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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

Clarifications Regarding the “supposed opposition” Between the Civil Law and the Common Law in the Employment Context

The case *Michel Grimard v. The Queen*, 2009 FCA 47, concerns a taxpayer’s status for purposes of the *Income Tax Act*: Employee or independent contractor?

During the relevant taxation years (1995-1998), the taxpayer, a medical specialist, worked as a medical assessor for two provincial administrative tribunals: first for the Commission d’appel en matière de lésions professionnelles (the “CALP”) and then, beginning in 1998, for the Commission des lésions professionnelles (the “CLP”), an organization that replaced the CALP. The taxpayer filed his tax returns for those years on the basis that he was earning professional income and, in so doing, deducted related expenses incurred in the course of carrying out his duties, including rent for an apartment in Montreal which he also used as an office, office expenses, and travel expenses for trips between Montreal and his principal residence in the City of Sherbrooke.

Following the 1998 audit of the CLP conducted by the ministère du Revenu du Québec, the latter determined that the CLP’s, and, its predecessor, the CALP’s assessors were to be considered employees. This determination led to a reassessment by the ministère du Revenu du Québec of the taxpayer’s returns and the denial of deductions for various expenses claimed. The taxpayer challenged the reassessments without success. In the Court of Québec, Justice Barbe asserted that (translation) “jurisprudence has identified four principal criteria which allow one to establish whether an employer-employee relationship exists between persons.”¹ The criteria identified by Justice Barbe were the ownership of tools; the possibility of profit and loss; the integration of the worker into the business; and the matter of control and subordination.² Applying these criteria, the Court of Québec concluded that the taxpayer was in an employment relationship, and this decision was upheld by the Québec Court of Appeal.³

The Canada Revenue Agency followed with its own assessments, and confirmed same on the basis of the decision of the Québec Court of Appeal.⁴ In the Tax Court of Canada, Justice Archambault took note of the Court of Québec’s decision and of the fact that the Court of Québec invoked the four generally accepted common law criteria. For his part, Justice Archambault began by referring to section 8.1 of the *Interpretation Act*⁵ and then moved on to an examination of the

¹ *Michel Grimard c. Sous-ministre du Revenu du Québec*, 500-02-087518-002, at par. [33].

² *Ibid.*

³ 2005 QCCA 346.

⁴ 2007 TCC 755, at par. [11].

⁵ R.S.C. 1985, c. I-21.





relevant articles of the *Civil Code of Québec* and the terms of the contract entered into between the parties. He determined that the civil law and the common law rules on the matter were not identical and that therefore it was inappropriate to invoke common law decisions in interpreting the civil law.⁶ Identifying the presence or absence of subordination as the central element that, in civil law, distinguishes a contract of employment from a contract for services,⁷ the Tax Court of Canada nonetheless came to the same conclusion as the Court of Québec: the taxpayer was in an employer-employee relationship with the CALP and the CLP, and the deduction of claimed expenses was properly denied.

The Federal Court of Appeal denied the taxpayer's appeal. In so doing, however, the Court saw "an opportunity to clarify matters on ... the supposed opposition ... between Quebec civil law and common law."⁸ After affirming that it was correct for the trial judge to rely on the *Civil Code of Québec* in the circumstances, Justice Létourneau continued, opining that "it would be wrong to believe that there is antinomy between the principles of Quebec civil law on this point and what has been referred to as common law criteria" despite differences in the conceptualization of the relationship and the approach taken in characterizing a contract of employment and a contract of enterprise.⁹ Further on, he states:

*In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.*¹⁰

The case has not been appealed.

The Last Word in the *Prévost Car Inc.* Case

The Crown has not sought leave to appeal *The Queen v. Prévost Car Inc.*, 2009 FCA 57 to the Supreme Court of Canada. In that case, the Federal Court of Appeal concluded that a Dutch holding company was the "beneficial owner" of dividends for purposes of the Canada/Netherlands tax convention and therefore entitled to a reduced rate of withholding tax. As to the *Velcro Canada Inc.* case (2007-1806 (IT)G), which was being held in abeyance pending the outcome in *Prévost Car*, that case remained in abeyance at the time of writing.

Legislation

Royal Assent

The *Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, S.C. 2009, c. 2, received royal assent on March 12, 2009. From a bijural perspective, we draw to your attention the amendments to subsection 248(3) and the introduction of new subsection 248(3.2). These provisions effectively eliminate the need to meet the requirements of provincial private law conditions in order to establish a trust for the purposes of RDSPs, RESPs, RRIFs, RRSPs and TFSAs governed by the laws of the Province of Quebec, and thereby resolve the potential difficulties brought to light by the *Thibault* case.¹¹ Note as well new subsection 248(3.1) which introduces exceptions to the application of subsection 248(3) for certain gifts of the bare ownership of an immovable.

⁶ *Supra* note 4, at par. [21].

⁷ *Ibid.* par. [23].

⁸ 2009 FCA 47, par. [2].

⁹ *Ibid.* par. [26] - [28].

¹⁰ *Ibid.* par. [43].

¹¹ *ScotiaMcLeod Inc., now Scotia Capital Inc. v. Bank of Nova Scotia and Guy Thibault, and Deputy Minister of Revenue of Quebec*, 2004 SCC 29.

