

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

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INTRODUCTION

The new *Civil Code of Québec*^[1], which came into force on January 1, 1994, replaced the 1866 *Civil Code of Lower Canada*.^[2] In replacing the former Code, did the Quebec legislature exceed its powers by repealing the provisions of that pre-Confederation statute dealing with interest, bills of exchange and promissory notes? The question arises because the Parliament of Canada has had exclusive authority over these matters since the coming into force of the *Constitution Act, 1867*^[3], specifically under subsections 91(18) (bills of exchange and promissory notes) and 91(19) (interest) of that Act. It is this question that will be considered in this report.

To begin with, we will see that under section 129 of the Constitution, all pre-Confederation law continued in force "as if the Union had not been made", and the power to amend or repeal that law was divided between the two levels of government (I). To determine whether the Parliament of Canada or the Quebec legislature was granted the power to repeal C.C.L.C. provisions concerning interest and negotiable instruments^[4] (II), the specific relationship between federal and provincial jurisdiction in the area of private law must be considered (II.A). To do this, three points will be examined: first, the various meanings of the concept of exclusivity of federal and provincial jurisdiction (II.A.1); second, the recognition that the provinces have fundamental jurisdiction in the area of private law (II.A.2); and third, the granting of exceptional jurisdiction in this area to the federal Parliament (II.A.3). An understanding of the very specific nature of the division of powers in relation to private law will make it possible to better understand the scope given by the courts to the federal Parliament's exclusive and ancillary powers in respect of negotiable instruments (II.A.3.i) and interest (II.A.3.ii).

Once the scope of these federal and provincial powers has been determined, an examination of the pre-Confederation provisions of the C.C.L.C. can be undertaken (II.B). I will identify the provisions of that statute, if any still existed at the time of its repeal in 1991, that fell in whole or in part under Parliament's exclusive power over negotiable instruments and interest. Finally, in light of these findings, I will set out my recommendations for resolving the constitutional difficulties raised by the repeal of these provisions by the Quebec legislature.

I. -CONSTITUTIONAL LIMITS ON THE POWER TO AMEND PRE-CONFEDERATION LAW: GENERAL PRINCIPLES

In the following pages, I will show that the level of government that has jurisdiction over the matter to which a given pre-Confederation provision relates also has the power to amend or repeal that provision (A). I will then briefly consider the specific problem raised by pre-Confederation provisions that may apply in both an area of federal law and an area of provincial law (B). Lastly, a word will be said about the power to implicitly repeal pre-Confederation provisions (C). All of these issues must be addressed before a more specific examination of the pre-Confederation provisions of the C.C.L.C. is undertaken, as they relate to negotiable instruments and interest. To address these issues, I will briefly consider the interpretation of section 129 of the Constitution.^[5]

A. Section 129: continuation in force of pre-Confederation law and distribution of the power to repeal

This section reads as follows:

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.

There is no doubt that this section 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. I will therefore not examine this facet of section 129 in any detail^[6]. Rather, this study will be concerned with the second function of section 129.

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"^[7].

The first important decision on the scope of section 129 of the Constitution is *Dobie v. The Temporalities Board*,^[8] which was rendered by the Privy Council in 1882. In that case, a challenge was made to the constitutional validity of a Quebec statute enacted in 1875^[9] that repealed a statute passed by the united province of Canada in 1858^[10]. The purpose of the 1858 statute had been to establish a corporation called the "Board for the management of the Temporalities Fund of the Presbyterian Church of Canada". The purpose of the challenged Quebec statute 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 power of the federal Parliament or the provincial legislatures to amend pre-Confederation law is "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"^[11]. 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^[12]. However, the judge 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^[13]. Indeed, the impugned statute regulated the company's rights and obligations in both Quebec and Ontario.

The judge also refused to validate the repeal effected by the 1875 statute, 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"^[14]. He added the following 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 under the jurisdiction of the Quebec legislature could have been distinguished from the provisions falling under the jurisdiction of the Ontario legislature, then the Quebec legislature could have repealed the provisions within its jurisdiction.^[15] Since that was impossible, only the federal Parliament had jurisdiction to repeal the 1858 statute.^[16]

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 necessary to analyse 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 Canada ^[17] confirms that the power to amend pre-Confederation law was distributed on the basis of sections 91 and 92 of the Constitution. The Court also gave its opinion on the scope of the federal power to repeal pre-Confederation norms. I will look at each of these two points in turn.

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* ^[18] passed in 1864 by the united province of Canada. To begin with, Lord Watson found that the challenged federal statute, the *Canada Temperance Act*,^[19] could validly be based on Parliament's residual jurisdiction.^[20] 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.^[21] 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 enacted: "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".^[22] While this last conclusion may be open to question today,^[23] 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.

Because of his opinion that Parliament could not amend the statute in question, Lord Watson did not have to take a detailed look at the nature and extent of Parliament's power to amend or repeal a pre-Confederation provision within its own jurisdiction. In *obiter*, he nonetheless stated that:^[24]

It has been frequently recognised 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.*

Should it be inferred from this passage, as some authors have,^[25] that Parliament cannot amend or repeal the form and, more specifically, the wording of the C.C.L.C.? Is its power confined to the repeal of the normative content of the pre-Confederation provisions within its jurisdiction? Patenaude and Macdonald are also of the opinion that while the Quebec legislature is the only entity that can amend the form of the C.C.L.C., it has no authority to amend pre-Confederation provisions dealing with federal matters.^[26] What conclusion have they drawn from this? According to Professor Macdonald, "it may be that the actual text of the articles of the *Civil Code of Lower Canada* that fall within federal jurisdiction may not be repealed explicitly by either legislature".^[27]

I believe that this is the correct approach. In my opinion, however, these two authors did not take their argument far enough. I feel that neither the federal Parliament nor the Quebec legislature can amend the form of the C.C.L.C. As noted by Lord Watson, a legislative body is not constitutionally authorized to repeal an enactment passed by another legislative body; the fact that the norm set out in the enactment is unconstitutional changes nothing. It need hardly be pointed out that the C.C.L.C. was enacted not by the Quebec legislature but by the legislature of the united province of Canada, and that the legislature of the province of Quebec is not, legally speaking, the legislature of the united province of Canada. The same is true of the federal Parliament. If the legislative body that passed a legislative provision is the only entity that can repeal its form, it must be concluded that it is impossible for the legislature of the province of

Quebec to repeal even the form of the pre-Confederation provisions within its own jurisdiction that were enacted by the legislature of the united province of Canada.

Should it therefore be concluded that neither of the two levels of government can repeal pre-Confederation law? I do not think so. The purpose of section 129 was to avoid a legal vacuum immediately after the Constitution came into effect. As Rand J. said so aptly in a decision that I will examine in a moment, 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*".^[28] All the law - and not just the "statutes" - was to continue in force until amended or repealed by the competent legislative body. Pre-Confederation statutes did not become federal or provincial statutes under section 129. In form, they never ceased to be, and will never cease to be, colonial statutes. The purpose of section 129 is therefore the continuation in force not of those pre-Confederation colonial statutes, but rather of the norms they express. This provision gives the competent level of government the power to repeal or amend that normative content, but not the form of the physical medium through which the norms were once expressed. The level of government that has jurisdiction over the subject matter of a pre-Confederation norm has the power to repeal that norm.

I refer explicitly to a power to amend pre-Confederation norms because, in my opinion, there is a difference between such norms and the enactments that express them. The enactment is not the norm itself; it is no more than its physical medium.^[29] Thus, for a legislative body, the power to repeal corresponds to the power to abolish or permanently eradicate a legal norm, which can occur without the physical medium being touched. It is not a matter of making a given provision inoperative *pro tanto*; rather, its normative existence is ended.

It is true that the repeal of a statute generally presupposes the "express elimination of a statute".^[30] On this subject, Professor Côté has stated that "when a statute is repealed, it disappears altogether".^[31] Does this mean that the federal Parliament and the provincial legislatures cannot repeal pre-Confederation norms because they are unable to destroy the form of pre-Confederation statutes? Professor Côté's opinion must be qualified. In his description of the problem raised by the concept of repeal, he clearly did not have in mind the very specific situation created by section 129 of the Constitution. It is my opinion that repeal seeks to permanently eliminate a norm, which does not necessarily mean the elimination of its physical medium. Nonetheless, in such a situation, there is a repeal 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.^[32]

In practice, however, Parliament took for granted that it was entitled to amend or repeal not only the normative content, but also the actual form of the C.C.L.C. provisions that came within its jurisdiction.^[33] The attitude of the commissioners responsible for revising the statutes of Quebec in 1888 also suggests that the province did not question this power.^[34]

However, the distinction I make between the power to repeal a norm and the power to destroy its form is not irrelevant. As will be seen in the next section, one level of government may have jurisdiction to permanently repeal a pre-Confederation norm without the expression of that norm disappearing. The enactment will continue to exist if it still acts as a medium for the pre-Confederation norm *in its application to the other level of government*. Once that level of government has also explicitly repealed the norm, then it will truly cease to exist. Such a situation has occurred in the past and deserves to be looked at for a moment.

B. Problem raised by provisions that may fall within the jurisdiction of both levels of government

Reference In re Bowater's Pulp and Paper Mills Ltd.^[35] highlights a specific problem raised by section 129, namely the continuation in force, after a colony joins Confederation, of pre-Confederation provisions that may fall under both federal and provincial jurisdiction. It will be seen that in such a situation, Parliament or a provincial legislature can repeal the norm in question only if it relates to one of its heads of power. This decision also clarifies the more general question of how the power to amend or repeal pre-Confederation law is distributed.

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 taxes. In return, the company agreed to invest several million dollars in the colony's industrial sector. The contracts were later confirmed by statutes passed by the colony.

In the Supreme Court, the company argued that under Term 18(1) of the *Terms of Union of Newfoundland with Canada*,^[36] 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 passed in 1949.^[37] 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.^[38] As noted above,^[39] he refused to rule on the question of whether pre-Confederation provisions relating to federal matters continued to apply after

Newfoundland joined Confederation.[40] He was of the view that the federal income tax legislation had permanently repealed the pre-Confederation provisions.[41] However, he acknowledged that the tax exemptions could still be relied on by the company in its dealings with the provincial tax authorities.[42]

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.[43] 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.[44]

In my opinion, the most interesting view of this question is that of Rand J., who found that pre-Confederation law whose subject matter comes under federal jurisdiction at the time of Union continues to apply as long as Ottawa does not intervene.[45] He then added that "the 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 their 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." [46] 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.[47] According to the judge, the determination of which legislative body could amend the pre-Confederation provisions did not require that the amendment's impact on the content of the contract be considered; in his opinion, the determining factor was the matter to which the provisions related.[48] 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".[49] 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 contracts.[50]

Kellock J. gave reasons similar 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.[51] Although he felt that in this case there was no express repeal, the pre-Confederation provisions in question were nonetheless "altered" or "abolished" by the passage of the federal income tax legislation.[52] There was no question that the provisions in issue related to a federal matter and that Ottawa had the power to legislate.[53]

Estey J. reaffirmed that the power to repeal a pre-Confederation provision belongs to the level of government that has the power to enact an identical provision.[54] 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.[55] 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:[56]

[T]he fact that such legislative action on the part of one or the other [level 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 taken place[57] but that the federal Parliament could not repeal them unilaterally since they were too closely linked to the provisions that were within provincial jurisdiction.[58] He added: "the 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 power attributed by the B.N.A. Act, *directly enact them*." [59]

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 that are within its jurisdiction.

This decision also raises an issue that had not arisen in any earlier case. Which level of government has jurisdiction to amend or repeal a pre-Confederation provision that may fall within both federal and provincial areas of jurisdiction? Who has the power to amend or repeal a provision that can be said to have a double aspect?

In *Bowater*, Rand J. stated that the pre-Confederation provisions in question were "as severable as if they were contained in another statute".[60] This was possibly true for the customs and excise tax exemptions, which were solely within federal jurisdiction. But what about the income tax deductions? Both levels of government have jurisdiction in

this area under subsections 91(3) and 92(2) of the Constitution. This means that the *same* pre-Confederation provisions might have been applicable in both federal and provincial areas of jurisdiction.

In *Bowater*, 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:

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.*^[61]

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* ^[62]. 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.^[63] However, the repealing provision in the R.S.O. expressly stated^[64] 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 relied on against the federal Crown.^[65] Thus, the provincial repeal eliminated the pre-Confederation norm only in so far as it related to a provincial matter.

The preceding discussion is not without relevance to this report, since it is possible, as will be seen below, to argue that some C.C.L.C. provisions relating to negotiable instruments have both a federal aspect and a provincial aspect. If that is the case, it seems preferable to me for both levels of government to take action to repeal the pre-Confederation norm in its entirety.

C. Specific problem of implied repeal

There is no doubt that the federal Parliament can expressly repeal a pre-Confederation norm that falls within its jurisdiction. However, I am not convinced that it can alter the form of the legislative provision that expresses the norm. Be that as it may, the question remains as to whether it can implicitly repeal a pre-Confederation norm by enacting a provision that clearly goes against the purpose of that norm.

This question is important because repeal does not make the pre-Confederation provision simply inoperative *pro tanto*;^[66] it destroys its existence. Only express legislative intervention could resurrect such a provision. Furthermore, this question is highly relevant to this report because, as will be seen, some authors argue that the C.C.L.C. articles on evidence in relation to negotiable instruments were implicitly repealed by Parliament when it passed the *Canada Evidence Act*.^[67] In my opinion, only an express repeal can permanently eliminate a legal norm. Nonetheless, I must admit that there is a minority trend among the courts that does not share my opinion. I will look at that trend before setting out my own point of view.

In *Bowater*, for example, Kellock J. seemed to state that a repeal could be implied. He stated:^[68] "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*.^[69] That case, like *Bowater*, concerned a pre-Confederation statute that granted a tax exemption to an individual. A statute of the united province of Canada passed 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.^[70] 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 subsection 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."^[71] At the very end of his judgment, Audette J. stated:^[72]

[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. seems very questionable. 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.^[73] I share Professor Côté's opinion that there is no such thing as an implied or implicit repeal.^[74] It is true that the Supreme Court has used that term at times.^[75] However, when Parliament passes 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 passed a provision that conflicts with a pre-Confederation norm, there is no basis for concluding that the norm has been permanently discarded.

I will, however, keep this debate in mind when making my recommendations.

II. - IDENTIFICATION OF THE LEVEL OF GOVERNMENT ENTITLED TO AMEND OR REPEAL PRE-CONFEDERATION PROVISIONS OF THE C.C.L.C. RELATING TO NEGOTIABLE INSTRUMENTS AND INTEREST

There are several stages involved in determining whether the federal Parliament or the province of Quebec has the power to amend the pre-Confederation provisions of the C.C.L.C. relating to negotiable instruments and interest. First, the specific characteristics of the distribution of powers in the area of private law, as effected by sections 91 and 92 of the Constitution, must be examined (A). Once the various interpretations of the concept of exclusivity of jurisdiction have been reviewed (A.1), I will look at the fundamental provincial jurisdiction in the area of private law (A.2) and analyse the exceptional federal power in that same field, more specifically as regards negotiable instruments and interest (A.3).

Once the provisions that may be problematic have been identified, I will be able to express an informed opinion on the power of the Quebec legislature to repeal them unilaterally, as it did in 1991 (B.2). In light of the result of my analysis, recommendations can then be made (C.3).

A. Examination of the specific relationship between provincial and federal jurisdiction in the area of private law

Before more specifically examining the scope of provincial power in relation to private law and the federal power in relation to negotiable instruments and interest, I must briefly look at the meaning given to the concept of "exclusivity" in Canadian constitutional law. Without a good understanding of what is meant by that term, I will not be able to properly formulate an opinion on the legality of the Quebec legislature's repeal of the C.C.L.C. articles on negotiable instruments and interest.

1. Exclusivity of jurisdiction: a question of legislative purposes, not legislative spheres

Sections 91 and 92 expressly grant each level of government the exclusive power to legislate in relation to certain matters. The courts were quick to recognize that because of this exclusivity of legislative jurisdiction, the failure by one level of government to exercise one of its powers under the Constitution does not authorize the other level to do so instead.^[76] It is also agreed that sections 91 and 92 recognize the existence of categories of law, not of facts.^[77] Those sections grant legislative jurisdiction *in relation to* certain matters within the enumerated classes of subjects. It is not the matters or subjects themselves that are granted. In short, exclusivity is a concept that has to do with the types of legislative *purposes* that can be fulfilled by exercising a given power.

However, it must be noted that the concept of exclusivity of jurisdiction has evolved. This fluctuation in the meaning given by judges to the concept of exclusivity has a great deal to do with their "pre-understanding"^[78] of their role and, more specifically, their view of federalism.^[79] Without going into detail, it can be said that two major concepts of exclusivity have come into conflict, and continue to come into conflict,^[80] in Canadian constitutional law: the "watertight compartments" doctrine and the "aspect" doctrine.

The watertight compartments doctrine, which for a long time prevailed, is a legal approach characterized by a reluctance to acknowledge that the fields of jurisdiction of the two levels of government may overlap.^[81] This approach accentuates the compartmentalization of fields of jurisdiction. Since this approach is overly restrictive for the two levels of government, the courts developed the "ancillary power" doctrine, which allows for encroachment where necessary for the effective exercise of a given power.^[82] This traditional approach first requires that the exclusive content of a jurisdiction be identified. This makes it possible to determine whether an encroachment is necessarily incidental to the exercise of the jurisdiction. In contrast, it will be seen that the aspect doctrine emphasizes the purpose to be achieved by a statute much more than the exclusive content of the jurisdiction relied on to support its validity. However, it will also be seen that the aspect doctrine does not completely eliminate the duty to assess the scope of the exclusive power involved in a field of jurisdiction.

The watertight compartments doctrine now seems to have given way to the aspect doctrine, also called the "pith and substance" doctrine.^[83] According to that doctrine, "a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and *vice versa*)".^[84] This approach encourages the "overlap of legislation"^[85] rather than watertight compartmentalization. As long as the main object - or dominant characteristic - of a provincial statute is to achieve a legislative purpose that falls within one of the heads of power listed in section 92 of the Constitution, the statute will not be found unconstitutional even if it has a slight impact on an area of federal law. The question of whether the statute also has a federal aspect becomes irrelevant.^[86] Conversely, a federal statute whose main purpose is within the legislative authority of Parliament under section

91 of the Constitution is not unconstitutional simply because it may affect an area of provincial jurisdiction.

What happens, though, when a statute relates to a subject that falls under a head of federal jurisdiction when looked at from one angle and a head of provincial jurisdiction when looked at from another angle? In such a case, the courts say that the subject has a "double aspect". Legislation on such a subject can therefore be passed by either Parliament or a province, in so far as each is pursuing a purpose that is within its jurisdiction.^[87]

The aspect doctrine and its corollary, the double aspect doctrine, are both the expression of a certain form of judicial reticence. The courts generally favour an approach that enables statutes to be found constitutional.^[88] When the double aspect doctrine is applied, federal and provincial norms on the same subject can both subsist. To resolve the conflicts that may result from the simultaneous application of the statutes in question, the courts apply the rule of federal paramountcy,^[89] according to which any provincial statute that conflicts with a federal statute becomes inoperative.^[90]

However, the aspect doctrine must not serve to endanger the rule of exclusive jurisdiction explicitly recognized in sections 91 and 92 of the Constitution. It must not deny that exclusivity. On the contrary, it "can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction".^[91] Thus, it can be applied only when the multiplicity of aspects is real.^[92] In *Bell Canada v. CCST*,^[93] Beetz J. noted that the double aspect doctrine must be applied with caution:

The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the *Constitution Act, 1867* and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation.

Another concept was developed by the courts to limit the scope of the aspect doctrine in cases where it applies. It is the "interjurisdictional immunity" concept, also known as the "intrinsic elements" doctrine. According to that concept, Parliament's *exclusive* power in a given field of jurisdiction is deemed to include all the "essential and vital elements"^[94] of that jurisdiction. A valid provincial statute of general application that interfered with those elements would be deemed to bear on the "specifically federal nature of the jurisdiction".^[95] It would thus interfere with the "basic, minimum and unassailable content"^[96] of the jurisdiction. The rule of exclusive jurisdiction would prohibit its application,^[97] since the provincial statute would be authorizing a prohibited encroachment.^[98] It is true, as authors such as Peter Hogg ^[99] have noted, that the "specifically federal nature" concept is hard to reconcile with a pure aspect doctrine. Nonetheless, its recognition is necessary if we are to avoid transforming exclusive federal and provincial fields of jurisdiction into "concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the same aspect".^[100] There is therefore a relationship of similarity between "exclusive legislative power", "exclusive legislative

purpose" and "specifically federal content". Although the interjurisdictional immunity doctrine was developed in the context of federal jurisdiction over undertakings and incorporation, there is no reason why it cannot apply in other federal spheres.[101]

In short, what must be stressed is that whatever approach is taken - the "watertight compartments" doctrine or the "aspect" doctrine - it is always necessary to determine the scope of the exclusive power conferred under a given head of jurisdiction. I will now define what falls under exclusive provincial jurisdiction in the area of private law under subsection 92(13) and what falls under exclusive federal jurisdiction in relation to negotiable instruments and interest under subsections 91(18) and 91(19).

2. Private law: a fundamental provincial jurisdiction

In a 1992 study,[102] I traced the history of federal jurisdiction over negotiable instruments. I also looked at the scope of subsection 92(13) of the Constitution, which provides that "property and civil rights" are within provincial jurisdiction. That analysis clearly demonstrated the general nature of provincial jurisdiction in the area of private law and the very exceptional nature of federal jurisdiction in that area.

I will briefly summarize my findings in that study. First, an examination of *Citizens Insurance Company of Canada v. Parsons*[103] and of the origins of the 1867 Constitution leads to the conclusion that subsection 92(13) should be very liberally construed; the expression "property and civil rights" should be understood as broadly as possible. The purpose of that provision has been interpreted as being to grant the provinces a fundamental jurisdiction in matters of private law. Professor Hogg, for example, defines "property and civil rights" as follows: "a compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government".[104] It has been said that this expression thus designates all existing rules of law, with the exception of rules of criminal law and rules that govern the exercise of sovereignty by the King of England.[105]

This means that the matters listed in section 91 of the Constitution are not, as former Chief Justice Laskin argued when he was a professor [106] mere illustrations of Parliament's general power to legislate set out in the introductory paragraph of that provision. In reality, if the powers listed below had not been specifically assigned to the Parliament of Canada under subsections 91(2), (15), (16), (18-19), (21-23) and (28), they would be within provincial jurisdiction under subsection 92(13) of the Constitution:[107] the regulation of trade and commerce, banking, the 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. As noted by Professor Lederman, the "notwithstanding" provision found in the introductory paragraph of section 91 clearly shows that the enumerated heads of power, in so far as they have to do with property and civil rights, are deemed to be withdrawn from the historic scope of subsection

92(13).[108] It also follows that the jurisdiction conferred on Parliament in the area of private law is exceptional in nature.

To summarize, it can be said with no fear of error that subsection 92(13) authorizes the provinces to legislate in all fields of private law. They therefore have the power to develop the [*Translation*] "*jus commune*",[109] "a given body of norms [that] apply [in private matters] unless there is an express exception".[110] It should be noted that subsection 92(14) also grants the provinces the power to regulate procedure in provincial matters[111] and the administration of justice in the province.

However, there is an important limitation on this fundamental provincial jurisdiction in the area of private law. The provinces are not authorized to pursue legislative purposes that have been exceptionally and specifically assigned to the federal Parliament. It follows that the actual scope of subsection 92(13) varies, depending on the interpretation given by the courts and academic writers to the private law heads of power listed in section 91 of the Constitution.

I will now look at two of those exceptional federal heads of power in the area of private law, namely negotiable instruments and interest.

3. Exceptional nature of the federal private law power

Federal jurisdiction in relation to private law is therefore exceptional in nature. By examining Parliament's jurisdiction over bills of exchange, notes, cheques and interest, I will be able to highlight the two consequences that flow from this situation. First, it will be seen that Parliament's exclusive power in relation to these matters is very limited but that its ancillary power is considerable. Second, it will be seen that the fundamental provincial jurisdiction in the area of private law, combined with the very limited scope of the exclusive federal power over negotiable instruments and interest, explains why the courts have found that the provinces have a very broad power to act in relation to these matters.

(i) Scope of federal jurisdiction over negotiable instruments[112]

(a) Scope of the exclusive power

Up to this point, we have seen that sections 91 and 92 provide for a distribution of the legislative purposes that can be pursued and that a certain number of exclusive purposes is linked to each enumerated head of power. Furthermore, as I attempted to illustrate in a recent study,[113] while the various subsections of these two sections all confer legislative powers in the manner I have just indicated, this does not necessarily mean that all of those powers are of the same nature. In my opinion, the scope of the exclusive legislative purposes encompassed by each head of power depends on the intrinsic nature of the power in question. It follows that the degree of exclusivity of the various federal powers varies from one power to another.[114] Finally, the approaches used to determine

which legislative purposes are encompassed by a given head of power also vary with the nature of the power.

What about federal jurisdiction over bills of exchange and promissory notes? What is the scope of Parliament's exclusive and ancillary powers over these matters? To properly answer this question, it is necessary to determine the specific nature of federal jurisdiction over negotiable instruments. Subsections 91(18) and 92(13) of the Constitution both have the following very important characteristic: they both grant a power *of the same nature*. Each subsection gives one of the two levels of government jurisdiction in the area of private law. Yet unlike rail transportation, for example, private law is not a matter that can be divided according to physical or geographic criteria. It involves overlap much more than exclusion. What characterizes private law is precisely the unity and intermingling of its parts.

Thus, to determine the scope of the exclusive federal legislative power, it is necessary to identify the defining aspects of a negotiable instrument. It comes down to the identification of the aspects of the law of negotiable instruments that can be regulated only by Parliament pursuant to the jurisdiction conferred on it by subsection 91(18) of the Constitution.

The historical approach I used to demonstrate that the provinces have fundamental jurisdiction in the area of private law under subsection 92(13) also highlighted the exceptional nature of federal jurisdiction in that area.^[115] I also concluded from my research that in 1867, the exclusive jurisdiction that was to be assigned to Parliament in relation to negotiable instruments was limited to the power to legislate concerning the contractual aspects that distinguish those agreements from other contracts. Thus, it is not the negotiable instrument itself - or any legal rule that may be related to it - that falls under exclusive federal jurisdiction. Only the specific legal rules that make such an instrument a negotiable instrument by endorsement, and that can be grouped under the term "law of negotiable instruments in a strict sense",^[116] fall under exclusive federal jurisdiction. Included among those rules are all the rules concerning the negotiation and form of a negotiable instrument. As Caron and Bohémier put it, the federal government has exclusive jurisdiction over the following matters: [*Translation*] "conditions for the formation and negotiability of instruments, the rights and obligations of the parties, the types of holders and the privileges granted to each of them".^[117] Since the rules in question form part of the exclusive content of federal jurisdiction under subsection 91(18), no provincial statute, even one of general application, could validly deal with those matters even if there were no federal statute on the subject.^[118] In any event, provincial legislation that sought to remedy problems presented by the negotiation or form of a negotiable instrument could not be characterized as legislation of general application.^[119]

However, which norms will apply if federal legislation is silent about a matter that does not form part of the exclusive federal content, but rather falls under the law of negotiable instruments in a wide sense? Since Parliament's jurisdiction under subsection 91(18) relates to a private law contract,^[120] and since the provinces have fundamental

jurisdiction in relation to private law under subsection 92(13), general civil law rules will fill in the gaps in federal legislation on bills of exchange. As Professor Bohémier has noted:^[121] [Translation] "the *Bills of Exchange Act* is legislation that is subsidiary to the civil law. The purpose of the law of negotiable instruments is not to alter or circumvent the general rules of the *jus commune*. Its aim is simply to promote the circulation of negotiable instruments by ensuring their negotiability. That is why the bills of exchange legislation must be consistent with basic civil law rules."

In short, validly enacted provincial provisions on contracts or civil procedure - provisions that are presumed not to have any effect on the law of negotiable instruments in a strict sense - can certainly apply to the agreement that a negotiable instrument constitutes, unless there is an operational conflict. Where there is such a conflict, the provincial statute remains valid but is deemed inoperative to the extent of the conflict.^[122]

Constitutional litigation reinforces the above propositions. The courts have, at least implicitly, acknowledged the very symbiotic nature of the field of private law. Their approach has also been to confine the exclusive content of federal jurisdiction to the "law of negotiable instruments in a strict sense". In this way, they have authorized a very generous application of provincial legislation in matters concerning bills of exchange and notes. However, they will intervene if a provincial statute touches on the minimum essential content of federal jurisdiction over negotiable instruments. *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*^[123] is a good illustration of this.

In that case, the plaintiff-respondent sued Winstanley to recover on a promissory note. In defence, the appellant argued that unless Atlas Lumber held a permit for the recovery of money, as required by section 8 of the *Debt Adjustment Act*,^[124] it did not have the right to sue. The permit in question had to be issued by a provincial board. The respondent argued that section 8 was unconstitutional.

All the Supreme Court judges found that the impugned provision was inoperative. Duff C.J. and Kerwin J. concluded that section 8 of the provincial Act was in direct conflict with the unqualified right granted by the *Bills of Exchange Act* to the holder of a negotiable instrument to sue the maker and endorsers of the instrument. Rinfret J. was of the view that the effect of the challenged provision was to give a provincial administrative body an absolute and purely discretionary power to decide whether to grant or deny a permit that gave access to the courts, which was necessary for a creditor wishing to recover a debt. In his opinion, the effect of such a provision was therefore to deprive the holder of a note of the privileges conferred by the federal *Bills of Exchange Act*:

The prohibition goes to the right to sue. It has nothing to do with mere procedure. The right to bring an action is not procedure; it is a substantive right.^[125]

...

[T]he right to sue, or to enforce payment, or to recover on a bill or note is of the very essence of bills of exchange; it is one of the essential characteristics of a bill or of a promissory note. The matter falls within the strict limits of sub-head 18 of sec. 91. It flows from the provisions establishing negotiability, which has become the primary quality of a bill or note and in which consist the true character and nature of these instruments.

The provisions relating to the right to sue, to enforce payment and to recover before the courts are not incidental provisions; they are, in truth, the very pith and substance of the statute.

...

The effect is to destroy the value of the negotiability of the bill or note and to deprive the holder of a bill or note of the right and power to sue and enforce payment and recover, which are conferred upon him by the *Bills of Exchange Act*.^[126]

Hudson, Taschereau and Davis JJ. were all of the opinion that a province could not impose extrajudicial control over rights of action created under a federal statute.^[127]

However, provided there is no such interference with a matter that falls under the law of negotiable instruments in a strict sense, provincial statutes do apply to bills of exchange and notes. The entire problem, of course, lies in determining what falls under the law of negotiable instruments in a strict sense. I will come back to this question in Part II.B.1.

If a provincial statute is not directed at a matter that falls under the law of negotiable instruments in a strict sense, it can refer expressly to negotiable instruments. Several decisions confirm this.

In *Duplain v. Cameron*,^[128] a Saskatchewan statute^[129] required all persons trading in securities to register with an administrative body. Duplain had sold promissory notes that matured less than one year from the date of issue. Under paragraph 20(2)(f) of the challenged statute, only a registered salesman could negotiate such an instrument. After the transactions in question, and as a result of acts that were not set out in the record, the provincial commission cancelled the appellant's registration as a salesman. Duplain then ran the risk of having penal sanctions imposed on him if he attempted to negotiate the instruments. His main argument was that the impugned statute dealt with a subject that fell within the exclusive jurisdiction of Parliament, namely bills of exchange and promissory notes.

Kerwin C.J.^[130] rejected Duplain's arguments on the ground that the impugned statute related to the regulation of trading in securities and was therefore not directed at negotiable instruments.^[131] This case,^[132] he said, could be distinguished from *Atlas Lumber* because in this case the holder's right of action was not denied by the statute. There was nothing to prevent the holder of "Promissory Notes and Collateral Covenants" from suing the makers of those documents. As for Cartwright J., he was of the view that

the provincial statute was valid and applicable because it did not alter the nature or character of the note.[133]

Thus, it can be seen that the judges of the Supreme Court are concerned with identifying what differentiates the contract that a bill of exchange constitutes from other agreements. It is all a question of purpose. The fact that negotiable instruments are referred to in a provincial statute does not necessarily mean that the statute is invalid. As long as the provincial statute does not affect the "form, content, validity or enforceability of promissory notes"[134] - the law of negotiable instruments in a strict sense - it will be applicable, since it will not frustrate the intention of Parliament.

The same circumspect attitude was adopted by the Quebec Court of Appeal in *127097 Canada Ltd. v. Québec (P.G. du Québec)*. [135] In that case, the appellant challenged the validity of section 251 of the *Consumer Protection Act*, [136] which prohibited imposing a charge for cashing a cheque issued by the government of Canada or Quebec or by a municipal corporation. The Act therefore expressly covered negotiable instruments. The appellant argued that the Act interfered with the negotiability of negotiable instruments because it had the effect of fixing the price at which such an instrument had to be negotiated.

Gendreau J.A. [137] held that the challenged Act was directed at the protection of consumers - a matter within provincial jurisdiction - and that section 251 validly prohibited a [Translation] "socially unacceptable trade practice", namely the imposition of a charge by a person who is well aware that a cheque issued by a government will be promptly and completely honoured. [138]

The Court then noted that the negotiability of a bill of exchange, within the meaning of the *Bills of Exchange Act*, [Translation] "is the right and capacity to ... assign and transfer [the bill of exchange] so that its holder can enforce it *in his or her own name* against all those bound by it"; [139] it is [Translation] "characterized by the right of the holder to enforce the instrument in his or her own name against all those bound by it and also by the right of a holder in due course to take the bill of exchange free from all defects". [140]

The judge then stated that the challenged section did not affect the law of negotiable instruments "in the strict sense" and did not interfere with the negotiability of a cheque. It was directed only at persons running a cheque-cashing business and prohibited them from imposing a charge; according to the judge, [Translation] "the form, validity and enforcement of the cheque continue to be governed exclusively by the *Bills of Exchange Act*". [141]

While it was true to say that [Translation] "if the word 'negotiation' is taken in its broad, ordinary sense, section 251 affects the transfer or acquisition of a cheque", [142] there was no conflict because negotiability within the meaning of the federal Act was not affected. The Court therefore held that the Act was *intra vires* the province. [143]

Red River Forest Products Inc. v. Ferguson^[144] also demonstrates that legislation of *specific* application that falls within provincial jurisdiction, that is, a law which expressly applies to negotiable instruments will not necessarily be found unconstitutional. In that case, the respondent refused to honour a note that he had given in payment of a gambling debt. He argued that an English statute, the 1835 *Gaming Act*,^[145] which provided that a gambling debt could not be the lawful consideration for a bill of exchange, was part of Manitoba law. In defence, the appellant argued that the Act ^[146] was inoperative because it conflicted with the *Bills of Exchange Act*:^[147] "the [*Gaming Act*] provision touches upon enforceability of bills of exchange, and is therefore *ultra vires* the province".

Helper J.A.^[148] rejected that argument. First of all, he noted that in *Atlas Lumber*, on which the appellant was relying, Rinfret J. had ruled on the ability to institute an action, not on the capacity to contract.^[149] Furthermore, he felt that the *Gaming Act* did not concern a matter that fell under the law of negotiable instruments in a strict sense. In his opinion, the reasoning adopted in *McGillis v. Sullivan* ^[150]was applicable. In that case, the Ontario Court of Appeal decided that the Ontario *Gaming Act* ^[151] was not unconstitutional even though section 2 of the Act - which was identical to the section in issue in *Ferguson* - specifically referred to negotiable instruments. The Ontario Court of Appeal decided that the Ontario *Gaming Act* was not a statute in relation to bills of exchange and notes. Rather, it was directed at the regulation of gaming and betting, which was within provincial jurisdiction. Relying on that decision, Helper J.A. stated in *Ferguson* that the *Gaming Act* "did not prevent or prohibit the use of such instruments or destroy their value in the hands of persons other than the winner of money or other valuable thing described in the enactment . . . It dealt only with the rights and relationship between the loser and the winner in a gaming transaction. It did not extend to third persons and therefore did not infringe upon the federal legislation dealing with holders in due course."^[152] The Act was therefore applicable to negotiable instruments.

In an attempt to explain the Manitoba Court of Appeal's reasoning in *Ferguson*, Professor Geva^[153] has stated: "one could perhaps . . . conclude that even provincial legislation that relates specifically and exclusively to bills and notes is good law, as long as it addresses 'wide sense' matters and is not inconsistent with federal law".

To summarize, it can be said that the extremely limited scope given to *exclusive* federal jurisdiction over negotiable instruments has allowed for a very broad application of provincial private law, even when it is directed at such instruments. At the risk of repeating myself, that application is possible only if the provincial statute, in seeking to achieve a purpose falling within one of the heads of power listed in section 92, does not touch on an element of the law of negotiable instruments in a strict sense. In addition to meeting this first criterion, the provincial statute must not conflict with a valid federal provision.^[154] In other words, it can be said that matters falling under the law of negotiable instruments in a wide sense may have a double aspect. Thus, in *Ferguson*, the question of whether a gambling debt could be the lawful consideration for a bill of exchange had a provincial aspect, because the provinces have jurisdiction to regulate contracts in general and gambling debts specifically. It also had a federal aspect, because

it concerned the lawfulness of a bill of exchange. That federal aspect would authorize Parliament to legislate on the same subject.

Up to this point, I have noted that the entire problem lies in distinguishing what falls under the law of negotiable instruments in a strict sense from what falls under the law of negotiable instruments in a wide sense. I will address that problem when I examine the pre-Confederation provisions of the C.C.L.C. relating to negotiable instruments (II.B.1). It is now essential to assess the scope of the ancillary power that Parliament can exercise under subsection 91(18).

(b) Scope of the ancillary power

Should the approach described above, which involves limiting Parliament's exclusive power in relation to negotiable instruments and bills of exchange to a very narrow sphere, affect the assessment of its ancillary power in that area in the same manner? I do not think so. Rather, I believe that the specific relationship between federal and provincial powers in the area of private law must lead to a recognition that Parliament has a wide trenching power as part of its jurisdiction over bills of exchange and notes.

Because of the interaction between the private law powers assigned to the provinces and Ottawa,^[155] the test of "fit" to be applied to justify an encroachment could prove to be very flexible.^[156] Thus, even though the legislative purposes that only Parliament can pursue are very limited, Parliament has a very invasive ancillary power. The homogeneous nature of private law as a subject matter leads to this conclusion. This "narrow exclusive power - wide ancillary power" relationship also exists for interest^[157] and bankruptcy. As Professors Brun and Tremblay have noted:^[158]

[*Translation*] In both cases [interest (91(19) and bankruptcy and insolvency (91(21))], federal exclusivity has a "very limited scope", but the courts have found that the federal government has a "very wide ancillary jurisdiction". This approach is certainly the most consistent with a contextual interpretation of the division of powers: in private law, federal powers are exceptions to the rule of subsection 92(13), and care must be taken to prevent that rule from becoming the exception through the combined effect of broad, exclusive federal powers.

Thus, even assuming, for instance, that prescription does not come within the law of negotiable instruments in a strict sense or, in other words, the minimum exclusive content of federal jurisdiction over bills of exchange and notes,^[159] it is my opinion that Parliament could most certainly use its ancillary power to enact a prescription period for negotiable instruments. There is no reason why such legislative action would not be valid, despite its impact on provincial legislative powers. There is no doubt that the federal government can restrict a right of action that it has itself created. The restriction could be in the form of a ban on appealing a court decision ^[160] or even an actual prescription period.^[161] In *Wewayakum Indian Band v. Canada*,^[162] Teitelbaum J. said the following: "Parliament can in the exercise of its powers under section 91 enact

limitations which apply to matters, which for constitutional purposes, fall within the exclusive legislative competence of Parliament."

Does the federal Parliament also have jurisdiction, for example, to enact rules of evidence with respect to negotiable instruments? Those rules can be divided into two types: (1) substantive rules, that is, [*Translation*] "all the rules on demonstrating the existence of a fact before a court"; and (2) [*Translation*] "procedural rules of evidence, [which] govern the use of various methods of proof in court proceedings".^[163] In provincial courts in Quebec, the latter rules are found in the articles of the *Civil Code of Procedure*. The procedural rules that apply in federal courts have been enacted by the federal Parliament.^[164]

There is no question that Parliament has the power to enact substantive rules of evidence in fields within its jurisdiction.^[165] If such a power did not flow from its exclusive jurisdiction, it would certainly be part of its ancillary jurisdiction. Parliament exercised that power in relation to negotiable instruments when it enacted section 57 of the *Bills of Exchange Act*. It has also enacted the *Canada Evidence Act*,^[166] which is most certainly valid in its application to federal civil matters, such as bills of exchange. In fact, it has been held that the provisions of that Act take precedence over provincial rules of evidence in litigation concerning negotiable instruments.^[167] Finally, section 40 of the *Canada Evidence Act* provides that provincial rules of evidence apply on a suppletive basis in proceedings under federal jurisdiction. However, that application is possible only if [*Translation*] "the application of provincial law is not excluded by a specific provision of a federal statute".^[168]

In reality, in so far as Parliament's purpose is to regulate negotiable instruments and not to indirectly regulate contracts in general, its ancillary power most likely authorizes it to legislate in relation to the following subjects: the capacity to make an instrument, the scope of the liability of those who have signed or endorsed a note or bill of exchange, the establishment of prescription periods, the cause or consideration that makes a note or bill lawful and, finally, as we have seen, evidence.

The importance of Parliament's ancillary power in relation to bills of exchange and promissory notes will be taken into account when I make my recommendations.

I will now examine Parliament's jurisdiction over interest.

(ii) *Federal jurisdiction over interest*

(a) Scope of the exclusive power

Subsection 91(19) grants Parliament exclusive jurisdiction in relation to "interest". This private law power, like the one I have just examined, is an exception to subsection 92(13) of the Constitution. If it had not been assigned to Parliament, it would most certainly fall under subsection 92(13).^[169] Thus, everything that was said above about the relationship between federal private law and provincial civil law is also applicable here.

In this section, it will be seen that federal jurisdiction over interest has been interpreted by the courts in the same way as federal jurisdiction over negotiable instruments. The courts have kept the scope of Parliament's exclusive jurisdiction to a strict minimum, while acknowledging that it may have a "very wide ancillary jurisdiction".^[170] As a result of this approach by the courts, the provinces have a great deal of leeway as far as interest is concerned. For the purposes of this report, it is not necessary to discuss all the decisions rendered on the scope of subsection 91(19) of the Constitution. However, a few are deserving of attention.

Given the exceptional nature of federal jurisdiction over interest, the question arises: what are the legislative purposes that only Parliament can pursue in exercising that jurisdiction? What is the specifically federal content of the jurisdiction? To answer this question, the reasons why the jurisdiction was assigned to Parliament must be determined.

Generally speaking, the heads of power set out in section 91 of the Constitution were assigned to Parliament because of a concern for uniformity, for guaranteeing the protection of the country's general interests.^[171] The need for uniformity resulting from the negotiability of commercial paper explains why Parliament was granted exclusive jurisdiction over such instruments.^[172] What explains its jurisdiction over interest?

The fact that Parliament was given jurisdiction over interest under subsection 91(19) can be explained by the desire of the legislators of the time to ensure that a uniform commercial and economic policy was put in place across Canada.^[173] This can be seen from the fact that Parliament was also given jurisdiction over banking (91(15)), currency and coinage (91(14)), weights and measures (91(17)), taxation (91(3)) and commerce (91(2)). One of the objectives of that policy was most certainly to ensure the free movement of capital by avoiding a situation in which interest rates varied from one province to another, which is why Parliament was given exclusive jurisdiction over this matter.^[174] The objective sought by the legislators was the centralization of credit policy,^[175] and to date, most of the federal enactments in this area have concerned contracts for the lending of money.^[176] A provincial statute dealing with interest, even one that relates explicitly to interest, will therefore not be found unconstitutional unless it can be said that it is "primarily concerned with financial matters".^[177] Accordingly, to properly understand the scope given by the courts to federal jurisdiction over interest, it is essential to bear in mind its economic and financial purpose.

In *Attorney-General for Ontario v. Barfried Enterprises Ltd.*,^[178] the respondent argued that a provincial statute, *The Unconscionable Transactions Relief Act*,^[179] was unconstitutional because it was in relation to interest. The Act authorized a judge to modify the terms of a loan of money if the judge found that the "cost of the loan" was excessive. The Act defined the expression "cost of the loan" as the whole cost to the debtor of money lent, including discount, subscription, premium, dues, bonus, etc., as

well as interest. In short, the Act applied only to contracts for interest-bearing loans and, what is more, related directly to interest.

The Court of Appeal found the Act invalid on the ground that it authorized a judge to modify a loan contract by reducing the interest payable.^[180] According to the Court, the word "interest" was to be understood in its broadest sense as meaning the whole cost of a loan.^[181] The Supreme Court of Canada rejected that approach and found the Act to be valid.

Judson J.^[182] first stated that exclusive federal jurisdiction under subsection 91(19) of the Constitution concerns interest as a sum of money that accrues from day to day.^[183] Therefore, not all compensation for loss of the use of money can be considered interest. Judson J. then noted that the Act dealt with rights arising from contract; as such, it was *prima facie* within the exclusive jurisdiction of the provinces under subsection 92(13) of the Constitution. Finally, he concluded that the dominant characteristic of the Act was not the regulation of interest to be paid but the reformation of unconscionable contracts. He wrote the following in this regard:^[184]

The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor . . . The fact that interference with such a contract may involve interference with interest as one of the constituent elements of the contract is incidental. The legislature considered this type of contract as one calling for its interference because of the vulnerability of the contract as having been imposed on one party by extreme economic necessity.

Cartwright J.'s opinion of the impugned Act was that "[i]ts primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest specified in head 19 of s. 91".^[185] It might be added that even though the Act touched on a credit-related matter, it sought to achieve a fundamental social purpose, namely the protection of vulnerable borrowers.

A few years later, the Supreme Court of Canada once again stressed the very limited scope of exclusive federal power over interest. In *Tomell Investments Limited v. East Marstock Lands Limited*,^[186] Pigeon J.^[187] stated that Parliament's exclusive power "does not extend to interest on all kinds of debts or claims, but only on contractual obligations."^[188] According to Pigeon J., the result of this very restrictive interpretation was as follows:^[189]

Although in principle the abstention by the federal Parliament to exercise its exclusive legislative power does not enable the provincial legislatures to enact legislation on the subject, this is true only of what may be called the federal primary power. With respect to matters which are not strictly within such primary power but can be dealt with ancillary, provincial jurisdiction over property and civil rights and over matters of a local nature remains unimpaired until such time as the field is occupied.

Exclusive federal jurisdiction over interest has thus been interpreted very restrictively. The approach taken by the Supreme Court in *Barfried* and *Tomell* was also consistent with earlier decisions in relation to interest. The only provincial statutes that have been found invalid on the ground that they encroached on exclusive federal jurisdiction under subsection 91(19) of the Constitution are all statutes whose purpose was to regulate the interest to be paid on certain categories of debts^[190] or on government bonds ^[191] by reducing or limiting the rate. Nonetheless, it should not be concluded from those decisions that a province can never set or reduce a rate of interest. As long as the *main purpose* of a provincial statute is not to regulate a rate of interest but rather to legislate in relation to a provincial matter, it has been found that the province can incidentally modify that rate.

In *Ladore v. Bennett*,^[192] two municipalities were amalgamated and their respective debts consolidated pursuant to a provincial statute. The debentures issued by the new municipality carried a lower rate of interest than the debentures they replaced. According to the Privy Council, this reduction in the interest rate was constitutional because it was incidental to the exercise of a valid provincial power in relation to municipal institutions.^[193] In reality, the exclusivity of federal jurisdiction over interest is so limited in scope that one author has concluded that there is concurrent federal and provincial jurisdiction in this area^[194].

It will now be seen that to this restrictive interpretation of the specifically federal content of jurisdiction over interest, there is a corresponding generous interpretation of Parliament's ancillary power in this area.

(b) Scope of the ancillary power

As with negotiable instruments, the courts have found that the federal ancillary power in relation to interest is very wide. However, the exercise of that power must be consistent with its primary purpose, namely the establishment of a centralized credit policy.

In *Tomell*, the appellant challenged the constitutional validity of subsection 8(1) of the *Interest Act*,^[195] which prohibited the recovery, on any arrears of interest secured by a mortgage of real estate, of any fine, penalty or rate of interest that had the effect of increasing the charge on such arrears beyond the rate of interest payable on principal money not in arrears. The appellant had attempted to recover a bonus of three months' interest stipulated to be payable on default in a mortgage deed. Subsection 8(1) presented a problem because it covered charges, such as bonuses, that did not constitute interest within the meaning given to that term in *Barfried*. In other words, they were not charges that accrued day by day. The subsection therefore could not come within the exclusive power granted to Parliament by subsection 91(19) of the Constitution.

A majority of the Court in *Tomell* relied on the ancillary power concept to validate subsection 8(1) of the *Interest Act*. As Pigeon J. noted, any legislation fixing a maximum rate of interest would be futile if Parliament could not, "expressly or impliedly, prohibit any stipulation that would have the effect of increasing the charge beyond the rate of

interest allowed".^[196] Thus, although the Act did not deal with interest in the strict sense of a charge accruing day by day, it was still valid.^[197] Finally, Pigeon J. noted that the "narrow exclusive power/wide ancillary power" combination does not exist only for Parliament's jurisdiction over interest; it also exists in relation to bankruptcy and insolvency.^[198] It must be admitted that the objective of the federal Act in question was completely in accordance with the purpose of subsection 91(19), namely the regulation of credit.

The conclusion that should be drawn from this is that the only thing the provinces cannot do is fix or limit the rates of interest payable under a contract.^[199] In fact, as Hogg has noted, unless the provincial legislation amounts to an abuse of power - colourable legislation - there is a good chance that it will be found valid.^[200]

The power of the two levels of government to legislate in respect of interest and negotiable instruments having been delineated, it is time to move on to an examination of the pre-Confederation provisions of the C.C.L.C. that deal with these matters.

B. Examination of the pre-Confederation provisions of the C.C.L.C. relating to negotiable instruments and interest

I will now specifically examine the provisions of the C.C.L.C. that refer to bills of exchange, promissory notes, cheques and interest. Once those provisions are identified, I will examine them in connection with the federal and provincial powers defined and analysed above. I will then determine whether any of the provisions fall within exclusive provincial or federal jurisdiction and whether there are some that neither level of government can deal with. Based on my conclusions, I will make the recommendations that I consider necessary.

1. Articles relating to negotiable instruments

(i) Identification of the articles that may still cause problems

The task of identifying the provisions on bills of exchange, notes and cheques that were part of the C.C.L.C. prior to 1867 has been greatly simplified by the work of P.-A. Crépeau and J.E.C. Brierley entitled *Code civil - Civil Code, 1866-1980: Historical and Critical Edition*.^[201] From a careful reading of their work, I was able to conclude that the following pre-Confederation provisions refer to bills of exchange, notes and cheques: 1077, third paragraph, 1229, 1573, 1750, 2190, 2260(4) and 2279 to 2354.^[202]

As will now be seen, a number of those provisions were repealed by Parliament prior to the replacement of the C.C.L.C. in 1991.

(a) C.C.L.C. articles repealed by Parliament prior to 1991

In 1886, Parliament decided to revise its own statutes and also certain pre-Confederation statutes that were still in force and, since 1867, "relate[d] to matters within the legislative authority of the Parliament of Canada".^[203] However, because it doubted whether it had jurisdiction to deal with some of those statutes, Parliament drew up a list of the pre-Confederation provisions "in respect to which the power of legislation is doubtful or has been doubted, and which have in consequence not been consolidated".^[204] Those provisions included the following articles: 1573, 2280, 2287, 2306a, 2334, 2336, 2340, 2341, 2342, 2343a, 2346, 2348 and 2354.^[205] All of them deal with bills of exchange, notes and cheques.

A few years later, in 1890, Parliament enacted its first major statute on bills of exchange, notes and cheques, the *Bills of Exchange Act*.^[206] Section 95 provided that the enactments listed in the second schedule to the Act were repealed as from the commencement of the Act. The second schedule read in part as follows: "Articles 2,279 to 2,354, both inclusive, [e]xcept in so far as such articles, or any of them, relate to evidence in regard to bills of exchange, cheques and promissory notes". Subject to the problem presented by modification of the form of the C.C.L.C. articles, section 95 had the effect of expressly repealing the provisions mentioned in the schedule. However, there has been disagreement on the scope of the exception set out in the schedule. Which articles relate to evidence? Authors are at least agreed that the only problematic articles are 2340, 2341, 2342, 2346 and 2354; the others have been permanently repealed.

As far as article 2340 is concerned, I agree with Perrault that it was repealed in 1890. It does not relate to evidence, whereas article 2341 does specifically deal with evidence. It can be deduced that the purpose of article 2340 was not also to regulate evidence.^[207]

What of articles 2341 and 2342?^[208] The latter refers to articles 1246 to 1256 C.C.L.C., dealing with the examination of parties under oath. Those articles were repealed in 1897 when the *Code of Civil Procedure* was enacted. According to Perrault, if it cannot be said that article 2342 was [*Translation*] "indirectly repealed", it must at least be admitted that it has no purpose.^[209] It is my opinion, in keeping with the one I stated above,^[210] that since article 2342 was not repealed *expressly*, it was still in force in 1991. It may well be that it has been inoperative since 1897, but this does not mean that its normative existence was permanently abolished.

The same conclusion applies to article 2341. Much has been written^[211] about whether that provision was repealed either by the passage of the *Canada Evidence Act*^[212] or by section 4 of the statute^[213] that implemented the Revised Statutes of Canada of 1906. Those who argue that it was repealed have had to acknowledge that the repeal was at most implied.^[214] There is no need to review the arguments of those authors in detail. Like article 2342, article 2341 may now be inoperative, but it has not been expressly repealed.^[215]

Having completed this analysis, I would like to again point out the provisions that remained problematic prior to the replacement of the C.C.L.C. They are articles 1077, 1229, 1573, 1750, 2190, 2260(4), 2341, 2342, 2346 and 2354. The question that now

arises is whether the province of Quebec could unilaterally repeal those articles. To answer this question, it must be determined whether the matter to which they relate falls under the law of negotiable instruments in a strict sense. If so, the province did not have the power to repeal them. In other words, it must be determined whether they relate to the conditions for the formation and negotiability of negotiable instruments, to the rights and obligations of the parties to such contracts, to the types of holders or to the privileges granted to them. If that is not the case, the provincial repeal will be valid, since, as noted above,^[216] when pursuing a purpose that falls within its jurisdiction, a province can specifically deal with bills of exchange, notes and cheques.

(b) C.C.L.C. articles repealed by the Quebec legislature in 1991

Just before the C.C.L.C. was replaced, the following articles were still in force: 1077, 1229, 1573, 1750, 2190, 2260(4), 2341, 2342, 2346 and 2354. In my opinion, all those articles, except article 1750, could be repealed by Parliament in the exercise of its ancillary jurisdiction over bills of exchange, notes and cheques. However, to properly answer this question, I must consider whether the repeal by the Quebec legislature was also valid. If so, federal action may not be desirable. My recommendations will flow from the conclusions reached.

Article 1077: Article 1077 deals with moratory damages, that is, damages to compensate for harm suffered by a creditor because of the late performance of an obligation. The third paragraph of article 1077 states that A[t]his article does not affect the special rules applicable to bills of exchange and contracts of suretyship". Originally, that paragraph related to article 2336, which set the rate of damages payable when a person failed to honour a bill of exchange. That article was repealed in 1890 and replaced by section 57 of the *Bills of Exchange Act*.^[217] Paragraph 3 of article 1077 does not in any way concern the law of negotiable instruments in a strict sense. Its main focus is not negotiable instruments, but moratory damages. It simply recognizes that the C.C.L.C. provisions applicable to such damages do not preclude the application of provisions that deal specifically with the question of damages resulting from the failure to pay a bill of exchange. In short, the purpose of this provision is to acknowledge the primacy of the rules specifically applicable to bills of exchange. The province clearly had the power to repeal it.

I also feel that, as a provision falling within the law of negotiable instruments in a wide sense, this provision could be repealed by Parliament.

Article 1573: Very little has been written about this provision.^[218] Its purpose is basically to specify that the formalities established by articles 1571 and 1572 of the C.C.L.C. for the sale of a whole class of debts do not apply to negotiable instruments.^[219] Its purpose is similar to that of article 1077 *in fine*. Like that article, article 1573 simply provides that the rules specifically applicable to negotiable instruments must be followed. There is therefore no encroachment on the law of negotiable instruments in a strict sense. The province could repeal this provision. This conclusion is bolstered by the fact that article 1573 was referred to in Schedule B of the

1886 Revised Statutes of Canada.^[220] Thus, even Parliament doubted whether it had the power to amend it.

It should be added that while the *Bills of Exchange Act* regulates certain negotiable instruments (bills of exchange, notes, cheques and consumer notes and bills), there are many documents that, without meeting the definition criteria of those instruments, do have some of the same characteristics.^[221] It is not very clear which level of government has the power to regulate those documents. For example, the courts have applied rules analogous to those set out in the *Bills of Exchange Act* to debentures, bearer bonds and deposit certificates even though the Act does not say anything about them.^[222] On the other hand, no one questions the power of the provinces to legislate in relation to bills of lading, even though they may be negotiated by endorsement and delivery.^[223] It may therefore be thought that the Quebec legislature had jurisdiction with respect to debentures, the transfer of shares in the capital stock of provincial companies and, possibly, notes for the payment of money or the delivery of grain or other things.

However, although I am of the opinion that, given its purpose, article 1573 does not fall under the law of negotiable instruments in a strict sense, it seems clear to me that Parliament could repeal it by exercising its ancillary power. It should be noted that its power over banking and incorporation would also make its intervention valid. Article 1573 refers to "bank checks"^[224] and the transfer of shares in the capital stock of companies. Companies that pursue federal purposes are within Parliament's jurisdiction.^[225]

Article 1750: Only the Quebec legislature could repeal article 1750, because its purpose is simply to define what constitutes an advance. It obviously does not seek to regulate the law of negotiable instruments in a strict sense. The province of Quebec could repeal this article without any difficulty. Furthermore, the connection of the article to the law of negotiable instruments is so tenuous that I doubt that Parliament could have any jurisdiction over it.

Articles 2260(4) and 2190: To determine whether the Quebec legislature could repeal articles 2260(4) and 2190, which relate to prescription in connection with bills of exchange, two questions must be examined. First of all, is prescription a matter that falls within the law of negotiable instruments in a strict sense? If not, can it be regulated by a provincial statute of specific application? If it is acknowledged that the Quebec legislature has the power to enact a specific prescription period for negotiable instruments, it must be concluded that it was authorized to repeal the prescription period in article 2260(4). That provision establishes a prescription period of five years for bills of exchange, notes and all claims of a commercial nature. It therefore does not deal exclusively with negotiable instruments.

Article 2190 covers situations in which prescription is entirely acquired in Lower Canada or entirely under a foreign law. It does not deal solely with bills of exchange.

The *Bills of Exchange Act* has never provided for prescription periods. Provincial prescription periods [226] therefore apply [227] to litigation involving negotiable instruments.[228] This has always been the case, even prior to 1890, when the *Bills of Exchange Act* was enacted.[229]

A number of authors[230] have argued that this application of provincial statutes that establish prescription periods in the federal sphere is unconstitutional, because the statutes deal with a matter that falls within exclusive federal jurisdiction under subsection 91(18) of the Constitution. According to them, the application of such statutes is merely tolerated.[231] That tolerance is all the more justified given that section 9 of the *Bills of Exchange Act* is of no use when it comes to prescription, since the concept of "limitation", the equivalent of our concept of prescription, is a purely statutory creation.[232]

In an article entitled "L'interaction entre le droit privé fédéral et le droit civil québécois en matière d'effets de commerce: perspective constitutionnelle",[233] I gave detailed consideration to whether provincial prescription periods apply to negotiable instruments. My conclusions were as follows: (1) prescription is not a matter that falls under the law of negotiable instruments in a strict sense; and (2) it is not unconstitutional for a provincial legislature to establish a specific prescription period for negotiable instruments.

As regards the first point, I felt that it could be said that a prescription period does not completely destroy a holder's right of action, as was the case with the provision in issue in *Atlas Lumber*. The provincial statute that was considered in that case had the effect of denying all access to the courts. The holder of a negotiable instrument could in no way exercise the rights given to holders by federal legislation. Without a permit, no action could be brought. The impugned statute [Translation] "hindered the use of negotiable instruments or made it impossible." [234] A prescription period does not have that effect. It simply seeks, on public interest grounds, to protect debtors from negligent creditors who fail to bring proceedings within a given time period. It does not completely destroy the holder's right of action. Access to the courts remains possible. A prescription period simply requires the creditor of the maker of a note to act promptly, and it in no way endangers the negotiability of a negotiable instrument. [235] Furthermore, there is no operational conflict, because the application of such a provincial provision does not seem to me to be incompatible with the *purpose* of federal legislation on negotiable instruments. That legislation gives the holder of a negotiable instrument a right to sue; however, there is no basis for concluding that this right is granted *ad vitam eternam*. It should be noted that in *Costley v. Allen*, [236] although the Saskatchewan Court of Queen's Bench held that the *Debt Adjustment Act* [237] was inapplicable to an action based on a note, it nonetheless found that the Saskatchewan *Statute of Limitations* applied.

Louis-Joseph de la Durantaye shares my opinion. According to him, it is necessary to distinguish between methods of extinction that extinguish both the instrument and the rights of action associated with it and methods that extinguish the obligation underlying

the instrument but leave the instrument intact.^[238] The former methods are related to negotiability and are therefore within federal jurisdiction.^[239] They include payment, release, confusion, alteration and nullity.^[240] The other methods of extinction, such as prescription, novation and compensation, are within provincial jurisdiction. As he notes, these methods of extinction concern *[Translation]* "the relationship of the parties outside the instrument".^[241] With respect to these methods, *[Translation]* "Parliament, which could have legislated in relation to them under the 1867 Act, has left the field unoccupied. Moreover, these methods do not change either the elements or the effects of negotiability and therefore have nothing to do with the application of section 10 [now section 9]."^[242] According to de la Durantaye, prescription does not fall within the law of negotiable instruments in a strict sense because its *[Translation]* "purpose relates not so much to the instrument as to the obligation behind it".^[243]

Finally, as regards the second point, I was of the opinion that in so far as provincial private law legislation does not encroach on the specifically federal nature of a private law power assigned to Parliament, it is not relevant whether that legislation is of general or specific application. Thus, in my view, a provincial statute could establish a specific prescription period for bills of exchange and notes.

Canadian courts have found a number of provincial statutes valid even though they have dealt specifically with persons or undertakings under Ottawa's jurisdiction.^[244] A direct reference to a note or bill of exchange does not make a provincial enactment unconstitutional, as shown above;^[245] this is evident from the decisions of the Quebec^[246] and Ontario^[247] Courts of Appeal. Since a provincial prescription period does not encroach on the specifically federal nature of Parliament's jurisdiction, and since the establishment of such a period therefore falls within provincial jurisdiction under subsection 92(13) of the Constitution, why deny the provinces the power to do specifically what they can do by enacting a general prescription period? Specific prescription periods have also been found valid by the courts.^[248] The close interrelationship of the components of private law, the exceptional nature of federal jurisdiction in this area and the scope of the power granted to the provinces by subsection 92(13) all make the approach suggested here plausible. The province of Quebec, for example, would thus be entitled to enact a specific prescription period in relation to negotiable instruments. Its power to regulate the methods of extinguishing contractual obligations would justify such an enactment. If the province was suspected of using this power for inappropriate purposes, the concept of colourable legislation could be invoked. In any event, Parliament could, if it wished, enact a prescription period that excluded the application of the provincial period.^[249]

Other authors^[250] have attempted to argue that provincial prescription periods are applicable in federal matters on the basis that prescription is procedural and not substantive in nature. According to them, prescription is a matter of procedure, and the provinces have the power to legislate specifically with respect to provincial procedure *and* federal procedure, other than criminal procedure.^[251] This provincial jurisdiction over non-criminal procedure, they say, is based on jurisdiction over "[t]he Administration of Justice in the Province", granted to the provinces under subsection 92(14) of the

Constitution.^[252] The drawback of this approach^[253] is that it assumes that prescription is a matter of procedure and not of substantive law. Yet nothing is less certain. That is why my interpretation seems preferable, as it is not based in any way on the "procedure/substantive law" distinction. I believe the provinces can establish prescription periods for negotiable instruments in the exercise of their jurisdiction under subsection 92(13) of the Constitution. The Quebec legislature was therefore able to repeal the prescription period established by article 2260(4); it could also repeal the norm set out in article 2190 in so far as it related to bills of exchange. In doing so, it was pursuing a valid provincial purpose - the regulation of methods of extinguishing contractual obligations - without encroaching on the specifically federal nature of Parliament's jurisdiction over negotiable instruments.^[254]

I am aware that I am in the minority in stating that prescription in relation to bills of exchange and notes is not part of the law of negotiable instruments in a strict sense. Moreover, in *Cusson v. Robidoux*,^[255] the Supreme Court stated that the principles of common law are to be applied when classifying legislation for testing its constitutionality.^[256] The Supreme Court recently stated that statutes relating to prescription are not procedural because they "destroy substantive rights";^[257] rather, they establish substantive rules. In light of this conclusion, can it still be said that prescription is not part of the law of negotiable instruments in a strict sense, in other words, of the specifically federal content of the power granted to Parliament by subsection 91(18) of the Constitution? I believe that it can. I think that it is dangerous to apply private international law distinctions in the context of the distribution of powers. *Tolofson* did not involve a distribution of powers issue, but rather a private international law issue. In such a context, the Court therefore did not have to concern itself with the specific relationship between the fundamental provincial jurisdiction in the area of private law and the exceptional federal powers in that area. Furthermore, the issue in such cases is not identifying the legislative authority that can *enact* legislation, but determining which validly enacted legislation should be *applied* in a given context. Finally, in the constitutional context, considerations of certainty and order favour the courts' usual practice of applying prescription periods established by provincial law.

Nonetheless, my recommendations will take into account the uncertainty that surrounds the specific legal nature of prescription. Finally, as shown above, Parliament's ancillary power would certainly authorize it to regulate prescription in relation to negotiable instruments and therefore to repeal the normative content of articles 2260(4) and 2190,^[258] in so far as those articles relate to bills of exchange, notes and cheques.

Articles 1229, 2341 and 2342: All these articles deal with evidence. The first, unlike the others, does not relate exclusively to negotiable instruments. Could these provisions be repealed by the province of Quebec? In other words, do substantive rules of evidence fall within the law of negotiable instruments in a strict sense? I admit that there is no easy, clear answer to this question.

Since 1893, federal evidence legislation has included a provision ^[259] making provincial rules of evidence applicable to federal matters on a suppletive basis. It would be wrong to

believe that this legislation has settled all the constitutional problems that might arise. Once again, rules of substantive law must be distinguished from mere rules of evidence.^[260] Despite this difficulty, a very broad provincial power to legislate with respect to evidence in federal civil matters has been recognized. This can be explained, *inter alia*, by the fundamental provincial jurisdiction in the area of private law and by provincial jurisdiction over civil procedure. Chevette and Marx have stated that:^[261]

[*Translation*] [s]ubject to these classification problems [substantive law/law of evidence], a provincial statute concerning procedure or evidence, to be applicable to federal matters on a suppletive basis, does not have to be a general statute and *may deal specifically with some of those matters* . . . Its general nature may even make it so inappropriate to a given federal field that it will become inapplicable to that field. Conversely, its specific nature may be an indication that it is colourable legislation.

This approach would lead to the conclusion that the repeal of articles 1229, 2341 and 2342 by the province of Quebec was valid.^[262] If a province has jurisdiction to enact evidence provisions of specific application in relation to negotiable instruments, it also has jurisdiction to repeal them. It could therefore be said that rules of evidence are not part of the law of negotiable instruments in a strict sense, in so far as they do not affect either negotiability or the rights and obligations of the parties to a negotiable instrument.

On the other hand, there are others who think that only Parliament can regulate the law of evidence in relation to bills of exchange, notes and cheques.^[263] Ducharme, for example, has written that the province of Quebec was not competent to repeal articles 2340 and 2341, 2342, 2346 and 2354 C.C.L.C.^[264] It must be acknowledged that the question of which rules of evidence are applicable may affect the content of the rights and obligations of the parties in respect of a negotiable instrument. This can be seen from *MacDonald v. Whitfield*.^[265]

In that case, the directors of a company had all endorsed a note as security for a loan from the Merchants Bank of Canada. The signatures of the parties to the case followed one another on the back of the instrument, with MacDonald appearing as the first endorser. In an action brought by the bank, the appellant offered no defence. As for the respondent, he brought an action in warranty against MacDonald under article 1953 C.C.L.C. His purpose in so doing was to be reimbursed for any compensation he might be required to pay to the bank.

After conceding that a first endorser was under a duty, originating in the law-merchant, to indemnify subsequent endorsers,^[266] Lord Watson declared that another well-established rule of law was no less applicable: that all the circumstances attendant upon the signing of a negotiable instrument could be referred to for the purpose of ascertaining the scope of the obligations to be borne by each endorser.^[267] In the case before him, Lord Watson said, the signing of the note by the parties to the case did not in itself constitute a true endorsement contract; in signing it, the endorsers did nothing more than perform what they had undertaken to do in an earlier agreement:

In a case like the present, the signing of their names on the note, by way of indorsement, in order to induce the bank to discount it to the promissor, is not, as between the indorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities inter se, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement.[268]

Lord Watson then summarily dismissed the American and Canadian decisions [269] that favoured the approach advocated by Whitfield. He based his decision on article 2340 C.C.L.C. Because article 2346 C.C.L.C. provided that article 2340 was applicable to notes, "in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and the respondent, that question must . . . be decided according to the law of England,"[270] which in this case was a decision of the Court of Common Pleas.[271] As a natural consequence of this decision, it was held in Quebec that testimony may be used to prove the nature of the circumstances surrounding the signing of a negotiable instrument.[272]

In short, the least that can be said is that there is no easy answer to the question as to whether or not evidence falls within the law of negotiable instruments in the strict sense.[273] Nevertheless, considering that the provinces have fundamental jurisdiction in matters relating to private law and evidence in civil matters, and that the federal evidence legislation attests to Parliament's intention that provincial law be applied in a complementary manner in these areas, I agree with Chevrette and Marx that evidence instead falls within the law of negotiable instruments in the wide sense. Thus, a provincial legislature could legislate in this area. In the event of conflict with a federal norm, the federal norm will prevail. The province of Quebec was therefore competent to repeal articles 1229, 2341 and 2342 C.C.L.C. My recommendations will take into account the uncertainty as to whether or not the law of evidence falls within the law of negotiable instruments in the strict sense.

Finally, it should be noted that here again Parliament could use its ancillary power to repeal the provisions mentioned above.[274]

(ii) Conclusions and recommendations

As the philosopher Jean Guittou said, [Translation] "He who does not know what he is looking for does not know what he finds". In presenting my recommendations, I will therefore presume that the Parliament of Canada has undertaken this vast analysis of the C.C.L.C. in order to prevent litigation and clarify the law. I will also presume that Parliament intends, in compliance with the motion passed by the federal government on December 11, 1995, to intervene in a manner that respects the integrity of Quebec's "civil law tradition". It is in light of these concerns that I will now present my recommendations.

(a) Introductory comments

In the following recommendations, the reader will see that I propose that Parliament repeal the normative content of certain provisions of the C.C.L.C. On this subject, two comments must be made.

First, if it is to be effective, the repeal must be *express*. It is not enough for Parliament to merely enact provisions in the *Bills of Exchange Act* - for example, a prescription period - that would be inconsistent with a pre-Confederation norm. In such a situation, for the reasons given in Part I.C, the pre-Confederation norm would not be eliminated but would merely be inapplicable.

Second, it would be wise to draft the repealing provision in such a way that it clearly applies to the normative content of the article. There are two reasons for this approach. First, certain articles, such as articles 1129, 2190 and 2260(4), are not limited to negotiable instruments - they also deal with provincial matters. As a result, the norms referred to in these articles can be repealed by Parliament only in so far as they relate to bills of exchange, promissory notes and cheques. Second, as explained above,^[275] it is not clear that either level of government is competent to alter the actual *form* of the C.C.L.C.

(b) Recommendations

- *Article 1750*: This article presents no difficulties. In my opinion, it has been validly repealed by the Quebec legislature. I even consider it doubtful that Parliament could intervene in any way whatsoever in the matter to which it relates, i.e. advance payments.

I recommend that the Parliament of Canada take no action with respect to article 1750.

- *Third paragraph of article 1077 and article 1573*: For the reasons given above, it is my opinion that these provisions have been validly repealed by the Quebec legislature. Parliament could also repeal them under its ancillary power. However, I consider it politically expedient for Parliament to refrain from intervening where repeal by the province is unlikely to give rise to litigation. It would be advisable to take action only where truly necessary, which is not the case here. The sole purpose of these two provisions was to recognize the primacy of rules specifically applicable to negotiable instruments.
- *Articles 1229, 2340, 2341, 2342, 2346 and 2354*^[276] *C.C.L.C.*: Although it might be said that all these articles have been validly repealed by the Quebec legislature, not all authors share this point of view. I therefore consider it necessary for the Parliament of Canada to intervene, as it is authorized to do in virtue of its ancillary power, by expressly repealing the norms noted in the above articles in so far as they relate to bills of exchange, promissory notes and cheques. It is time to end the controversy to which they give rise.

It should be noted that, although article 2340 was in my opinion repealed by the *Bills of Exchange Act* of 1890, I have nevertheless added it to my list of norms to be eliminated. I consider it appropriate to do so in order to eliminate any possibility of disputes. A section worded as follows could be added to the *Bills of Exchange Act*:

Proposal No. 1^[277]

(1)(a) The legal rules referred to in articles 2340, 2341, 2342, 2346 and 2354 C.C.L.C. are repealed.

(b) The legal rule referred to in article 1229 C.C.L.C. is repealed in so far as it relates to bills, notes or cheques.^[278]

or

Proposal No. 2

(1)(a) Articles 2340, 2341, 2342, 2346 and 2354 C.C.L.C. are repealed.

(b) Article 1229 C.C.L.C. is repealed in so far as it relates to bills, notes or cheques.

To repeal the norms referred to in these provisions would result, in conformity with s. 40 of the *Canada Evidence Act*, in the application of provincial rules of evidence to negotiable instruments on a suppletive basis. This was in fact what the Parliament of Canada intended when it enacted the *Canada Evidence Act* in 1893. That Act already contained an incorporating provision corresponding to the present s. 40. As Perrault wrote: [*Translation*] "[i]t must be presumed that Parliament intended, with section [40], to submit bills of exchange, cheques and promissory notes to the rules of evidence in force in our province, not to those in force in England on May 30, 1849, and to give articles 1203 to 1245 C.C. precedence over articles 2341, 2346 and 2354 C.C."^[279] He considered this reasoning "more logical"^[280] than to argue that this provision referred indirectly to the law of England.

Nevertheless, despite the express repeal of articles 1229, 2340, 2341, 2342, 2346 and 2354, one problem remains, i.e. in light of s. 9 of the *Bills of Exchange Act*, s. 40 of the *Canada Evidence Act* may not be sufficiently explicit to guarantee the application of provincial rules of evidence to negotiable instruments. It will still be possible for a litigant to argue that evidence falls within the law of negotiable instruments in the strict sense and that s. 9 of the *Bills of Exchange Act* accordingly authorizes recourse to the rules of evidence of English law. This reasoning has already had some success in Quebec courts.^[281] Thus, if the intention is in fact for provincial rules of evidence to apply on a suppletive basis where evidence is at issue, it will be necessary to introduce a provision similar to s. 40 of the *Canada Evidence Act* into the *Bills of Exchange Act* itself. It might read as follows:

(1) In all proceedings involving a bill, a note or a cheque, the rules of evidence in force in the province in which those proceedings are instituted apply to those proceedings in so far as they are not excluded by a specific provision of this Act.

- *Articles 2190 and 2260(4)*: These two articles deal with prescription in relation to bills of exchange; they also deal with matters which are within provincial jurisdiction. As was mentioned *supra*, even though the question has been the subject of much debate, the repeal of articles 2260(4) and 2190 by the Quebec legislature is most likely valid. Nevertheless, I recommend that Parliament intervene expressly to definitively repeal this prescription period. In light of the uncertainty surrounding this question, some able litigant is certain to argue that the repeal of article 2260(4) by the province of Quebec was unconstitutional.^[282] The following section could be added to the *Bills of Exchange Act*:

Proposal No. 1 ^[283]

(1) The legal rules referred to in articles 2190 and 2260(4) C.C.L.C. are repealed in so far as they relate to bills, notes or cheques.^[284]

or

Proposal No. 2

(1) Articles 2190 and 2260(4) C.C.L.C. are repealed in so far as they relate to bills, notes or cheques.

This repeal by Parliament would lead in practice to the application of provincial prescription periods of general application where prescription is at issue. As has already been mentioned, the *Bills of Exchange Act* contains no prescription periods. It is true that the application of provincial prescription periods raises constitutional problems.^[285] To overcome them, a section could be added to the *Bills of Exchange Act* to make provincial prescription periods applicable to litigation involving a bill of exchange, promissory note or cheque.^[286] This provision could read as follows:

(1) In all proceedings involving a bill, a note or a cheque, the laws relating to prescription and the limitation of actions as between subject and subject that are in force in the province in which those proceedings are taken apply to those proceedings.

Parliament may consider it appropriate not only to repeal article 2260(4), but also to adopt a specific prescription period for bills of exchange, promissory notes and cheques. If that is its intention, it will have to bear in mind that the concept of "limitation" recognized by the common law provinces is not perfectly identical to the civil law concept of "prescription". In light of Ottawa's badly bungled work on prescription in relation to intellectual property,^[287] I do not recommend the adoption of a specific prescription period for bills of exchange, promissory notes and cheques. It seems

preferable to me to make provincial prescription periods applicable by reference. Furthermore, this would merely confirm the usual practice of the courts.

2. Articles relating to interest

As will be seen, the pre-Confederation articles of the C.C.L.C. relating to interest are much less problematic even though they are more numerous than those relating to negotiable instruments.

(i) Identification of the articles that may still cause problems

The study by P.-A. Crépeau and J.E.C. Brierley has enabled me to identify almost fifty pre-Confederation provisions that refer to interest.^[288] Most of them are in no way related to the federal head of power set out in subsection 91(19) of the Constitution.

Some of the provisions essentially indicate when interest becomes payable in the absence of an express stipulation. This is the case in relation to tutorship (articles 296 and 313), usufruct (article 722), the thing bequeathed (article 871), community of property (article 1360, now repealed), the sale of litigious rights (article 1582), mandate (articles 1714 and 1724), presumption of payment (article 1786), deposit (article 1807), partnership (article 1840) and the hypothecary action (articles 2072 and 2074).

Other articles indicate whether a sum of money must be paid with principal and interest. They involve a number of subject areas: redemption of rents (article 393), usufruct (article 474), substitution (articles 947 and 965-966), quasi-contract resulting from the reception of a thing not due (article 1049), tender (article 1163), warranty against eviction (article 1511), sale price (articles 1534 and 1538) and forced sale (article 1586). Many of these provisions refer to the legal rate of interest.

Finally, some articles specify whether or not interest is included in, for example, civil fruits (article 449) or an accessory to a debt that has been sold (article 1575). Article 465 indicates to whom interest generated by certain things belongs (interest on sums of money comprised in a usufruct); articles 1111 and 1116 deal with joint and several obligations in relation to demands of interest; articles 1159, 1967 and 1974 concern the imputation of payments; and article 1787 concerns the constitution of rent. Articles 2017, 2034 and 2061 relate to hypothecs that secure the payment of interest, while articles 2122, 2124, 2125 and 2139 deal with interest and the registration of real rights. Finally, article 2250 establishes a prescription period for arrears of interest.

None of the above provisions are in any way concerned with credit. They do not govern the interest rate payable under the terms of a given obligation. They set neither the interest rate nor the maximum interest rate payable under the terms of a given obligation. They are therefore not "primarily concerned with financial matters".^[289] Nor do they directly or indirectly affect the free movement of capital. The dominant feature of them all is a matter incontestably within the provincial sphere.

There are only three pre-Confederation provisions of the C.C.L.C. that may be problematic: articles 1077, 1078 and 1785.^[290] Was it possible for the province to repeal these articles unilaterally? As will be seen below, although the repeal of article 1077 did not, strictly speaking, cause any problems, the same was not true of the repeal of articles 1078 and 1785.

- *Article 1077*: This provision deals with the awarding of moratory damages. The purpose of moratory damages is to compensate a creditor for the harm resulting from tardiness in the performance of an obligation. The obligation may be based on an agreement, a judgment or legislation.^[291] Furthermore, if such an obligation [*Translation*] "was created by an agreement, it does not matter whether the agreement was a sale, loan, mandate or deposit".^[292]

The burden is ordinarily on creditors to prove that they sustained damage due to the delay in performance.^[293] However, article 1077 establishes a rule that in the case of an obligation to pay money, moratory damages may be claimed in the absence of such proof. The harm is presumed.^[294] As Professors Pineau and Burman have noted,^[295] this provision is a codified expression of the popular saying: "Time is money". Nevertheless, damages will be available only if the debtor was put in default.^[296] Finally, the interest rate payable will be that agreed upon by the parties or, in the absence of such an agreement, the rate fixed by law, in this case, the *Interest Act*.^[297]

In my opinion, there is no question that the repeal of article 1077 is constitutional. This provision concerns only interest as damages, not interest as an instrument of credit. It therefore concerns a matter clearly within the authority of the province. It is included in a section entitled, "Of the Damages Resulting from the Inexecution of Obligations". The sole purpose of article 1077 is to set the amount of damages available for tardiness in the performance of a monetary obligation. This is clearly within provincial powers. As Professor J.-L. Baudouin noted,^[298] [*Translation*] "[i]t is . . . the provinces that have the exclusive power to provide for a legal means of compensating for the breach of a legal obligation. It is also the provinces that have the right to set the amount of this compensation where necessary. It is of little importance whether this amount is set, for moratory damages, by reference to a table in a federal statute, a provincial statute or a regulation, or even to any other rate (for example, a bank discount rate)". I agree. In my opinion, the repeal by the province of Quebec of the normative content of article 1077 was entirely valid. Article 1077 sets the amount of damages payable; it in no way attempts to set an interest rate.

- *Article 1078*: I consider that the province's repeal of article 1078 was valid.

This article states that anatocism, or the capitalization of interest, will be authorized only if the parties to an agreement have so agreed or if it is sought by way of judicial application.^[299] It follows that a default notice will not, in and of itself, result in anatocism.^[300]

It is true that this article [*Translation*] "prevents usury"[301] by limiting the situations that give rise to the capitalization of interest. It is clearly within Parliament's power under subsection 91(19) to determine what constitutes a usurious rate of interest.[302] Does this necessarily mean that article 1078 falls within Parliament's jurisdiction and that it alone has the power to repeal the normative content thereof?

I concluded above that the only thing a province is not authorized to do is to fix or limit the interest rates payable under a contract. This therefore bars it from defining what constitutes a usurious interest rate. Does article 1078 do this? I think not. It deals with interest as damages and its dominant feature is not the regulation *per se* of the interest rate. The exclusive jurisdiction of Parliament is generally defined as a power to [*Translation*] "set a maximum rate"[303] or to "fix or limit rates of interest under all types of contract".[304] Thus, in *Barfried*, the impugned provincial legislation was found to be valid because, *inter alia*, it did not specifically concern "the rate or amount of interest"[305] payable under a contract. Moreover, it was noted above [306] that only those provincial laws that reduce or set a maximum limit for the interest rate payable on certain categories of debts have been held to be unconstitutional.[307] Article 1078 does not do this. It neither sets nor regulates interest rates; it does not even prohibit anatocism, but simply *limits the cases in which anatocism is permitted*. Its purpose is to protect debtors by obliging a creditor to state in the agreement itself that he or she intends to claim interest on interest. It is thus pursuing a social objective far more than a financial one. If it infringes the federal government's exclusive jurisdiction over interest, the infringement seems to me to be quite minor. Thus, the repeal of the normative content of article 1078 by the province of Quebec was valid.

- *Article 1785*: With the exception of paragraph 1, which in my opinion is clearly within provincial jurisdiction, article 1785 falls decidedly within Parliament's jurisdiction. The lending of money most definitely falls within provincial authority. For example, the provincial legislation held to be valid in *Barfried* dealt only with loans of money. In my opinion, the constitutional validity of the repeal of article 1786 is accordingly incontestable. This provision states that "[a]n acquittance for the principal debt creates a presumption of payment of the interest, unless there is a reserve of the latter". While concerning itself with interest-bearing loans, however, the province must not pursue legislative ends that are within the exclusive power of the federal government under subsection 91(19) of the Constitution. Nonetheless, with the exception of its first paragraph, these are the ends pursued by article 1785. It is concerned with interest as an [*Translation*] "indemnity or . . . profit that the lender stipulates as the price for the enjoyment he grants the borrower." [308] It fixes the interest rate and sets a maximum rate in contractual matters, which is incontestably within the exclusive power of the Parliament of Canada. Article 1785 also deals with the interest rates that banks may impose, which is within Parliament's exclusive jurisdiction over such matters pursuant to subsection 91(15) of the Constitution.[309]

(ii) Recommendations

- *Article 1077*: Parliament should take no action with respect to this article. In my opinion, the article has no federal aspect significant enough to justify taking action.
- *Article 1078*: It seems to me that this provision is within the jurisdiction of the Quebec legislature and that it would therefore be entirely lawful for the province to repeal it. Even assuming that article 1078 could have a federal aspect significant enough to justify federal intervention, I recommend that the Parliament of Canada do nothing about it. It should not be forgotten that the repeal of article 1078 by Parliament could cast doubt on the constitutional validity of article 1620 C.C.Q. In any event, since the provincial repeal appears to me to be perfectly valid, and since the validity of article 1078 has never been challenged in 124 years, I recommend that Parliament take no action with respect thereto.
- *On article 1785*: The Quebec legislature had absolute jurisdiction to repeal the norm set out in paragraph 1 of article 1785. However, it did not have the authority to repeal the normative content of the other paragraphs of this article. Furthermore, the repeal by Parliament of the problematic paragraphs would have no practical consequences since those paragraphs are inoperative today in light of the *Interest Act*.[\[310\]](#)

I therefore recommend that a section worded as follows be added to the *Interest Act*:

Proposal No. 1[\[311\]](#)

(1) The legal rules referred to in paragraphs 2, 3.1, 3.2 and 3.3 of article 1785 C.C.L.C. are repealed.

or

Proposal No. 2

(1)(a) Paragraphs 2, 3.1, 3.2 and 3.3 of article 1785 C.C.L.C. are repealed.

C. Summary of recommendations:

- Parliament should take no action with respect to articles 1077, 1078, 1573 and 1750.
- The norms set out in articles 1229, 1785, 2190, 2260(4), 2340, 2341, 2342, 2346 and 2354 should be expressly repealed in so far as they relate to bills of exchange, promissory notes and cheques. The simplest way to do this would be to add a short section to the *Bills of Exchange Act*, which might read as follows:

Proposal No. 1[\[312\]](#)

(1)(a) The legal rules referred to in articles 2340, 2341, 2342, 2346 and 2354 C.C.L.C. are repealed.

(b) The legal rules referred to in articles 1229, 2190 and 2260(4) C.C.L.C. are repealed in so far as they relate to bills, notes or cheques.

or

Proposal No. 2

(1) (a) Articles 2340, 2341, 2342, 2346 and 2354 C.C.L.C. are repealed.

(b) Articles 1229, 2190 and 2260(4) C.C.L.C. are repealed in so far as they relate to bills, notes or cheques.

Once this first step is completed, the following measures could be adopted:

- In order to clarify the law, a section to the effect that provincial prescription periods apply to every action involving a bill of exchange, promissory note or cheque could be added to the *Bills of Exchange Act*. This provision might read as follows:

(1) In all proceedings involving a bill, a note or a cheque, the laws relating to prescription and the limitation of actions as between subject and subject that are in force in the province in which those proceedings are instituted apply to those proceedings.

- Should the Parliament of Canada prefer to adopt a prescription period in the *Bills of Exchange Act*, it must be careful not to make the same mistakes as were made in relation to intellectual property. More specifically, it will have to consider the distinction between the concepts of "limitation" and "prescription".
- A section should be added to the *Bills of Exchange Act* so as to guarantee that provincial rules of evidence apply to bills of exchange, promissory notes and cheques. In light of s. 9 of the *Bills of Exchange Act*, s. 40 of the *Canada Evidence Act* may not be explicit enough to guarantee the application of provincial rules of evidence to negotiable instruments. Such a section might read as follows:

(1) In all proceedings concerning a bill, a note or a cheque, the laws of evidence in force in the province in which those proceedings are instituted apply to those proceedings in so far as they are not excluded by a specific provision of this Act.

- Where article 1785 is concerned, the Quebec legislature had full jurisdiction to repeal the norm set out paragraph 1 thereof. However, it did not have the authority to repeal the normative content of the other paragraphs of this article. Finally, the repeal by the Parliament of Canada of the problematic paragraphs would have no

practical consequence since those paragraphs are inoperative today in light of the *Interest Act*.

I therefore recommend that a section reading as follows be added to the *Interest Act*:

Proposal No. 1[313]

(1) The legal rules referred to in paragraphs 2, 3.1, 3.2 and 3.3 of article 1785 C.C.L.C. are repealed.

or

Proposal No. 2

(1)(a) Paragraphs 2, 3.1, 3.2 and 3.3 of article 1785 C.C.L.C. are repealed.

APPENDIX I

BILLS OF EXCHANGE

Article 1077

The damages resulting from delay in the payment of money, to which the debtor is liable, consist only on interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law.

Dans les obligations pour le paiement d'une somme d'argent, les dommages-intérêts résultant du retard ne consistent que dans l'intérêt au taux légalement convenu entre les parties, ou en l'absence de telle convention, au taux fixé par la loi.

These damages are due without the creditor being obliged to prove any loss. They are due from the day of the default only, except in the cases where by law they are due from the nature of the obligation.

Ces dommages-intérêts sont dus sans que le créancier soit tenu de prouver aucune perte. Ils ne sont dus que du jour de la mise en demeure, excepté dans les cas où la loi les fait courir plutôt, à raison de la nature même de l'obligation.

This article does not affect the special rules applicable to bills of exchange and contracts of suretyship.

Le présent article n'affecte point les règles spéciales applicables aux lettres de change et aux cautionnements.

Article 1229

No indorsement or memorandum of any payment upon a promissory note, bill of

Nul endossement ou mémoire d'un paiement écrit sur un billet promissoire, lettre de

exchange or other writing, made by or on behalf of the party to whom such payment is made, is received in proof of such payment so as to take the debt out of the operation of the law respecting the limitation of actions.

Article 1573

The two last preceding articles do not apply to bills, notes or bank checks payable to order or to bearer, no signification of the transfer of them being necessary; nor to debentures for the payment of money, nor to transfers of shares in the capital stock of incorporated companies, which are regulated by the respective acts of incorporation or the by-laws of such companies.

Notes for the delivery of grain or other things, or for the payment of money, and payable to order or to bearer, may be transferred by endorsement or delivery, without notice, whether they are payable absolutely or subject to a condition.

Article 1750

Every payment, whether made by money bill of exchange or other negotiable security, is deemed an advance within the provisions of this chapter.

Article 2190

[As regards moveable property and personal actions, even in matters of bills of exchange and promissory notes and commercial matters in general, one or

change ou autre écrit par celui à qui tel paiement a été fait, ou de sa part, n'est reçu comme preuve de tel paiement, de manière à soustraire la dette à l'effet de la loi relative à la prescription des actions.

Les deux derniers articles qui précèdent ne s'appliquent pas aux lettres de change, billets, chèques ou mandats sur banquier, payables à ordre ou au porteur, dont la cession ne requiert pas de signification; non plus qu'aux débetures pour le paiement de sommes d'argent; ni au transport des actions dans les fonds de compagnies incorporées, qui est réglé par les actes d'incorporation ou les règlements respectifs de ces compagnies.

Les billets pour deniers ou pour la livraison de grains ou autres choses, payables à ordre ou au porteur, peuvent être transportés par endossement ou délivrance, sans signification, soit qu'ils soient faits d'une manière absolue ou sous condition.

Tout paiement fait soit en argent, en lettres de change ou autres valeurs négociables, est censé une avance dans le sens de ce chapitre.

[En matière de biens-meubles et d'actions personnelles, même en matière de lettres de change et de billets promissoires, et en affaires de commerce en général, l'on peut

more of the following prescriptions may be invoked:

1. Any prescription entirely acquired under a foreign law, when the cause of action did not arise or the debt was not stipulated to be paid in Lower Canada, and such prescription has been so acquired before the possessor or the debtor had his domicile therein;
2. Any prescription entirely acquired in Lower Canada, reckoning from the date of the maturity of the obligation, when the cause of action arose or the debt was stipulated to be paid therein, or the debtor had his domicile therein at the time of such maturity; and in other cases from the time when the debtor or possessor becomes domiciled therein;
3. Any prescription, resulting from the lapse of successive periods in the cases of the two preceding paragraphs, when the first period elapsed under the foreign law.]

Article 2260

4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of grain or other things, whether negotiable or not, or upon any claim of a commercial nature, reckoning from maturity; this prescription however does not apply to bank notes;

Article 2340

invoquer séparément ou cumulativement;

1. La prescription entièrement acquise sous une loi différente lorsque la cause d'action n'a pas pris naissance dans le Bas Canada, ou que la dette n'y a pas été stipulée payable, et lorsque cette prescription a été ainsi acquise avant que le possesseur ou le débiteur y ait eu son domicile;
2. La prescription entièrement acquise dans le Bas Canada, à compter de l'échéance de l'obligation, lorsque la cause d'action y a pris naissance ou que la dette y a été stipulée payable, ou que le débiteur y avait son domicile à l'époque de cette échéance; et dans les autres cas à compter de l'acquisition de ce domicile par le débiteur ou le possesseur;
3. La prescription résultant de temps successifs écoulés dans les cas des deux paragraphes précédents, lorsque le temps écoulé sous la loi différente a précédé.]

L'action se prescrit par cinq ans dans les cas suivants: [...]

4. En fait de lettres de change à l'intérieur ou à l'étranger, billets promissoires ou billets pour livraison de grains ou autres choses négociables ou non, et en toutes matières commerciales, à compter de l'échéance; cette prescription, néanmoins, n'a pas lieu quant aux billets de banque;

In all matters relating to bills of exchange not provided for in this code recourse must be had to the laws of England in force on the thirtieth of May, one thousand eight hundred and forty-nine.

Dans toute matière relative aux lettres de change pour laquelle il ne se trouve pas de disposition dans ce code, on doit avoir recours aux lois d'Angleterre qui étaient en force le trente de mai mil huit cent quarante-neuf.

Article 2341

In the investigation of facts, in actions or suits founded on bills of exchange drawn or endorsed either by traders or other persons, recourse must be had to the laws of England in force at the time specified in the last preceding article, and no additional or different evidence is required or can be adduced by reason of any party to the bill not being a trader.

Dans l'enquête des faits sur actions ou poursuites pour le recouvrement de lettres de change tirées ou endossées par des commerçants ou autres, on doit avoir recours aux lois d'Angleterre qui étaient en force à l'époque mentionnée dans l'article qui précède, sans que l'on doive ou puisse faire une preuve additionnelle ou différente à raison de ce que quelqu'une des parties sur la lettre de change n'est pas commerçante.

Article 2342

The parties in the actions or suits specified in the last preceding article may be examined under oath as provided in the title *Of Obligations*.

Dans les actions ou poursuites mentionnées dans l'article qui précède, les parties peuvent être examinées sous serment, ainsi qu'il est pourvu au titre: *Des Obligations*.

Article 2346

The provisions concerning bills of exchange contained in this title apply to promissory notes when they relate to the following subjects, viz.:

1. The indication of the payee;
2. The time and place of payment;

Les dispositions relatives aux lettres de change contenues dans ce titre s'appliquent aux billets promissoires quant aux matières suivantes, savoir:

1. L'indication du preneur;
2. Le temps et le lieu du paiement;

- | | |
|-----------------------------------------------------|------------------------------------------------------|
| 3. The expression of value; | 3. L'expression de la valeur; |
| 4. The liability of the parties; | 4. Le responsabilité des parties; |
| 5. Negotiation by endorsement or delivery; | 5. La négociation par endossement ou par délivrance; |
| 6. Presentment and payment; | 6. La présentation et le paiement; |
| 7. Protest for non-payment and notice; | 7. Le protêt faute de paiement et l'avis; |
| 8. Interest, commission, or usury; | 8. L'intérêt, la commission et l'usure; |
| 9. The law and the rules of evidence to be applied; | 9. La loi et la preuve applicables; |
| 10. Prescription. | 10. La prescription. |

Article 2354

In the absence of special provisions in this sections, cheques are subject to the rules concerning inland bills of exchange in so far as their application is consistent with the usage of trade.

En l'absence de dispositions spéciales dans cette section, les *chèques* sont soumis aux règles relatives aux lettres de change à l'intérieur, en autant que l'application en est compatible avec l'usage du commerce.

APPENDIX II

INTEREST

Article 1077

The damages resulting from delay in the payment of money, to which the debtor is liable, consist only on interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law.

Dans les obligations pour le paiement d'une somme d'argent, les dommages-intérêts résultant du retard ne consistent que dans l'intérêt au taux légalement convenu entre les parties, ou en l'absence de telle convention, au taux fixé par la loi.

These damages are due without the creditor being obliged to prove any loss. They are due from the day of the default only, except in the cases where by law they are due from the nature of the obligation.

Ces dommages-intérêts sont dus sans que le créancier soit tenu de prouver aucune perte. Ils ne sont dus que du jour de la mise en demeure, excepté dans les cas où la loi les fait courir plutôt, à raison de la nature même de l'obligation.

This article does not affect the special rules applicable to bills of exchange and contracts of suretyship.

Le présent article n'affecte point les règles spéciales applicables aux lettres de change et aux cautionnements.

Article 1078

Interest accrued from capital sums also bears interest:

Les intérêts échus des capitaux produisent aussi des intérêts:

1. When there is a special agreement to that effect;
2. When any action brought such new interest is specially demanded;
3. When a tutor has received or ought to have received interest upon the moneys of his pupil and has failed to invest it within the term prescribed by law.

1. Lorsqu'il existe une convention spéciale à cet effet;
2. Lorsque dans une action ces nouveaux intérêts sont spécialement demandés;
3. Lorsqu'un tuteur a reçu ou dû recevoir des intérêts sur les deniers de son pupille et a manqué de les employer dans le temps fixe par la loi.

Article 1785

Interest upon loans is either legal or conventional.

L' intérêt sur prêt est ou légal ou conventionnel.

The rate of legal interest is fixed by law at six per cent yearly.

Le taux de l'intérêt légal est fixé par la loi à six pour cent par année.

The rate of conventional interest may be fixed by agreement between the parties, with the exception:

Le taux de l'intérêt conventionnel peut être fixé par convention entre les parties, excepté:

1. Of certain corporations mentioned in

1. Quant à certaines corporations,

the act, intituled: *An act respecting interest*, which cannot receive more than the legal rate of six per cent;

2. Of certain other corporation which are limited as to the rate of interest by special acts;

3. Of banks, which cannot receive more than seven per cent.

mentionnées en l'acte intitulé: *Acte concernant l'intérêt*, qui ne peuvent recevoir plus que le taux légal de six pour cent;

2. Quant à quelques autres corporations qui par des statuts spéciaux sont limitées à certains taux d'intérêt;

3. Quant aux banques qui ne peuvent recevoir plus de sept pour cent.

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The issues discussed in Part I of this study are examined in greater depth in a subsequent study entitled "Thoughts on the Constitutional Problems Raised by the Repeal of the *Civil Code of Lower Canada*" included in this collection.

[1] S.Q. 1991, c. 64 (hereinafter "C.C.Q.").

[2] Hereinafter "C.C.L.C."

[3] R.S.C. 1985, App. V (hereinafter the "Constitution").

[4] For the sake of brevity, I will sometimes use the expression "negotiable instruments" to designate "bills of exchange and promissory notes". However, this does not mean that all negotiable instruments necessarily fall within exclusive federal jurisdiction under subsection 91(18) of the Constitution. In this regard, it should be noted that the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, covers only bills of exchange, notes, cheques and consumer notes and bills. As for other documents that do not meet the definition criteria of these negotiable instruments but do have some of the same characteristics, it is not contended that Parliament has exclusive jurisdiction over them. On this point, please see B.1.i.b.

[5] The only real study of this section was done by L. Patenaude in an unpublished 1966 text entitled *Le pouvoir de la Législature de Québec de modifier la forme du Code civil*.

[6] However, in *Reference In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 609, a case that will be considered in more detail below, Rinfret C.J. refused to rule on the question of whether pre-Confederation provisions that fall under federal jurisdiction once a province joins Confederation continue to apply (at pp. 621 and 624). The Chief Justice

seemed to state that it may be possible to argue that, pursuant to section 129, only Parliament has jurisdiction to amend or repeal such provisions, but that, in any event, the provisions ceased to be applicable once the province joined Confederation. I believe that this opinion is incorrect, as it clearly goes against the wording of section 129. The very purpose of that provision is the continuation in force of all pre-Confederation law as if the Union had not taken place. As stated by Rand J. at p. 639 of the same case, pre-Confederation statutes relating to matters that are federal under section 91 "from the moment of union . . . operate as Dominion laws". Pre-Confederation statutes therefore continue to apply, and charges may even be laid under them: *R. v. Yaldon*, (1908) 17 O.L.R. 179 (Ont. C.A.).

[7] L. Patenaude, *Le pouvoir de la Législature de Québec de modifier la forme du Code civil*, at p. 4. In support of this proposition, the author referred to the following cases: *Griffith v. Rioux*, (1883) 6 L.N. 211, at p. 214 (Sup. Ct.), in which it was stated that "the Legislature cannot repeal what it cannot re-enact"; *Rinfret v. Pope*, (1886) 12 Q.L.R. 303, at p. 311 (C.A.); *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 366; *The Queen v. Halifax Electric Tramway Co.*, (1897-1898) 30 N.S.R. 469, at p. 476; and *Ex parte O'Neil*, (1905) 28 C.S. 304, at p. 309. This list could also include *R. v. Yaldon*, (1908) 17 O.L.R. 179, at p. 181 (Ont. C.A.), and *McGee v. The King*, (1902) Ex. C.R. 309 (T.D.).

[8] (1881-82), 8 A.C. 446 (hereinafter "*Dobie*").

[9] *Act to amend the Act intituled "An 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.

[10] *An 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.

[11] *Dobie v. The Temporalities Board*, (1881-82) 8 A.C. 446, at p. 459. At p. 465, Lord Watson stated 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".

[12] *Ibid.*, at pp. 459-460.

[13] *Ibid.*, at p. 462.

[14] *Ibid.*, at p. 463.

[15] *Ibid.*, at p. 463: "If, by a single Act of the Dominion Parliament [united 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."

[16] *Ibid.*, at p. 465.

[17] [1896] A.C. 348.

[18] 27-28 Vict. ch. 18.

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

[20] *Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348, at p. 362.

[21] *Ibid.*, at p. 366.

[22] *Ibid.*, at p. 367.

[23] This conclusion seems questionable to me. It is now known that Parliament can pass provisions that apply to only one province. As regards private law, one example is the former *Divorce Act (Ontario)*, 1930, S.C. 1930, c. 14. The *Bills of Exchange Act*, 53 Vict., c. 33, also contained provisions that applied only to Quebec. Finally, the *Act respecting Bills of Exchange and Promissory Notes*, R.S.C. 1886, c. 123, which preceded the 1890 statute, was no more than a list of provisions that applied only to certain provinces. In the area of criminal law, it has also been recognized that uniformity is not a prerequisite to validity. Thus, the courts have held that differential application of a criminal law statute from one province to another is a legitimate means of forwarding the values of a federal system: *R. v. Sheldon S.*, [1990] 2 S.C.R. 254, at p. 289; see also P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 447.

[24] *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 366 (emphasis added).

[25] L. Patenaude, *Le pouvoir de la Législature de Québec de modifier la forme du Code civil*, at pp. 4 and 6; R. Macdonald, untitled manuscript, paragraph 128 (the numbering of paragraphs in this text is totally confusing).

[26] L. Patenaude, *Le pouvoir de la Législature de Québec de modifier la forme du Code civil*, at pp. 18, 21, 22, 31; R. Macdonald, untitled manuscript, paragraph 128.

[27] R. Macdonald, untitled manuscript, paragraph 128.

[28] *Reference In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 609, at p. 639 (emphasis added).

[29] 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.

[30] P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed., Éd. Yvon Blais, 1991, Cowansville, at p. 91.

[31] *Ibid.*, at p. 91 (notes omitted).

[32] *Ibid.*, at p. 91: "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."

[33] For example, see *An Act respecting Wreck and Salvage*, S.C. 1873, c. 55, section 37; and the *Bills of Exchange Act*, 53 Vict., c. 33, section 95.

[34] The commissioners took into account the amendments made by the federal Parliament to some provisions of the C.C.L.C. Not only did they make a list (R.S.Q. 1888, vol. 2, pp. 817-829, articles 6229-6271) they even changed the wording of the affected articles: L. Patenaude, *Le pouvoir de la Législature de Québec de modifier la forme du Code civil*, at p. 46.

[35] [1950] S.C.R. 609 (hereinafter "*Bowater*").

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

[37] *An Act to Amend The Income Tax Act and The Income War Tax Act*, S.C. 1949, c. 25, sections 49 and 50.

[38] *Reference In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608, at p. 620: "the '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."

[39] *Supra* note 6.

[40] *Reference In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608, at pp. 621 and 624.

[41] *Ibid.*, at pp. 621-622.

[42] *Ibid.*, at p.624.

[43] In support of his viewpoint, the judge quoted the passage from Lord Watson's judgment reproduced *supra* note 24.

[44] *Reference In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608, at pp. 630-631.

[45] *Ibid.*, at p. 639

[46] *Ibid.*, at p. 639 (emphasis added).

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

[48] *Ibid.*, at p. 641.

[49] *Ibid.*, at p. 642.

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

[51] *Ibid.*, at p. 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." He also quoted the following passage from *Great West Saddlery*, [1921] 2 A.C. 91, at p. 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."

[52] *Ibid.*, at p. 647.

[53] *Ibid.*, at p. 647.

[54] *Ibid.*, at pp. 651 and 655.

[55] *Ibid.*, at p. 654.

[56] *Ibid.*, at p. 656.

[57] *Ibid.*, at p. 634

[58] *Ibid.*, at p. 635.

[59] *Ibid.*, at pp. 635-636 (emphasis in original).

[60] *Ibid.*, at p. 642.

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

[62] [1902] Ex. C.R. 309 (T.D.).

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

[64] *Ibid.*, section 7.

[65] *McGee v. The King*, [1902] Ex. C.R. 309, at p. 316.

[66] A pre-Confederation provision could become inoperative if Parliament passed a provision that came into direct conflict with it. In such a situation, the pre-Confederation provision would be *inoperative*, but only for as long as the conflict lasted.

[67] (1893) 56 Vict., c. 31.

[68] *Reference In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608, at p. 646 (emphasis added).

[69] [1927] Ex. C.R. 68 (T.D.).

[70] *Ibid.*, at p. 72.

[71] *Ibid.*, at p. 73 (emphasis added).

[72] *Ibid.*, at p. 75.

[73] The concept of conflict is discussed *infra*, note 90..

[74] P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed., Cowansville, Éd. Yvon Blais Ltée, at p. 91.

[75] In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 514, La Forest J., speaking for the majority, said: "In enacting this provision [section 719 of the *Criminal Code*, which allows an appeal to the Supreme Court from a judgment rendered in a *habeas corpus* proceeding], Parliament obviously overlooked s. 40 of the *Supreme Court Act* [which prohibits such an appeal]. It must, however, be taken to have been superseded by the later provision. To the extent that there is conflict between s. 40 of the *Supreme Court Act* and s. 719 of the *Code*, then, s. 40 has been *impliedly repealed*." (emphasis added).

[76] *Union Colliery v. Bryden*, [1899] A.C. 580, at p. 588. However, in *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153, at p. 162, Laskin C.J. (writing for the Court) stated: "Unexercised federal authority may give leeway to the exercise of provincial authority in relation to local works and undertakings."

[77] F. Chevette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 280.

[78] This is translated from *Le système juridique entre ordre et désordre*, Michel Van deKerchove and François Ost, Les voies de droit, PUF, 1988, at p. 26.

[79] On this subject, see P.J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism", (1984) 34 *U.T.L.J.* 47, and B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations", (1991) 36 *McGill L.J.* 308.

[80] Although, as will be seen, the aspect doctrine is the prevailing approach today, the fact remains that the courts continue to have recourse to the idea of encroachment, which is closely linked to the traditional paradigm of "watertight compartments": *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641.

[81] The *Labour Conventions* case is the most obvious example: *A.-G. Canada v. A.-G. Ontario* [1937] A.C. 580.

[82] The ancillary power concept is most often relied on to justify a federal encroachment. This is because it was developed in reaction to the extremely generous interpretation given by the Privy Council to subsection 92(13) of the Constitution: F. Chevette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 307. I include in the term "ancillary power" all the doctrines that allow for encroachment. They are generally designated as follows: incidental power, functional relationship doctrine and, of course, ancillary power.

[83] *Alberta Government Telephones v. C.R.T.C.*, [1989] 2 S.C.R. 225, at p. 275. In *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18, Dickson C.J. stated: "The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like 'watertight compartments' qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues." This passage was quoted with approval by Dickson C.J., writing for the Court in *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669. Ironically enough, that decision also boosted the fortunes of the trenching power theory and the ancillary power doctrine.

[84] *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670 (emphasis added).

[85] *Ibid.*, at p. 669.

[86] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 62; *Whitbread v. Walley*, [1989] 3 S.C.R. 1273, at p. 1286; *Bank of*

Montreal v. Hall, [1990] 1 S.C.R. 121, at p. 145; *Reference re G.S.T.*, [1992] 2 S.C.R. 445, at pp. 490-492 (*per La Forest J.*, dissenting).

[87] For illustrations of the application of the double aspect doctrine, see *Smith v. The Queen*, [1960] S.C.R. 776; *Hodge v. The Queen* (1883-84), 9 A.C. 117; *Rio Hotel v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; and *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 16.

[88] In Canadian constitutional law, a statute is presumed to be within the jurisdiction of the level of government that enacted it unless otherwise proven: *Severn v. The Queen* (1878), 2 S.C.R. 70, at p. 103; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pp. 687 and 700; *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *The Queen v. Edwards Books*, [1986] 2 S.C.R. 713, at p. 742; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1285; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at pp. 258-259.

[89] *Tennant v. The Union Bank of Canada*, [1894] A.C. 31, at p. 45, and *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1031.

[90] *Robinson v. Countrywide Factors*, [1978] 1 S.C.R. 753, at p. 808; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at pp. 154-155: "[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 used as security by a debtor could be returned to a secured creditor. The appellant argued that this valid provincial statute conflicted with the security interest recognized by 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 repossessing the property used as security on pain of determination of the security interest.

[91] *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749, at p. 766.

[92] *Ibid.*, at p. 766. The definition of the double aspect concept given by Beetz J. at p. 765 shows that the purpose of that concept is not to contravene the exclusivity rule: "two relatively similar rules or sets of rules may validly be found, one in legislation within *exclusive* federal jurisdiction, and the other in legislation within *exclusive* provincial jurisdiction, because they are enacted for different purposes and in different legislative contexts which give them distinct constitutional characterizations". (emphasis added)

[93] *Ibid.*

[94] *Ibid.*, at p. 839.

[95] *Ibid.*, at p. 833.

[96] *Ibid.*, at p. 839.

[97] *Ibid.*, at p. 840: "and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. The exclusivity rule is absolute and does not allow for any distinction between these two types of statute."

[98] *Ibid.*, at p. 841.

[99] P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at pp. 395-402.

[100] *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749, at p. 766..

[101] It should be noted that the concept of interjurisdictional immunity could probably not be relied on in provincial matters. The only statutes that can result in the application of that concept are statutes of "general application". Federal powers are too narrow or restricted to justify the enactment of such statutes. The reasons behind the existence of the concept would not, for example, allow it to be applied to local undertakings. The application of the concept of interjurisdictional immunity to federal undertakings is justified by the fact that the concept is designed mainly to ensure that a uniform legislative scheme is established for the essential and vital elements of those entities.

[102] "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 *Cahiers de Droit* 535.

[103] (1881), 7 A.C. 96.

[104] P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 538.

[105] A. Tremblay, *Les Compétences législatives au Canada et les Pouvoirs provinciaux en Matière de Propriété et de Droits civils*, Ottawa, University of Ottawa Publications, 1967, at p. 30.

[106] B. Laskin, " 'Peace, Order and Good Government' Re-examined", (1947) 25 *Can. Bar Rev.* 1054, at p. 1057.

[107] P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 539.

[108] W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", (1975) 53 *Can Bar Rev.* 597, at pp. 601-603; see also K.M. Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-making Authority", (1979) 57 *Can. Bar Rev.* 531, at pp. 539-541.

[109] J.-M. Brisson, "L'impact du Code civil du Québec sur le droit fédéral: une problématique" (1992) 52 *R. du B.* 345, at p. 349: [Translation] "Since the provincial legislatures have fundamental jurisdiction in matters of private law, it is in provincial law that fundamental private law concepts are expressed and defined, or at least regulated. . . Parliament does not have the power to exhaustively or systematically regulate the general aspects of private law, except in a limited manner in pursuit of its own ends."

[110] J.E.C. Brierley, "La notion de droit commun dans un système de droit mixte: le cas de la province de Québec", in *La formation du droit national dans les pays de droit mixte*, Aix-en-Provence, Presses universitaires d'Aix-Marseille, 1989, at pp. 103-104.

[111] *Valin v. Langlois* (1879), 2 S.C.R. 1, at pp. 15 (*per* Ritchie C.J.), 81 (*per* Taschereau J.) and 89 (*per* Gwynne J.). Fournier and Henry JJ. did not express any view on this question. Strong J. did not take part in the judgment. The Privy Council affirmed the Supreme Court's decision without expressing an opinion on the meaning of the words "procedure in civil matters": (1879), 5 A.C. 115.

[112] This section is based largely on the following two studies: 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, and 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 *Cahiers de Droit* 535.

[113] "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.

[114] Thus, in the above-mentioned study [(1994) 28 *R.J.T.* 661], I attempted to demonstrate that while the exclusive content of Parliament's power in relation to federal undertakings - or in admiralty matters - is substantial, the same cannot be said for bills of exchange or promissory notes.

[115] 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 *Cahiers de Droit* 535.

[116] The distinction between "law of bills and notes in a strict sense" and "law of bills and notes in a wide sense" was first made by J. D. Falconbridge in *Banking and Bills of Exchange*, 5th ed., Toronto, Canada Law Book Co. Ltd., 1935, at p. 511. One author has described it as follows (B. Geva, "Negotiable Instruments and Banking: Review of Some Recent Canadian Case Law", (1993-1994) *B.F.L.R.* 197, at p. 198): "This division is premised on the double nature of the bill or note as a 'negotiable instrument' governed by

special law (whose historical roots are in the old law merchant), and as a chattel and obligation governed by the general law of property and contract. The former is 'the law of bills and notes in a strict sense'. The latter is its counterpart in 'the wide sense'. The former includes topics such as the form, issue, negotiation, and discharge of bills and notes. The latter deals with the general proprietary and obligatory elements applicable to such instruments." The distinction was developed to define the scope of the reference to English law in section 9 of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, which provides as follows: "The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, apply to bills, notes and cheques." Since it must be presumed that Parliament did not intend to encroach unlawfully on provincial powers in relation to "property and civil rights" when it enacted section 9 (formerly section 10), the scope of that section has been limited to matters that can be associated with Parliament's *exclusive* power in relation to bills of exchange and notes. The expression "law of bills and notes in a strict sense" would exclude: 1. any matter that is not part of the essence of the law of negotiable instruments, and 2. any subject on which Parliament can legislate only in an ancillary manner: J.D. Falconbridge, "The Bills of Exchange Act in Quebec" (1942) 20 *Can. Bar Rev.* 723, at p. 731. For a discussion of the interpretation of section 9, read 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.

[117] M. Caron and A. Bohémier, *Précis de droit des effets de commerce*, 7th ed., Montreal, Librairie Beauchemin Ltée, 1982, at p. 14.

[118] See *supra* note 97.

[119] An example of a provincial provision that is most probably unconstitutional is section 102 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, which reads: "A negotiable instrument signed at the time of a contract to acknowledge deferred payments forms part of the whole contract and neither such instrument nor the contract may be assigned separately by the merchant or any subsequent assignee." M. Caron and A. Bohémier, *Précis de droit des effets de commerce*, 7th ed., Montreal, Librairie Beauchemin Ltée, 1982, at p. 20, assert that this section is *ultra vires* [Translation] "in so far as it prevents the negotiation of a note separately from the contract to which it is linked. The objective of section 18 (now section 102) is undoubtedly to protect the consumer, but it attempts to achieve that objective by directly affecting the creation and negotiation of negotiable instruments and even by attempting to prevent future holders of an instrument from being holders in due course".

[120] Bills of exchange and promissory notes are always based on a civil obligation: M. Caron and A. Bohémier, *Précis de droit des effets de commerce*, 7th ed., Montreal, Librairie Beauchemin Ltée, 1982, at pp. 15-16. As McTiernan J. stated in *Stock Motor Ploughs Ltd. v. Forsyth*, (1932) 48 C.L.R. (Aust. H.C.), at p. 154, "[i]f debts were not contracted, the instruments to which the [Bills of Exchange] Act relates would not come into existence". L.-J. de la Durantaye, *Traité des effets négociables*, Wilson & Lafleur Ltée, Montreal, 1964, at p. 51, para. 72., states the following: [Translation] "Aside from

negotiability . . . the parties, whether they have signed the instrument or not, are usually bound, especially in terms of value, by the undertakings that continue to be regulated by provincial law, which thus plays a *supplementary* role in relation to federal legislation." Moreover, a negotiable instrument that does not meet the formal requirements set out in federal legislation is still a valid agreement between the contracting parties: M. Deschamps, "Validité d'un billet portant intérêt au taux préférentiel d'une banque" (1982-83) 17 R.J.T. 159, at p. 163; G. V. Nicholls, "The Bills of Exchange Act and Prescription in the Province of Quebec" (1936-37) 15 R. du D. 606, at p. 607.

[121] Bohémier, *Précis de droit des effets de commerce*, 7th ed., Montreal, Librairie Beauchemin Ltée, 1982, at pp. 7-8.

[122] *Robinson v. Countrywide Factors*, [1978] 1 S.C.R. 753, at p. 808.

[123] [1941] S.C.R. 87 (hereinafter "*Atlas Lumber*"). The Privy Council found the provincial statute unconstitutional on the ground that it related to bankruptcy and insolvency, an exclusive field of federal jurisdiction under subsection 91(21) of the Constitution: [1943] A.C. 356.

[124] Alberta, 1937, c. 9.

[125] *Attorney General for Alberta and Winstanley v. Atlas Lumber Co.*, [1941] S.C.R. 87, at p. 97.

[126] *Ibid.*, at p. 101.

[127] Taschereau J. adopted the reasons of his colleague Hudson J., while Davis J. wrote a separate judgment. Crocket J.'s judgment is not relevant to this study. In *Reference as to the Validity of The Debt Adjustment Act, Alberta*, [1942] S.C.R. 31 - a decision upheld by the Privy Council: [1943] A.C. 356 - the Alberta *Debt Adjustment Act* was declared unconstitutional in its entirety. Duff C.J. (and Rinfret, Davis, Kerwin, Hudson and Taschereau JJ. Crocket J. dissented) held that the entire Act was *ultra vires* on the ground, *inter alia*, that it encroached on federal jurisdiction over bankruptcy (at p. 40). He also said that it interfered with the rights of action recognized by federal legislation on bills of exchange, banks and federally incorporated companies. In this regard, he stated that "[t]he distinction between right and remedy is often a useful distinction, but an enactment which takes away the remedy by action, which the law otherwise would give to the creditor in respect of his debt, and substitutes therefor the chance of obtaining, by the arbitrary act of a public authority, permission to enforce a remedy is, I think, something more than an enactment relating to procedure. It strikes, I think, at the substance of the creditor's rights" (at p. 36). At p. 38, he added: "While in form this is legislation in relation to remedy and procedure, in substance this provision which attempts to regulate the remedial incidents of the right in this manner must, when it is read in light of the context in which it stands in this section 8(1), be regarded as a step in a design to regulate the right itself." The Act was held to be unconstitutional; the Chief Justice stated that it was impossible to read it down (at p. 41). It should be noted that in

Stock Motor Ploughs v. Forsyth (1932), 48 C.L.R. 128, the High Court of Australia held that state legislation analogous to the Alberta legislation challenged in *Atlas Lumber* was valid.

[128] [1961] S.C.R. 693.

[129] *The Securities Act*, 1954, (Sask.), c. 89.

[130] Taschereau, Fauteux and Judson JJ. approved the reasons of Kerwin C.J.

[131] *Duplain v. Cameron*, [1961] S.C.R. 693, at p. 700.

[132] *Ibid.*, at pp. 700-701.

[133] *Ibid.*, at p. 709. Locke J., in dissent, felt that the challenged legislative provisions hindered the application of the federal *Bills of Exchange Act* much more seriously than the Alberta *Debt Adjustment Act*. In his opinion, section 10 (now section 9) of the *Bills of Exchange Act* preserved the pre-1890 common law right to freely negotiate negotiable instruments. In this case, he said, the Saskatchewan statute not only prohibited the negotiation of notes by persons who did not have a permit, but also prevented instruments that did not meet the requirements of the statute from being negotiated.

[134] *Ibid.*, at p. 714 (*per* Ritchie J.).

[135] [1991] R.J.Q. 2526.

[136] R.S.Q., c. P-40.1.

[137] And Mailhot and Fish JJ.A.

[138] *127097 Canada Ltd. v. Québec (P.G. du Québec)* [1991] R.J.Q. 2526, at p. 2529.

[139] *Ibid.*, at p. 2530.

[140] *Ibid.*

[141] *Ibid.*

[142] *Ibid.*

[143] Similar reasoning was used in *Procureur général du Québec v. Greenspoon*, [1980] C.A. 587, and *C.I.B.C. v. Materi et al.*, (1974) 50 D.L.R. (3d) 400 (B.C.S.C.).

[144] (1992), 98 D.L.R. (4th) 697 (Man. C.A.).

[145] 1835 (U.K.), c. 41.

[146] The appellant also argued that this English statute was not part of Manitoba law. The argument was rejected on the ground that, according to section 1 of the *Court of Queen's Bench Act, 1874*, S.M. 1874, c. 12, all the English law in force on July 15, 1870 was in force in the province of Manitoba as regards "property and civil rights" (at p. 704).

[147] *Red River Forest Products Inc. v. Ferguson*, (1992) 98 D.L.R. (4th) 697, at p. 714.

[148] Scott J.A. agreed with his colleague's reasons, while Lyons J.A. succinctly rejected the appellant's arguments on the ground that they were "patently without merit and deserv[ed] no further comment"! (*ibid.*, at p. 699).

[149] *Ibid.*, at p. 713.

[150] [1947] O.R. 650 (decision affirmed by the Supreme Court without dealing with the constitutional issue: [1949] S.C.R. 201).

[151] R.S.O. 1937, c. 297.

[152] *Red River Forest Products Inc. v. Ferguson*, (1992) 98 D.L.R. (4th) 697, at p. 716.

[153] B. Geva, "Negotiable Instruments and Banking: Review of Some Recent Canadian Case Law", (1993-1994) 9 *B.F.L.R.* 197, at p. 199.

[154] *Ibid.*, at p. 198: "Such provincial jurisdiction over wide sense matters is not exclusive; rather, under 'federal paramountcy', it is superseded by Parliament, which is competent to legislate in both strict and wide sense matters. Stated another way, provincial legislation of a general nature may validly affect claims on bills and notes, as long as it does not conflict with a federal statute that relates directly to bills and notes."

[155] It has been recognized that the boundary between, for instance, provincial private law and banking law is very fluid: M.H. Ogilvie, *Canadian Banking Law*, Scarborough, Carswell, 1991, at p. 17. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 145, La Forest J. stated: "Thus it is clear that there can be no hermetic division between banking as a generic activity and the domain covered by property and civil rights."

[156] In *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641, Dickson C.J. stated that the relationship between an encroaching provision and the valid legislation to which it is attached determines whether the encroachment is constitutionally valid (at p. 668). As regards that relationship of integration, the Chief Justice stated (at pp. 668-669): "Answering the question first requires deciding what test of 'fit' is appropriate for such a determination. By 'fit' I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers . . . [I]n certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable." Finally, the Chief Justice noted that another element must be considered in

selecting the proper test, i.e. the specific nature of the power under which the legislation is valid (at p. 671).

[157] I will examine jurisdiction over interest in the next section.

[158] *Droit constitutionnel*, 2nd edition, Cowansville, Les Éditions Yvon Blais Inc., 1990, at p. 431. For a discussion of the restrictive interpretation given to the words "bankruptcy" and "insolvency", see P. Carignan, "La compétence législative en matière de faillite et d'insolvabilité", (1979) 57 *Can. Bar Rev.* 47, at p. 52.

[159] I will consider this question in Part II.

[160] *Cushing v. Dupuy* (1880), 5 A.C. 409.

[161] *Clark v. C.N.*, [1988] 2 S.C.R. 680, at pp. 709-710; *Whitbread v. Walley*, [1989] 3 S.C.R. 1273, at p. 1289; *Dupras v. Bezzina*, [1995] O.J. No. 562 (Ont. Ct. (Gen. Div.)), *per* Misener J., para. 15; *A.G. Can. v. A.G. Quebec*, [1947] D.L.R. 81, at p. 87. There are many examples of federal statutes that contain prescription or limitation periods, including: *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, section 32; *Federal Court Act*, R.S.C. 1985, c. F-7, subsections 39(1) and (2); *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, subsection 6(5); *Bank Act*, R.S.C. 1985, c. B-1.01, subsections 76(3), 272(2) and 363(2) and section 209; *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-15.3, subsections 39(7) and 60(7); *Canadian Exploration Incentive Program Act*, R.S.C. 1985, c. C-15.7, subsection 19(1); *Copyright Act*, R.S.C. 1985, c. C-42, section 41; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, subsections 38(5), 118(7) and 131(5); *Emergencies Act*, R.S.C. 1985, c. E-4.5, subsection 51(2); *Energy Supplies Emergency Act*, R.S.C. 1985, C. E-9, subsection 32.3(2); *Excise Tax Act*, R.S.C. 1985, c. E-15, subsection 82(2); *National Defence Act*, R.S.C. 1985, c. N-5, subsection 269(1); *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, subsection 26(5); and *Canada Shipping Act*, R.S.C. 1985, c. S-9, subsections 471(1), 572(1) and 677(10).

[162] [1995] F.C.J. No. 1202 (F.C.T.D.), at para. 163.

[163] L. Ducharme, *L'administration de la preuve*, 2nd ed., Montreal, Coll. Bleue, Wilson & Lafleur Ltée, 1995, at p. 1, paras. 1 and 2.

[164] L. Ducharme, *Précis de la preuve*, 4th ed., Montreal, Coll. Bleue, Wilson & Lafleur Ltée, 1993, at pp. 2-3, para. 6. To address the question with which I am dealing, I do not have to consider whether Parliament has jurisdiction to make rules on evidence-taking in federal matters, because the C.C.L.C. does not contain any provisions on that topic.

[165] *Ibid.*, at pp. 7-8, para. 25; F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*; Presses de l'Université de Montréal, Montreal, 1982, at pp. 835-836, and A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 1, at p. 207.

[166] R.S.C. 1985, c. C-5.

[167] *Banque Provinciale du Canada v. Poulin*, J.E. 80-509 (Prov. Ct.)

[168] L. Ducharme, *Précis de la preuve*, 3rd ed., Montreal, Coll. Bleue, Wilson & Lafleur Ltée, 1986, at p. 6.

[169] M.A. Waldron, *The Law of Interest in Canada*, Toronto, Carswell, 1992, at p. 20; P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 539.

[170] *Tomell Investments Limited v. East Marstock Lands Limited*, [1978] 1 S.C.R. 974, at p. 986.

[171] H. Brun and G. Tremblay, *Droit constitutionnel*, Cowansville, Editions Yvon Blais Inc., 1982, at p. 312. The following was stated by John A. MacDonald on February 6, 1865 in the Legislative Assembly of the province of Canada: "[A]ll the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies." Quote taken from the *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, Quebec, Hunter, Rose and Co., 1865, at p. 40. The desire for uniformity also explains why Parliament was granted jurisdiction over bankruptcy and insolvency: P. Carignan, "La compétence législative en matière de faillite et d'insolvabilité", (1979) 57 *Can. Bar Rev.* 47.

[172] *Duplain v. Cameron*, [1961] S.C.R. 693, at p. 707 (*per* Locke J.); A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 1, at p. 161.

[173] D. Nadeau, "L'intérêt de l'argent en droit constitutionnel canadien", (1985) 16 *R.D.U.S.* 1, at p. 12, and M.A. Waldron, *The Law of Interest in Canada*, Toronto, Carswell, 1992, at p. 18.

[174] D. Nadeau, "L'intérêt de l'argent en droit constitutionnel canadien", (1985) 16 *R.D.U.S.* 1, at p. 12; M.A. Waldron, *The Law of Interest in Canada*, Toronto, Carswell, 1992, at p. 18; and F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 608. To the free movement of capital guaranteed by subsection 91(19) can be added the free movement of goods guaranteed by sections 121 and 122 of the Constitution.

[175] F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 608.

[176] D. Nadeau, "L'intérêt de l'argent en droit constitutionnel canadien", (1985) 16 *R.D.U.S.* 1, at p. 19.

[177] M.A. Waldron, *The Law of Interest in Canada*, Toronto, Carswell, 1992, at p. 24. At pp. 20-21, the author explains: "The key, it may be argued, is the court's classification of the provincial jurisdiction under which regulation of interest may be justified. If that jurisdiction is seen as one that is primarily directed toward matters of finance, then to permit it to be used to justify interference with interest rates would be to erode a major aspect of the federal power and to jeopardize the mobility of commercial investment in the Dominion which the country's founders apparently sought to protect. Interference with private debt could only be justified by the province's right generally to control contract terms within the province and impose any financial terms it saw fit; the result of permitting this to encompass the stipulating of interest rates would be to eliminate almost entirely the effect of the federal power . . . In addition, in those cases in which the provincial power has been upheld, there has also existed a strong and broadly accepted social policy factor which was perceived to be just as important as protecting mobility of investments."

[178] [1963] S.C.R. 570 (hereinafter "*Barfried*").

[179] R.S.O. 1960, c. 410.

[180] *Re The Unconscionable Transactions Relief Act (Ontario), Re Sampson and Barfried Enterprises Ltd.*, (1962) 35 D.L.R. (2d) 449, at p. 463.

[181] *Ibid.*, at p. 463: "compensation for the loan".

[182] He was writing on behalf of his colleagues Taschereau C.J. and Fauteux and Hall J.J. Cartwright J. wrote a dissenting opinion. Martland and Ritchie J.J., also in dissent, found that there was a conflict between the provincial Act and the federal *Interest Act*; they therefore did not express an opinion on the validity of the provincial Act.

[183] *Attorney-General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570, at p. 575.

[184] *Ibid.*, at pp. 577-578.

[185] *Ibid.*, at p. 579.

[186] [1978] 1 S.C.R. 974, at p. 985 (hereinafter "*Tomell*").

[187] The judge was writing on behalf of his colleagues Ritchie, Spence, Dickson and Beetz J.J. Laskin C.J. and Martland J. wrote a concurring opinion.

[188] It must be acknowledged that this conclusion seems to have been questioned by Laskin C.J. in *British Pacific Properties Ltd. v. Minister of Highways and Public Works*, [1980] 2 S.C.R. 283, at p. 291.

[189] *Tomell Investments Limited v. East Marstock Lands Limited*, [1978] 1 S.C.R. 974, at p. 986.

[190] *Crédit Foncier Franco-Canadien v. Ross*, [1937] 3 D.L.R. 365 (Alta. C.A.), and *Sask. Farm Security Reference*, [1949] A.C. 110 (P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, questions the correctness of the latter decision at pp. 635-636).

[191] *Lethbridge Nor. Irrigation Dist. Trustees v. I.O.F.*, [1940] A.C. 523.

[192] [1934] A.C. 468.

[193] *Ibid.*, at p. 483: "If the provincial legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and, incidentally, may define the amount of interest which such obligations may bear. Such legislation, if directed *bona fide* to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion legislature over interest."

[194] P. W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 387.

[195] R.S.C. 1970, c. I-18; now the *Interest Act*, R.S.C. 1985, c. I-15.

[196] *Tomell Investments Limited v. East Marstock Lands Limited*, [1978] 1 S.C.R. 974, at p. 984.

[197] *Ibid.*, at p. 987. Laskin C.J. and Martland J. did not feel that it was necessary to apply the ancillary power doctrine. According to them, since the pith and substance of the legislation was to set the maximum charge that could be exacted from a debtor on arrears of principal under a mortgage contract, the legislation was valid (at p. 976).

[198] *Ibid.*, at pp. 986-987.

[199] F. Chevette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, 1982, at p. 608: [*Translation*] "federal jurisdiction over interest relates to the interest payable on contractual obligations. If a debt is based not on a contract but on a statute or a delict, there is nothing to prevent a province from providing for the interest it will bear. Federal jurisdiction can be explained, *inter alia*, by a desire to centralize credit policy and prevent rates from varying from one province to another, which would be an obstacle to the free movement of capital. A debt based on a statute or delict is unrelated to that objective."

[200] P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 387.

[201] SOQUIJ, Montreal, 1981.

[202] I have appended only the articles that, for reasons I will now explain, were still in force when the C.C.L.C. was repealed in 1991.

[203] *An Act respecting the Revised Statutes of Canada*, 1886, 49 Vict., c. 4, preamble.

[204] Schedule B of R.S.C. 1886; vol. II, pp. 2299 *et seq.*

[205] R.S.C. 1886, vol. 2, p. 2301.

[206] 53 Vict., c. 33. The *Act respecting Bills of Exchange and Promissory Notes*, R.S.C. 1886, c. 123, which preceded the 1890 Act, did not seek to set out general principles; rather, it was a compilation of exceptions. The methods of protest, which varied from one province to another, were explicitly approved by Parliament (Nova Scotia (section 7), Prince Edward Island (section 8), New Brunswick (section 10)). Sections 16 to 26, dealing with acceptance, protest and usurious consideration, applied only to Ontario. As well, three provisions dealt with the difficulties caused in Quebec by the form of protests and the fees charged by notaries to draft them (sections 27 to 30). Below section 30, it was specifically stated that "[t]he articles of the Civil Code of Lower Canada relating to this subject will be found in the collection of Statutes not consolidated."

[207] A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 1, at p. 201, and t. 3, at p. 1128.

[208] The fate of articles 2346 and 2354 depends on the fate of the other C.C.L.C. articles dealing with bills of exchange, because they simply state that the rules applicable to bills of exchange also apply to notes and cheques.

[209] A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 3, at p. 1129. L.-J. de la Durantaye, *Traité des effets négociables*, Wilson & Lafleur Ltée, Montreal, 1964, at p. 304, para. 487, also seems to acknowledge that article 2343 has no purpose.

[210] See Section I.C.

[211] A. Gérin-Lajoie, "Quelle loi s'applique en matière de preuve relativement aux effets de commerce?", (1926) 5 *R. du D.* 425; A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 1, at pp. 201-210, and t. 3, at pp. 1130-1131; L.-J. de la Durantaye, *Traité des effets négociables*, Wilson & Lafleur Ltée, Montreal, 1964, at pp. 304-305; M. Caron and A. Bohémier, *Précis de droit des effets de commerce*, 7th ed., Montreal, Librairie Beauchemin Ltée, 1982, at pp. 12-13.

[212] (1893) 56 Vict. c. 31.

[213] *Revised Statutes of Canada, 1906, Act*, (1907) 6-7 Ed. VII, c. 43.

[214] A. Gérin-Lajoie, "Quelle loi s'applique en matière de preuve relativement aux effets de commerce?", (1926) *R. du D.* 425, at pp. 437 and 440; A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 3, at pp. 1130-1131.

[215] L.-J. de la Durantaye, *Traité des effets négociables*, Wilson & Lafleur Ltée, Montreal, 1964, at p. 305, para. 487, shares my opinion on this point: [Translation] "Article 2341 of the Civil Code survived those ups and downs. Aside from these applications, the English rules of evidence that were in force on May 31, 1849 must still be followed in the province of Quebec in cases dealing with bills, cheques and notes."

[216] Section II.A.3.i.

[217] F. Langelier, *Cours de droit civil de la Province de Québec*, Montreal, Wilson & Lafleur Ltée, 1909, t. 3, at p. 529. That section is now section 133 of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4.

[218] A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 1, at pp. 467 and 531; P.-B. Mignault, *Le droit civil canadien*, Wilson & Lafleur Ltée, 1906, t. 7, at p. 191.

[219] P.-B. Mignault, *Le droit civil canadien*, Wilson & Lafleur Ltée, 1906, t. 7, at p. 191.

[220] See text corresponding to notes 204 and 205.

[221] See N. L'Heureux, *Droit bancaire*, 2nd ed., Cowansville, Les Éditions Yvon Blais Inc., 1995, at pp. 185-188 and 190.

[222] *Ibid.*, at p. 190.

[223] See articles 2040 to 2058 C.C.Q., and more specifically article 2043.

[224] The courts have applied the rules set out in the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, to bank drafts and personal money orders issued by banks: N. L'Heureux, *Droit bancaire*, 2nd ed., Cowansville, Les Éditions Yvon Blais Inc., 1995, at p. 186.

[225] *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, and *Great West Saddlery*, [1921] 2 A.C. 91.

[226] I am using the term "prescription" in a generic sense. The concept of "limitation" recognized in the common law provinces is not exactly the same as the civil law concept of prescription. On this topic, see D. Vaver, "Limitations in Intellectual Property: 'The Time is Out of Joint'", (1994) 73 *Can. Bar Rev.* 451, at pp. 456-457. All of the common law provinces and territories have enacted legislation establishing general limitation periods: G. Mew, *The Law of Limitations*, Markham, Butterworths, 1991, at p. 17. Moreover, in all of the common law provinces, the limitation period is six years: B.

Crawford and J.D. Falconbridge, *Banking and Bills of Exchange*, 8th ed., Toronto, Canada Law Book Inc., 1986, vol. 2, at p. 1655.

[227] *Evans v. Bank of Hamilton* (1909), 13 O.W.R. 374 (Div. Ct.). In *Royal Bank of Canada v. Hiebert*, [1990] S.J. No. 92 (Sask Q.B.; Wimmer J.), the appellant argued that the Saskatchewan *Limitation of Civil Rights Act* did not apply to an action it had brought on a promissory note. The appellant argued that although the provincial Act was valid, it "cannot operate to preclude a chartered bank from enforcing its rights under a promissory note because section 91(15) and section 91(18) give to the Parliament of Canada the exclusive legislative jurisdiction over banking and bills of exchange". The judge rejected that argument, stating that "banks, like all institutions and individuals, are subject to provincial laws of general application". It is interesting to note that the judge took for granted that the provincial limitation period was applicable to bills of exchange, as can be seen from the rest of his decision.

[228] See *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153, at p. 162: "Unexercised federal authority may give leeway to the exercise of provincial authority in relation to local works and undertakings."; see also *Windermere Watersport Inc. v. Invermere (District)*, [1989] B.C.J. No. 863 (B.C.C.A.). What is true of undertakings may also be true of prescription for bills of exchange and promissory notes.

[229] B. Crawford and J.D. Falconbridge, *Banking and Bills of Exchange*, 8th ed., Toronto, Canada Law Book Inc., 1986, vol. 2, at p. 1655.

[230] *Ibid*, at p. 1663; G.E. Le Dain, "Book Reviews: Banking and Bills of Exchange by J.D. Falconbridge" (1956-57) 3 *McGill L.J.* 113, at pp. 118-19; Ontario Law Reform Commission, *Report on Limitations of Actions*, 1969, at pp. 19-20 and 136 (that report makes a distinction between a provincial limitation provision that is procedural in nature and one that is substantive in nature; only the former would be applicable to negotiable instruments).

[231] G.E. Le Dain, "Book Reviews: Banking and Bills of Exchange by J.D. Falconbridge" (1956-57) 3 *McGill L.J.* 113, at pp. 118-119. Although B. Crawford and J.D. Falconbridge (*Banking and Bills of Exchange*, 8th ed., Toronto, Canada Law Book Inc., 1986, vol. 2, at p. 1666) are of the opinion that prescription comes within exclusive federal jurisdiction, they acknowledge that in practice the courts have applied provincial periods of general application because of the silence of the federal legislation.

[232] J.S. Williams, *Limitations of Actions in Canada*, 2nd ed., Toronto, Butterworths, 1980, at p. 25. G. Mew, *The Law of Limitations*, Markham, Butterworths, 1991, at p. 17. Even if it is assumed that section 9 refers not only to common law rules but also to rules of equity, the doctrine of laches recognized by the latter is of no help. That doctrine applies only to actions in equity and not to common law actions, such as those based on negotiable instruments: B. Crawford and J.D. Falconbridge, *Banking and Bills of Exchange*, 8th ed., Toronto, Canada Law Book Inc., 1986, vol. 2, at p. 1662, note 2.

[233] (1995) 40 McGill L.J. 691.

[234] M. Caron and A. Bohémier, *Précis de droit des effets de commerce*, 7th ed., Montreal, Librairie Beauchemin Ltée, 1982, at p. 19.

[235] It is interesting to note that the same arguments are made by R.H. Barrigar, "Time Limitations on Dominion Statutory Causes of Action" (1964) 40 *C.P.R.* 82, at p. 84, and F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, 1982, at p. 838, to show that prescription is part of procedural law rather than substantive law.

[236] [1941] 4 D.L.R. 754, 758 (Sask. Q. B.); reversed on other grounds: [1942] 3 D.L.R. 76 (Sask. C.A.).

[237] 1934-35 (Sask), c. 88.

[238] L.-J. de la Durantaye, *Traité des effets négociables*, Wilson & Lafleur Ltée, Montreal, 1964, at p. 221.

[239] *Ibid.*, at p. 244.

[240] *Ibid.*, at p. 221.

[241] *Ibid.*

[242] *Ibid.*, at p. 244 (notes omitted).

[243] *Ibid.*, at p. 220. F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, state the following at p. 838: [Translation] "[J]ust as a province can regulate judicial control of constitutionality but cannot abolish it or make it unworkable . . . so too it can declare that actions, even federal actions, are prescribed after a certain lapse of time, even if it may not completely prevent the bringing of such actions or subject them to the discretion of its administrative officials. Prescription is justified, *inter alia*, by the demands of the proper administration of justice and by the evidentiary difficulties that may be faced in the course of a trial if the cause of action is too remote in time. A province must have jurisdiction in this regard."

[244] See P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at pp. 380-381, and the decisions cited by him.

[245] See Section II.A.3.i.a.

[246] *127097 Canada Ltd. v. Québec (Procureur général)*, [1991] R.J.Q. 2526 (C.A.).

[247] *McGillis v. Sullivan*, [1947] O.R. 650 (Ont. C.A.); decision affirmed by the Supreme Court of Canada, which did not deal with the constitutional issue: [1949] S.C.R. 201; *Red River Forest Products Inc. v. Ferguson* (1992), 98 D.L.R. (4th) 697 (Man. C.A.).

[248] In *Weingarden v. Moss* (1955), 4 D.L.R. 63, at p. 69, the Manitoba Court of Appeal stated: "Limitation of time for action on promissory notes has been held to be within the legislative authority of the Province." In *Burton v. Burton*, [1946] 1 D.L.R. 315, at p. 325 (Alta. C.A.), a decision in which federal jurisdiction over marriage was in issue, Mr. Justice Frank Ford said: "It may be assumed . . . that the Legislature of Alberta presently has the power, by apt words, to provide for a period of limitation in respect of actions for nullity of marriage on the ground of incapacity to consummate the marriage, acting under its legislative jurisdiction in respect of procedure in the provincial Courts."

[249] See Section II.A.3.i.b.

[250] R.H. Barrigar reviewed the cases on this question in "Time Limitations on Dominion Statutory Causes of Action" (1964), 40 *C.P.R.* 82. See also F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at pp. 836-840. B. Crawford and J.D. Falconbridge, *Banking and Bills of Exchange*, 8th ed., Toronto, Canada Law Book Inc., 1986, vol. 2, at p. 1666, also suggest this possibility.

[251] There is no question that criminal procedure falls within exclusive federal jurisdiction under subsection 91(27) of the Constitution.

[252] F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at pp. 836 and 839.

[253] For a detailed critique of this approach, read J. Leclair, "L'interaction entre le droit privé fédéral et le droit civil québécois en matière d'effets de commerce: perspective constitutionnelle", (1995) *McGill L.J.* 691, at pp. 723-737.

[254] It should not be thought that the province could amend or repeal a prescription period found in a federal statute. In my opinion, if both levels of government are entitled to legislate concerning article 2260(4) C.C.L.C., it is because of the pre-Confederation nature of that provision. Since it was enacted in 1866 by the united province of Canada, article 2260(4) cannot be said to be "provincial" or "federal" in nature. The only way to determine which legislative authority has jurisdiction over it is by looking at the matter to which it relates. I have concluded that Parliament's ancillary power over bills of exchange and notes would enable it to validly legislate with respect to prescription, while the exclusive provincial power over contracts and methods of extinguishing obligations would also enable the province to legislate. That is why both levels of government can amend article 2260(4).

[255] [1977] 1 S.C.R. 650.

[256] *Ibid.*, at p. 655.

[257] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1070 (hereinafter "*Tolofson*"). However, the Court had stated the contrary in *Cusson v. Robidoux*, [1977] 1 S.C.R. 650, at p. 655: "the prescription of actions is a matter of procedure". The Court based this conclusion on the principles of private international law set out in *Livesley v. Horst Co.*, [1924] S.C.R. 605, at p. 608.

[258] L.-J. de la Durantaye, *Traité des effets négociables*, Wilson & Lafleur Ltée, Montreal, 1964, at p. 298, states that article 2190 is within provincial jurisdiction.

[259] Today, it is section 40.

[260] F. Chevette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 839; A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 1, at p. 207; it should be noted that the question of what distinguishes substantive law from the law of evidence as far as negotiable instruments are concerned has been debated in Quebec since 1785!!! See 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 *Cahiers de Droit* 535, at pp. 570-571.

[261] F. Chevette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 839 (emphasis added).

[262] A. Perrault, *Traité de droit commercial*, Montreal, A. Lévesque, 1940, t. 3, at p. 1131, is of the opinion that the province was authorized to repeal these articles.

[263] B. Crawford and J. D. Falconbridge, *Banking and Bills of Exchange*, vol. 2, 8th ed., Toronto, Canada Law Book Inc., 1986, at p. 1219.

[264] L. Ducharme, "Le nouveau droit de la preuve en matières civiles selon le Code civil du Québec," in *La réforme du Code civil*, t. 3, Ste-Foy, Presses de l'Université Laval, 1993, 443, at p. 531; and L. Ducharme, *Précis de la preuve*, 4th Ed., Montreal, Coll. Bleue, Wilson & Lafleur, 1993, at pp. 12-13.

[265] (1883), 8 A.C. 733 (P.C.).

[266] *Ibid.*, at pp. 744-745.

[267] *Ibid.*, at p. 745.

[268] *Ibid.*, at p. 746.

[269] The judge referred to a decision of the Court of Error and Appeal in Upper Canada and to "three other decisions of the Canadian Courts" (*Ibid.*, at p. 749) that he did not even bother to name.

[270] *MacDonald v. Whitfield* (1883), 8 A.C. 733, at p. 750.

[271] *Reynolds v. Wheeler* (1861), 10 C.B. (N.S.) 561; 142 E.R. 572.

[272] *Northfield v. Laurance* (1891), 21 R.L. 359 (Sup. Ct.); *Vallée v. Talbot*, (1892) 1 S.C. 223 (Sup. Ct. in review). The rule stated by Lord Watson was applied in the following cases, which did not mention *MacDonald v. Whitfield* or article 2340 C.C.L.C.: *Lavallée v. Daigle* (1880), 2 D.C.A. 129; *Dame Laurent dite Lortie v. Mercier* (1884), 3 D.C.A. 350; and *Day v. Sculthorpe* (1861), 9 R.J.R.Q. 422 (Q.B.).

[273] As was mentioned *supra*, s. 9 has been interpreted as allowing the introduction of English law provided that the issue relates to the law of negotiable instruments in the strict sense. The interpretation of this section is thus a good indication of what is and is not within the specifically federal content of Parliament's jurisdiction over negotiable instruments. However, it should be noted that there is disagreement as to whether or not evidence is included in this. It was held in the following decisions that evidence does not fall within the law of negotiable instruments in the strict sense: *Blais v. Mathieu*, (1918) 56 S.C. 3 (Ct. Rev.); *Jean v. B.C.N.* (1931), 69 S.C. 66; *Spasiuk v. Zyla* (1939), 46 R.L.(N.S.) 23 (Sup. Ct.); *Armand v. Checotel Finance Corp.*, [1985] S.C. 1154; and *Banque Provinciale du Canada v. Poulin*, J.E. 80-509 (Prov. Ct.). On the other hand, some judges have held otherwise: *Larochelle v. Bluteau* (1923), 34 R.L.(N.S.) 328 (K.B.); *Hébert v. Poirier* (1911), 40 S.C. 405; and *Boyer v. Sambeau* (1919), 57 S.C. 79.

[274] See Section II.A.3.I.b.

[275] See Section I.A.

[276] It should be noted that what happens to articles 2346 and 2354 will depend on what happens to the other articles of the C.C.L.C. on bills of exchange, since they merely state that the rules applicable to bills of exchange will apply to notes and cheques.

[277] The wording of Proposal No. 1 takes into account the fact that it is unclear whether the Parliament of Canada is competent to alter the actual form of the C.C.L.C. Proposal No. 2 assumes that it does have the power to do so.

[278] Article 1229, unlike articles 2340, 2341, 2342, 2346 and 2354, cannot be repealed in its entirety by Parliament, as it does not deal exclusively with negotiable instruments.

[279] A. Perrault, *Traité de droit commercial*, t. 3, Montreal, A. Lévesque, 1940, at p. 1131.

[280] *Ibid.*

[281] See *supra* note 274.

[282] There is another justification for my recommendation that Parliament expressly repeal the norms set out in the C.C.L.C. articles on evidence and prescription in relation to bills of exchange, promissory notes and cheques. Up to this point I have assumed that these matters--evidence and prescription--can be regulated by provincial law because they are part of the law of negotiable instruments in the wide sense. In other words, these matters have a double aspect, which would explain, for example, why the provincial repeal of the norm set out in article 2260(4) was valid while the Parliament of Canada could also repeal the norm set out in this provision. If this is true, should it not, in light of what has been said in Part I, lead to the conclusion that provincial intervention could repeal the norm set out in paragraph 2260(4) *only in its provincial aspect*? Could it not then be argued that the five-year prescription period for bills of exchange can still be relied on because it has never been repealed by Parliament in its federal aspect? This is why, despite the fact that they have been repealed by the province of Quebec, I feel that Parliament must be encouraged to repeal the normative content of articles 1229, 2190, 2260(4), 2341, 2342, 2346 and 2354 C.C.L.C. It would then be clear that the norms set out in these articles have been repealed definitively in both their federal and provincial aspects.

[283] The wording of Proposal No. 1 takes into account the fact that it is unclear whether the Parliament of Canada is competent to alter the actual form of the C.C.L.C. Proposal No. 2 assumes that it does have the power to do so.

[284] These articles cannot be repealed in their entirety because Parliament does not have constitutional authorization to repeal the norms set out in these articles in their entirety, since these articles do not deal exclusively with bills of exchange, promissory notes and cheques; this is the reason for the words "in so far as they relate to bills, notes or cheques".

[285] Nevertheless, as was aptly pointed out by B. Crawford and J. D. Falconbridge in *Banking and Bills of Exchange*, vol. 2, 8th ed., Toronto, Canada Law Book Inc., 1986, at p. 1666: "It appears to be a peculiarly Canadian compromise in which it is tacitly agreed on all sides that troublesome issues of principle will not be permitted to interfere with the ordinary conduct of affairs unless it is not possible to avoid confrontation".

[286] In *Wewayakum Indian Band v. Canada*, [1995] F.C.J. No. 1202 (F.C.T.D.), Teitelbaum J. had to rule on the constitutionality of s. 39 of the *Federal Court Act*, R.S.C. 1985, c. F-7, which provides that provincial prescription periods apply to litigation in the Federal Court. He held this incorporation to be *intra vires* because (paras. 163-164) "[t]he general power to prescribe limitation periods for the bringing of actions is within the legislative competence of the province of B.C. and would fall under subsection 92(13) of the Constitution Act, 1867, property and civil rights, as well as subsection 92(14), a matter of procedure. On the other hand, Parliament can in the exercise of its powers under section 91 enact limitations which apply to matters, which for constitutional purposes, fall within the exclusive legislative competence of Parliament . . . Therefore,

there is nothing to stop Parliament from repeating in the *Federal Court Act* the same limitation provisions contained in any provincial Limitations Act, including the *B.C. Limitation Act*. . . . On the other hand, it is also equally within Parliament's competence to adopt by reference the provincial limitation legislation as it exists from time to time. The process of adoption by reference was approved by the Supreme Court in *Coughlin v. Ontario Highway Transport Board et al*, (1968), 68 D.L.R. (2d) 384. In my opinion, the specific purpose of section 39 of the *Federal Court Act* is to expand the application of provincial limitation laws by incorporating such laws by reference and directing this Court to apply such limitation not as provincial law, but as valid federal law. In that way, the applicability of provincial limitation laws to matters, which for constitutional purposes fall within the exclusive legislative jurisdiction of Parliament, is resolved by referential incorporation of such laws as federal law by virtue of section 39."

[287] On this subject, see D. Vaver, "Limitations in Intellectual Property: 'The Time is Out of Joint'", (1994) 73 *Can. Bar Rev.* 451.

[288] I have not taken into account those articles dealing with types of interest that have nothing to do with money. Two example of this are article 2607, which refers to "an insurable interest", and article 1882 which refers to "a special partner's interest in the partnership".

[289] M. A. Waldron, *The Law of Interest in Canada*, Toronto, Carswell, 1992, at p. 24.

[290] In a few pages I was given of a paper written by Professor Macdonald, he seems to be of the opinion that the final paragraph of article 1149 on usurious interest is a pre-Confederation provision. This is incorrect, as this provision was enacted in 1906 by the *Act to amend article 1149 of the Civil Code respecting judgments in suits for usurious interest*, S.Q. 1906, c. 40; it has now become article 2332 C.C.Q. On the constitutionality of this provision, see D. Nadeau, "L'intérêt de l'argent en droit constitutionnel canadien," (1985) 16 *R.D.U.S.* 1, at pp. 72-75.

[291] L. Faribault, *Traité de droit civil du Québec*, t. 7bis, Montreal, Wilson & Lafleur, at p. 431.

[292] *Ibid.*, at pp. 431-432.

[293] J. Pineau and D. Burman, *Théorie des obligations*, Montreal, Les Editions Thémis, 1988, at pp. 431-432.

[294] As L. Faribault explained in *Traité de droit civil du Québec*, t. 7bis, Montreal, Wilson & Lafleur, at pp. 429-430: [*Translation*] "[a] creditor is entitled to damages even if he or she did not in fact sustain any injury. This difference is due to the fact that it is almost impossible for creditors to prove how they would have used the money had they been paid at the agreed-upon time. This is why the legislature felt it had to set the quantum of these damages itself".

[295] *Ibid.*, at p. 432.

[296] J. Pineau and D. Burman, *Théorie des obligations*, Montreal, Les Éditions Thémis, 1988, at p. 431.

[297] R.S.C. 1985, c. I-15.

[298] "Chronique de droit civil québécois: session 1982-1983", (1984) 6 *Sup.Ct.L.Rev.* 189, at p. 195.

[299] This article also authorizes the capitalization of interest "[w]hen a tutor has received or ought to have received interest upon the moneys of his pupil and has failed to invest it within the term prescribed by law".

[300] L. Faribault, *Traité de droit civil du Québec*, t. 7bis, Montreal, Wilson & Lafleur, at p. 453.

[301] *Ibid.*, at p. 453.

[302] D. Nadeau, "L'intérêt de l'argent en droit constitutionnel canadien", (1985) 16 *R.D.U.S.* 1, at pp. 20-21.

[303] F. Chevrette and H. Marx, *Droit constitutionnel; Notes et jurisprudence*, Presses de l'Université de Montréal, Montreal, 1982, at p. 610.

[304] *Tomell Investments Limited v. East Marstock Lands Limited*, [1978] 1 S.C.R. 974, at p. 977.

[305] *Attorney-General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570, at p. 577.

[306] Section II.A.3.ii.

[307] *Supra* notes 190 and 191.

[308] H. Roch and R. Paré, *Traité de droit civil du Québec*, t. 13, Wilson & Lafleur Ltée, 1952, at p. 214, which here reproduces *verbatim* the definition given by P.-B. Mignault, *Le droit civil canadien*, t. 8, Wilson & Lafleur Ltée, 1909, at p. 130.

[309] H. Roch and R. Paré, *Traité de droit civil du Québec*, t. 13, Wilson & Lafleur Ltée, 1952, at pp. 214-215, make it clear that the matter dealt with in article 1785 is within federal jurisdiction.

[310] *Banque de Montréal v. Burton Glenns*, 93-1283.

[311] The wording of Proposal No. 1 takes into account the fact that it is unclear whether the Parliament of Canada is competent to alter the actual form of the C.C.L.C. Proposal No. 2 assumes that it does have the power to do so.

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