79] P.-A. Côté, *op. cit.* note 68 at 99: [Translation]"Legislation that contradicts an earlier statute without however repealing it merely renders the first enactment inapplicable to the extent of the conflict. The shell of the statute survives, and theoretically at least, the enactment may be revived if the second statute is eliminated."

[80] By way of example, see *An Act respecting Wreck & Salvage*, S.C. 1873, c. 55, s. 37; *An Act respecting the shipping of Seamen*, S.C. 1873, c. 129, s. 5; *An Act relating to shipping and for the registration, inspection and classification thereof*, S.C. 1873, c. 128, s. 3; and the *Bills of Exchange Act*, *supra* note 39, s. 95.

[81] The commissioners took into account the amendments by the federal Parliament to some provisions of the Civil Code. Not only did they draw up a list (R.S.Q. 1888, vol. 2 at 927-42, arts. 6228-6271), but they even changed the wording of the articles in question: L. Patenaude, *loc. cit.* note 14 at 46.

[82] R.A. Macdonald, *loc. cit.*, note 14 at par. 56.

[83] It might further be added that the bilingualism of federal and Quebec statutes is the best illustration of the fact that legal norms exist over and above enactments

and that an enactment is no more than the physical medium through which a norm is expressed.

[84] This is what it did, for example, in the statutes listed in note 80. For example, under section 95 of the *Bills of Exchange Act*, *supra* note 39, the enactments mentioned in the second Schedule of that Act were repealed as from commencement of that Act.

[85] There is no doubt that since 1867 this article has fallen within federal jurisdiction, under section 91(18) of the Constitution. This article was not affected by the express repeal effected in 1890 by section 95 of the *Bills of Exchange Act*, *supra* note 39. That provision stated that the enactments mentioned in the second schedule to that Act should be considered repealed as from commencement of the Act. The second schedule read: "Articles 2,279 to 2,354, both inclusive" [and, in a footnote] "Except in so far as such articles, or any of them, relate to evidence in regard to bills of exchange, cheques and promissory notes".

[86] (1893) 56 Vict. c. 31.

[87] (1907) 6-7 Ed. VII, c. 43.

[88] A. Gérin-Lajoie, "Quelle loi s'applique en matière de preuve relativement aux effets de commerce?" (1926), 5 R. du D. 425 at 437 and 440; A. Perrault, *Traité de droit commercial*, vol. 3 (Montreal: A. Lévesque, 1940) at 1130-31.

[89] M. Caron and A. Bohémier, *Précis de droit des effets de commerce*, 7th ed. (Montreal: Beauchemin, 1982) at 12-13. L.-J. de la Durantaye, *Traité des effets négociables* (Montreal: Wilson & Lafleur, 1964) at 305, par. 487: [Translation] "Article 2341 of the Civil Code has survived this on-and-off pattern. Save these applications, the province of Quebec must still, in procedures involving bills of exchange, cheques and promissory notes, follow the English rules of evidence that were in force on May 31 [*sic*], 1849" (notes omitted).

[90] Section 4 of the *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46, is another example of implied repeal. It states that this Act "contains all of the prohibitions in law in Canada against marriage by reason of the parties being related". In my opinion, this provision has not repealed articles 125 and 126 of the Civil Code; it has simply rendered them inoperative.

[91] *Bowater*, *supra* note 42 at 646 (emphasis added).

[92] [1927] Ex. C.R. 68 (T.D.).

[93] *Ibid.* at 72.

[94] *Ibid.* at 73 (emphasis added).

[95] *Ibid.* at 75.

[96] *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 at 154-55: "[D]ual compliance will be impossible when *application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose*. . . The focus of the inquiry [into the conflict], rather, must be on the broader question *whether operation of the provincial Act is compatible with the federal legislative purpose*. Absent this compatibility, dual compliance is impossible" (emphasis added). In *Hall*, a provincial statute authorized a judge to decide if, when and in what circumstances, property lodged as security by a debtor could be delivered over to a secured creditor. The appellant argued that this valid provincial statute conflicted with the security interest created pursuant to sections 178 and 179 of the *Bank Act*. The Court found for the appellant on the ground that the application of the provincial statute entailed non-compliance with the federal statute. The purpose of the regime established by the federal provisions in question was to grant an *immediate* right to seize and sell the pledged property, whereas the purpose of the provincial statute was to prohibit the creditor from immediately seizing the property used as security on pain of determination of the security interest.

[97] P.-A. Côté, *op. cit.* note 68 at 99.

[98] In *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at 514 and *R. v. Mercure*, *supra* note 22 at 264-65.

[99] *Supra* note 41 at 756.

[100] He uses the expressions "repeal by operation of the law" and "repeal by necessary implication" (*ibid.*).

[101] *Moore v. Johnson et al.*, *supra* note 41.

[102] *Ibid.* at 123 (emphasis added).

[103] *Supra* note 66. For an identical decision, see *Johnson v. Drummond* (1873), 17 L.C.J. 176 (Circuit Court).

[104] (1860) 23 Vict. c. 17.

[105] *An Act to make temporary provision for the Election of Members to serve in the House of Commons of Canada*, (1871) 34 Vict. c. 20.

[106] *Willet v. De Grosbois*, *supra* note 66 at 295. "The fact of the Dominion Legislature having enacted the 34 Vict., c. 20, cannot help the plaintiff. This was enacted for the whole Dominion, but in Quebec and Ontario there was left the 23 Vict., c. 17, sec. 6, in full force. Nothing is in the 34 Vict., c. 20, resembling what

is enacted by sec. 6 of c. 17 of 23 Vict., against the executory contracts and promises referred to in it."

[107] "Double aspect" is the term used when a statute addresses a matter which may be said to deal, from one perspective, with a matter of federal jurisdiction, and, from another perspective, with a matter of provincial jurisdiction. An enactment dealing with such a matter may therefore be equally adopted by Parliament or a province, in so far as each level of government is pursuing an objective within its own right.

[108] Arts. 803 par. 2, 1998 final par., and 1999(4). See, in this regard, A. Bohémier, *loc. cit.* note 67.

[109] Arts. 1229, 2340, 2341, 2342, 2346 and 2354. See, in this regard, J. Leclair, *loc. cit.* note 67.

[110] Arts. 400, 402, 403, 1989, 1994 (10), 2032, 2086, 2121(2), 2211, 2212 and 2263. See, in this regard, J. Auger, *loc. cit.* note 67 and G. Côté, *loc. cit.* note 67.

[111] *Supra* note 42.

[112] *Ibid.* at 624 (emphasis added). It will be recalled that the Chief Justice also concluded (at 621-22) that sections 49 and 50 of the federal income tax legislation had explicitly repealed the pre-Confederation provisions in question.

[113] *Supra* note 22.

[114] *An Act respecting the Revised Statutes of Ontario*, 40 Vict. (Ont.), c. 6, s. 6.

[115] *Ibid.*, s. 7.

[116] *McGee v. The King*, *supra* note 22 at 316.

[117] Second paragraph of the preliminary provision of the *Civil Code of Québec*.

[118] The first version of this approach was set out in a 259-page paper!: R.A. Macdonald, "The Constitutional Position of the *Civil Code of Lower Canada* and the *Civil Code of Québec* as an Expression of Federal Suppletive Law", a study presented to the federal Department of Justice, March 31, 1996. Professor Macdonald summarizes this paper in an article entitled "Encoding *Canadian Civil Law*", which we referred to earlier (*loc. cit.* note 14).

[119] R.A. Macdonald, *loc. cit.* note 14, pars. 46, 58 and 65.

[120] This distinction between ordinary law in the utilitarian sense and the substantive sense was developed by professors J.-M. Brisson and A. Morel in

"Droit fédéral et droit civil: complémentarité, dissociation", (1996) 75 *Can. Bar Rev.* 297 at 324-30.

[121] R.A. Macdonald, *loc. cit.*, note 14, par. 15.

[122] *Ibid.* par. 46 and 58.

[123] *Ibid.* par. 65.

[124] *Ibid.*, par. 46; in Quebec, this federal and provincial *jus commune* is so to speak identical (*ibid.*, par. 47).

[125] The provinces have fundamental jurisdiction over matters of private law under section 92(13). An exceptional jurisdiction in such matters has been given to the federal Parliament, however, under paragraphs 2, 15, 16, 18-19, 21-23 and 28 of section 91, in the following areas: regulation of trade and commerce, banking, incorporation of banks, savings banks, bills of exchange and promissory notes, interest, bankruptcy and insolvency, patents of invention and discovery, copyrights and, finally, the establishment, maintenance and management of penitentiaries.

[126] R.A. Macdonald, *loc. cit.* note 14, par. 58-59 and 65.

[127] *Ibid.*, par. 64.

[128] Whereas the *jus commune* designates "the fundamental regime of general jural concepts and rules that govern the private law" (R.A. Macdonald, *loc. cit.* note 118, par. 41), the suppletive law contemplates "the body of law that actually serves as the backdrop for any enactment - either a statutory regime, or . . . even a civil code" (*ibid.*, par. 57). Admittedly, the requisite nuance is not completely clear. As an example of the subtle difference that may exist between the two concepts, Macdonald explains (*ibid.*, par. 55): "It follows, *a contrario*, that the *ius commune* may not always serve as the suppletive law for an enactment. It may well be that the statute in question, say a statute regulating the devolution of estates, might explicitly provide that in so far as family religious artefacts are concerned, it is the law of the relevant religious sect - canon law, talmudic law, Islamic law, and so on - that shall govern *post mortem* dispositions and entitlements. In such a case, while the *ius commune* may well serve as implicit residual suppletive law for the devolution of estates in general, some other body of law serves the function of specific suppletive law in so far as questions relating to religious artefacts are concerned."

[129] R.A. Macdonald, *loc. cit.* note 14, par. 65, and R.A. Macdonald, *loc. cit.* note 118, par. 193: "In other words, in their function as federal *ius commune*, the provisions of the *Civil Code of Lower Canada* will cede (in their operation) before valid contrary provincial statutes, just as if they had been carried into

federal jurisdiction as unenacted common law." I agree with Professor Macdonald when he says that *Hellens v. Densmore*, *supra* note 22, was wrongly construed as meaning that the pre-Confederation law now within the jurisdiction of Parliament could prevail over a valid provincial statute (see *Re Broddy and Director of Vital Statistics* (1982), 142 D.L.R. (3d) 151 (Alta. C.A.). In *Hellens v. Densmore*, the majority instead held that a provincial enactment cannot reproduce a pre-Confederation enactment dealing with a basic condition of marriage, since such matters fall within the exclusive jurisdiction of Parliament. Only Rand J. suggested that the concept of paramountcy could be applied to a norm of pre-Confederation law.

[130] See, on this issue, J.-M. Brisson and A. Morel, *loc. cit.* note 120 at 310, and the authorities referred to therein.

[131] J.-M. Brisson, "L'impact du Code civil du Québec sur le droit fédéral: une problématique", (1992) 52 *R. du B.* 345 at 347-48. Professor B. Laskin differs, however (*Canadian Constitutional Law*, 4th ed. (Toronto: Carswell, 1975) at 793: "[B]ecause the common law is potentially subject to overriding legislative power, there is federal common or decisional law and provincial common or decisional law according to the matters respectively distributed to each legislature by the *B.N.A. Act.*" See also B. Laskin, *The British Tradition in Canadian Law* (London: Stevens, 1969) at 129.

[132] It is this "reception" into the federal order that apparently distinguishes the notion of *jus commune* from the concept of Asuppletive law".

[133] R.A. Macdonald, *loc. cit.* note 14, par. 43. This approach is close to that of B. Laskin, *op. cit.* note 131.

[134] *Supra* note 72.

[135] R.S.C. 1970, c. S-17, now R.S.C. 1985, c. S-23.

[136] *ITO*, *supra* note 73 at 766.

[137] *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654 at 658. See also *Roberts v. Canada*, [1989] 1 S.C.R. 332 at 338.

[138] A. Braën, "La compétence maritime du Parlement canadien et ses conséquences sur l'application du *Code civil*", (1986) 31 *McGill L.J.* 369 at 412-14.

[139] Incorporation by reference presupposes in any event the existence of a federal statute, which adopts a law from the other level of government.

[140] *Roberts v. Canada*, *supra* note 137. In that case, Wilson J. appears to have assigned a federal character to the right to the possession and occupation of their tribal lands that aboriginal peoples enjoy at common law.

[141] *Quebec North Shore Paper Company v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054 at 1065.

[142] An identical argument had been adopted in *Associated Metals & Minerals Corp. v. L'EVIE*, *supra* note 72. It should be noted forthwith that these decisions were rendered before the decisions in *Moore v. Johnson et al.*, *supra* note 41, and *ITO*, *supra* note 73. Furthermore, in those two cases the Supreme Court (*supra* note 72) upheld the decisions without ruling on the reception argument. In *The Queen v. Prytula*, *supra* note 72, for example, the Court instead found that the statute in question and the *Canada Student Loans Regulations*, SOR/68-345, governed all aspects of the relationship between the respondent and the appellant.

[143] *The Queen v. Prytula*, *supra* note 72 at 524-25 (notes omitted).

[144] It is true that Professor Macdonald ( *loc. cit.* note 118, par. 47, note 87) states that section 129 is not the equivalent of an "ordinary reception statute"; however, he recognizes that this provision (*ibid.*, par. 47) "in effect restated that amalgam of statute and common law of a foundational general private law tenor, as the *received ius commune* in relation to both federal and provincial legislative competence" (emphasis added).

[145] F. Chevrette and H. Marx, *op. cit.* note 12 at 7.

[146] For example, in *Regina v. Carrière et al.* (1955), 113 C.C.C. 11 (B.C.S.C.), it was unsuccessfully argued that only the English common law rules handed down prior to the crucial date for British Columbia (1858) had been introduced into that province's law. Concerning the reception of English law in the Canadian provinces, see J.E. Côté, *loc. cit.* note 13.

[147] R.S.B.C. 1979, c. 224: "The Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in the Province; but those laws shall be held to be modified and altered by all legislation having the force of law in the Province." We might note that all of the "reception statutes" have been drafted in a similar way.

[148] R.S.C. 1985, c. F-7, now subsection 2(1) following the enactment of the *Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 1.

[149] *ITO*, *supra* note 73 at 779.

[150] Concerning section 42 of the *Federal Court Act*, *supra* note 148 (which states that Canadian maritime law as it was immediately before June 1, 1971 continues subject to such changes therein as may be made by federal legislation), McIntyre J. adds (*ITO*, *supra* note 73 at 779): "Section 42 cannot be considered a referential incorporation of provincial law or a re-enactment of provincial law. It is clearly only a continuation of law provision."

[151] R.A. Macdonald, *loc. cit.* note 14, par. 25 (emphasis added).

[152] *Ibid.*, par. 34.

[153] It reads: "Legal proceedings taken against one of the codebtors do not prevent the creditor from taking similar proceedings against the others."

[154] As Lord Halsbury stated in *Quinn v. Leatham*, [1901] A.C. 495 at 506: "[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are [*sic*] not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other [observation which I wish to make] is that a case is only an authority for what it actually decides."

[155] Professor Macdonald does not entirely disagree with this position, since he acknowledges that the way in which the legislator formulates a pre-existing norm may have some effect on its scope.

[156] R.A. Macdonald, *loc. cit.* note 14, par. 45.

[157] *Ibid.* For example, in *The Queen v. Prytula*, *supra* note 72 at 525, Heald J.A. states, in support of his theory concerning the incorporation of pre-Confederation law into federal law that "If it were otherwise, a provincial legislature could, by abolishing the law of contract (and substituting some new system of statutory relationships), abolish, or alter completely, the law regulating one of the main branches of 'banking'."

[158] On this issue of the relationship between federal and provincial private law jurisdiction, see J. Leclair, "L'interaction entre le droit privé fédéral et le droit civil québécois en matière d'effets de commerce: perspective constitutionnelle", (1995) 40 *McGill L.J.* 691; J. Leclair, "L'impact de la nature d'une compétence législative sur l'étendue du pouvoir conféré dans le cadre de la *Loi constitutionnelle de 1867*", (1994) 28 *R.J.T.* 661; J. Leclair, "La Constitution par l'histoire: portée et étendue de la compétence fédérale exclusive en matière de lettres de change et de billets à ordre", (1992) 33 *C. de D.* 535; and P. Carignan, "La compétence législative en matière de faillite et d'insolvabilité", (1979) 57 *Can. Bar Rev.* 47.

[159] In maritime law: *ITO*, *supra* note 73, *Q.N.S. Paper v. Chartwell Shipping*, [1989] 2 S.C.R. 683, *Monk Corporation v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779 and *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; in bankruptcy: *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453; and in banking: *Bank of Montreal v. Hall*, *supra* note 96.

[160] R.A. Macdonald, *loc. cit.* note 118, par. 32, note 43.

[161] This is clearly shown by the extensive litigation relating to the applicable law in maritime matters.

[162] We leave open the issue of whether, in some areas, federal law has already acquired an autonomy that obviates the need to resort to provincial private law as suppletive law. In this regard, see *supra* note 140, and J.-M. Brisson and A. Morel, *loc. cit.* note 120 at 333-34.