



the link

No. 34 October 2010

www.bijurilex.gc.ca

The Bijural Revision Services Unit (Taxation and Comparative Law) of the Legislative Services Branch of the Department of Justice is pleased to keep you posted on the most recent harmonization and bijuralism news.

Jurisprudence

Alberta Court Weighs Competing Policy Objectives to Fill Gap

In *Mutter (Re.)*,¹ the Alberta Court of Queen's Bench upheld the decision of the Registrar in Bankruptcy, finding that the Minister's right to garnish² amounts payable by a trustee in bankruptcy to a bankrupt tax debtor should be read as subject to provincial rules concerning exemptions from seizure.

Mr. Mutter was an undischarged bankrupt with an outstanding tax liability of \$128,587 related to post-bankruptcy income. His principal residence was sold by order of the Court of Queen's Bench (Sitting in Bankruptcy) and the proceeds paid over to his trustee. However, Mr. Mutter and the Minister of National Revenue disagreed on the matter of entitlement to \$40,000 of said proceeds. This amount represents the exemption from seizure related to a principal residence provided under the Alberta *Civil*

Enforcement Act.³ For its part, paragraph 67(1)(b) of the *Bankruptcy and Insolvency Act*,⁴ provides that property benefiting from a provincial exemption from seizure not be included in the property divisible among creditors.

In assessing the Minister's claim, Justice LoVecchio quickly dispensed with the requirement to pay issued under the *Excise Tax Act*.⁵ ETA subsection 317(3) addresses the matter stating that it applies "[d]espite any other provision of this part, any other enactment of Canada other than the *Bankruptcy and Insolvency Act*, any enactment of any province or any law...". Thus, the Court concluded that insofar as subsection 317(3) ETA is subject to the BIA, it is also subject to exemptions from seizure recognized therein [par 30]. (Note that the Court did not specifically address the fact that the opening words of subsection 317(3) ETA also state that the provision applies "[d]espite...any enactment of any province.") The Alberta Court of Queen's Bench decision implies that provincial law limits incorporated into the BIA override the express *exclusion* of provincial law under subsection 317(3) ETA.

As to the application of ITA subsection 224(1), which is silent on the matter of whether its operation is subject to the BIA or provincial laws on execution, the Court again concluded that the Minister's requirement to pay was subject to provincial exemptions from execution. LoVecchio J. so concluded on two distinct bases.

First, he agreed with the Registrar's conclusion that the sum to be paid over by the trustee is not the type of "payment" contemplated by subsection 224(1). The trustee is merely administering property that at all times remained

¹ 2010 ABQB 312.

² Section 224(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supplement), hereinafter the "ITA." Unless otherwise stated statutory references throughout are to the ITA.

³ R.S.A. 2000, c. C-15.

⁴ R.S.C. 1985, c. B-3 (the "BIA").

⁵ R.S.C. 1985, c. E-15 (the "ETA").





Mr. Mutter's, as such the disbursement of the \$40,000 was not a payment that could be subject to a requirement to pay. While this was ostensibly sufficient to dispense with the matter, Justice LoVecchio went on to consider the role of provincial exemptions from seizure in face of the silence in section 224.1,

[34] (...), should the absence of "subject to the BIA" or "notwithstanding the BIA" language mean that Parliament meant to override the BIA exemptions and take away the benefit of the financial stake provided for in the exemptions when an RTP under s. 224(1) of the ITA is issued or leave them in place?

LoVecchio J. refers to *Marcoux v. AG Canada*, 2001 FCA 92 and *Bouchard v. AG Canada*, 2009 FCA 115, decisions he describes as standing for the proposition that silence means the Minister did not intend to be subject to provincial exemptions. He also cites a Saskatchewan case that went the other way (*Investors Group Trust v. Eckhoff*, 2008 SKCA 18), but then observes that the matter has never been addressed in Alberta and determines that the cited authorities are not binding on him. Having earlier in his judgment considered the laudable objectives of bankruptcy legislation and provincial exemption from seizure legislation, he concludes:

[40] Reading "subject to the BIA" into s. 224(1) of the ITA makes this provision more consistent with other exemption provisions and the policy behind the exemption itself and in my view is what Parliament intended.

The *Mutter* decision is unsatisfactory in a number of respects. One might begin by observing the Court's quick dismissal of contrary decisions rendered by courts with primary jurisdiction in the application and the interpretation of the Income Tax Act. The judgment also reveals a misunderstanding or at least a misstatement of the *Bouchard* decision. The ABQB states:

[36] Similarly, in *Bertrand Bouchard v. Attorney General*, 2009 FCA 115, the Federal Court of Appeal considered s. 224.1 of the ITA, which also does not use notwithstanding or subject to language, and concluded that this silence meant that it was not "necessary" to refer to provincial exemptions legislation to interpret the collection provision, thereby excluding the exemption in interpreting s. 224.1.

Concerning the *Bouchard* case, it must be noted that *Bouchard* did not concern garnishment of amounts payable by a third party to a tax debtor. Rather, it concerned the right of the Crown to set-off amounts that *the Crown was due to pay* to the tax debtor. Second, the issue in *Bouchard* was not simply whether it provincial exemption legislation applied, but rather, whether the reference to statutory set-off at section 224.1 ITA made it necessary to refer to the Quebec civil law concept of "compensation." Only such a need to rely on the Quebec rules on compensation – a need which was not established in *Bouchard* – would have raised the issue of provincial exemptions from seizure, as the Civil Code of Québec expressly prevents compensation from operating against property that is exempt from seizure.⁶

The greatest weakness of the *Mutter* decision is that the Court does not apply the usual approach to statutory interpretation in its endeavour to discern the meaning or intended scope of section 224. Rather, there is a weighing of policy objectives embodied in three statutes, with the Court deciding which should be favoured.

The Crown has appealed the decision to the Alberta Court of Appeal (appeal # 1001 0125AC).

Publication

Recent Articles on Bijuralism

Two articles published in recent months may be of interest to our readers.

The latest issue of the *Revue générale de droit*, a publication of the Civil Law Section of the Faculty of Law of the University of Ottawa, includes a contribution from **Professor Benoît Pelletier**: "Le bijuridisme au Canada et son impact sur le droit constitutionnel et sur les relations intergouvernementales" (2010) 40 R.G.D. 251.

For its part, the *Canadian Bar Review*, in September, published a special issue devoted to the 15th anniversary the Civil Code of Québec. The

⁶ For further discussion of *Bouchard*, see "Set-off" at Section 224.1 Does Not Bring Civil Law Compensation into Play" *The Link*, No. 33 (June 2010) 1.





special issue includes an article by **Me France Allard** of the Department of Justice Canada, entitled “La disposition préliminaire du Code civil du Québec, l’idée de droit commun et le rôle du code en droit fédéral” (2010) 88 Can. Bar Rev. 277.

Legislation

Bill S-12 Tabled:

Federal Law–Civil Law Harmonization Act, No. 3

On October 20th, the third harmonization bill was tabled and received first reading in the Senate, becoming Bill S-12. The harmonization amendments affect twelve statutes, among them the *Canada Business Corporations Act* and the *Expropriation Act*. Consequential and coordinating amendments affect five other statutes. No taxation statutes are targeted by Bill S-12.

Former Bill C-10 Proposals Reintroduced

On July 16th, the Minister of Finance released draft *Legislative Proposals to Amend the Income Tax Act and Related Legislation to Effect Technical Changes and to Provide for Bijural Expression in that Act*. Part 2 of the proposals reintroduces bijural measures previously included at Part 3 of former Bill C-10, which ceased to exist on September 7, 2008, on the dissolution of the 39th Parliament and the calling of a general election.

The bijural amendments address the concepts of “solidary liability”, “tangible property” / “corporeal property”, “intangible property” / “incorporeal property”, “personal property” / “movable property”, “real property” / “immovable property” et de “interest” / “right.” The measures are described in somewhat greater detail in the explanatory notes published by the Minister of Finance.

The explanatory notes make clear that the bijural amendments are part of the initiative for the harmonization of federal legislation and are not intended to change the current application of the amended provisions. The above measures will come into force on Royal Assent to any future enacting legislation.

Invitation

Tenth Edition of Research Contract Program

The 10th edition of the Program of Research Contracts on Canadian Bijuralism is underway and this year features a new, “post-exam” deadline for the submission of research proposals: **January 17th, 2011.**

To be eligible for the Program, candidates must, at the time of application, be:

- enrolled full-time in a program in law at a Canadian university;
- enrolled full-time in a university and hold an undergraduate law degree from a Canadian university; or
- enrolled full-time in a provincial or territorial professional training school leading to the title of lawyer or, in Quebec, lawyer or notary.

Consult www.bijurillex.gc.ca for program details or write to Me Ralph Mercedat at pcrcb-prccb@justice.gc.ca.

