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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

The Other Principle of Legislative Bijuralism

Over 15 months in the making, on June 19, 2009, the Supreme Court of Canada released its decision in *Caisse populaire Desjardins de l'Est de Drummond and in right of the Caisse populaire du Bon Conseil v. Her Majesty the Queen in Right of Canada*.[1] Of interest in a number of respects, it is particularly noteworthy for Justice Rothstein's restatement and affirmation of perhaps the most basic principle of Canadian legislative bijuralism (at par. [12]):

> *It is therefore open to Parliament to define a term in an area of its own legislative competence (…), as it has done here, in order to ensure that there is a rule of general application across all of the provinces.*

Much attention in these pages and other discussions of the imperatives of legislative bijuralism focuses on the need to rely on provincial laws respecting property and civil rights and highlights the disparities that can result due to differences in provincial law, particularly as between the common law and the civil law. This focus, however, can lead one to overlook the crucial first step: that of determining whether it is even necessary to refer to provincial law.

In *Caisse Populaire Desjardins*, the Supreme Court of Canada was called upon to determine whether certain agreements entered into between the tax debtor and a lending institution created a "security interest" in property. The lending institution had established a line of credit in the tax debtor's favour, and the agreements at issue essentially established a mutuality of obligations between the lending institution and the tax debtor, such that a right to compensation under civil law (analogous to common law set-off) would arise in the event of default by the tax debtor under the terms of the line of credit. The significance of the determination lies in the fact that such an interest is, in certain circumstances, expressly rendered subsidiary to Crown claims. In this case, at issue were Crown claims for unremitted payroll withholdings for income tax and employment insurance premiums. "Security interest" is defined for this purpose at subsection 224(1.3) of the *Income Tax Act* (Canada) (the "Act"):

> *"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;*

In dismissing the Caisse's appeal, the Supreme Court of Canada endorses the three prior decisions in the matter,[2] holding that the term "security interest" was broad enough to include the agreements in question. Writing for the majority (5-2), Justice Rothstein determines that despite

[1] 2009 SCC 29.

[2] 2005 FC 731; 2005 FC 1563; and 2006 FCA 366.

terminology similar to that used in provincial personal property security legislation, the only relevant definition of "security interest" is that found at subsection 224(1.3) of the Act. He emphasizes that "[w]hile Parliament has provided a list of 'included' examples, these examples do not diminish the broad scope of the words 'any interest in property'."[3] Justice Rothstein notes a clear intention in related provisions to maximize the Crown's ability to recover taxes owing, notwithstanding provincial or other laws to the contrary. However, he also cautions that it would not be correct to say that a contractual right to compensation or set-off will in all cases constitute or not constitute a security interest (par. [23]). Rather,

> *What must be considered is the substance of the agreement. If the substance of the agreement demonstrates that the parties intended an interest in property to secure an indebtedness, then a security interest exists within the meaning of s. 224(1.3) ITA.*[4]

Writing for the dissent, Justice Deschamps adopts a rather different approach to the issue, beginning by applying the rules of bilingual interpretation to the terms "security interest" and the French equivalent "*garantie*" (without regard to the definition set out in the Act) in an effort to establish a shared meaning. She concludes that the concept common to both terms is that of a real right in property. Finding that the right to compensation is not a real right and that compensation is furthermore not expressly listed in the statutory definition, she concludes that the Caisse's rights did not constitute a security interest in property of the tax debtor.

Legislation

A Tenth Anniversary

This year marks the tenth anniversary of the adoption of the *Cabinet Directive on Law-making*. Described on the Privy Council Office's web site as the foundation document for its *Guide to Making Federal Acts and Regulations*, the Directive was adopted by Cabinet in March 1999 and plays a critical role in the recognition and application of bijural principles in federal legislative drafting. In it, one finds the following mention:

> *The Constitution Act, 1867 requires federal laws to be enacted in both official languages and makes both versions equally authentic. It is therefore of primary importance that bills and regulations be prepared in both official languages. (….)*
>
> *It is equally important that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.*

Prior to the adoption of the Directive, the only official recognition of bijural principles was contained in the Department of Justice's internal 1995 *Policy on Legislative Bijuralism*. The inclusion of those principles in the 1999 *Cabinet Directive on Law-making* made bijural principles applicable to all government departments and agencies, including the Department of Finance which then, as now, assumed responsibility for the drafting of tax legislation.

For more information on the Directive or more generally on the drafting of federal acts and regulations, consult the Privy Council Office web site www.pco-bcp.gc.ca, under the heading Information Resources.

Invitation

Launch of Research Contract Program

The 9th edition of the Program of Research Contracts on Canadian Bijuralism has been launched. This year the program is open to all full-time undergraduate students pursuing law degrees at a Canadian university and to full-time graduate students who hold an undergraduate law degree from a Canadian university. For program details, consult our website www.bijurilex.gc.ca or write to Me Ralph Mercedat at pcrbc-prccb@justice.gc.ca. The deadline for the submission of research contract proposals is December 1st, 2009.

[3] *Supra* note 1 at par. [15].

[4] *Ibid.* at par. [25].