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The Bijuralism Group 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

Supreme Court Denies Rectification in Appeals from Ontario and Quebec

Last December, the Supreme Court of Canada denied rectification in two cases, one originating from Quebec, the other from Ontario. Justices Abella and Côté dissented in both decisions.

Le Groupe Jean Coutu (PJC) inc. v Canada (Attorney General), 2016 SCC 55 concerned a series of transactions undertaken to limit the effect of foreign currency fluctuations that resulted in undesirable tax consequences related to the passive income of a controlled foreign affiliate.

The Superior Court of Quebec[1] allowed Groupe Jean Coutu's request to amend their agreement by adding transactions that would solve the tax problem. This decision was overturned by the Quebec Court of Appeal, the Court being of the view that the taxpayer was seeking to rewrite tax history.[2] The Supreme Court of Canada agreed.

Article 1425 of the *Civil Code of Québec* serves as the legal basis for rectification in Quebec. It states that, in interpreting a contract, the common intention of the parties prevails over the literal meaning of words. Taking into account as well other rules in the Civil Code, governing obligations and the formation of contracts, the Supreme Court formulated the following test for rectifying a contract that would otherwise give rise to inadvertent tax consequences:

> *[24] In my opinion, when unintended tax consequences result from a contract whose desired consequences, whether in whole or in part, are tax avoidance, deferral or minimization, amendments to the expression of the agreement in accordance with art. 1425 C.C.Q. can be available only under two conditions. First, if the unintended tax consequences were originally and specifically sought to be avoided, through sufficiently precise obligations which objects, the prestations to execute, are determinate or determinable; and second, when the obligations, if properly expressed and the corresponding prestations, if properly executed, would have succeeded in doing so. This is because contractual interpretation focuses on what the contracting parties actually agreed to do, not on what their motivations were in entering into an agreement or the consequences they intended it to have.*
>
> (our underlining)

The Supreme Court found that the parties had only a general intention that the transactions be tax neutral.[3]

[1] 2012 QCCS 6917.
[2] 2015 QCCA 838, para [37].

[3] On March 2, 2017, the Supreme Court (docket #36773) dismissed the application for leave to appeal *Mac's Convenience Stores inc. v AGC et al*, 2015 QCCA 837. The Quebec Court of Appeal's decisions in *Mac's* and *Groupe Jean Coutu* were rendered on the same date. For a summary of the *Mac's* case, see "Provincial Superior Courts Confronted by Rectification Requests" *The Link* No. 39 (January 2013) 3.

In *Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, at issue were unintended tax consequences triggered by a 2007 redemption of shares. The taxpayer sought to replace the share redemption with a loan. The Supreme Court of Canada allowed the Crown's appeal, overturning the lower courts and overturning the 2000 decision in *Juliar*.[4]

Writing for the majority, Justice Brown emphasized that "rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement" (para [13]). He also expressed disagreement with the decision in *Juliar* being of the view that that decision incorrectly allowed rectification to correct an error in judgment.[5]

The Supreme Court identified the following conditions for establishing a right to common law rectification:

> *[38] To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.*
>
> *[39] A straightforward application of these principles to the present appeal leads unavoidably to the conclusion that the respondents' application for rectification should have been dismissed, since they could not show having reached a prior agreement with definite and ascertainable terms. …*

[4] *Juliar v Canada (Attorney General)* (1999), 46 OR (3d) 104, aff'd (2000), 50 OR (3d) 728.

[5] See paras [19] *et seq*. Among its observations, the Court found nothing in *Re Slocock's Will Trusts*, [1979] 1 All ER 358 (Ch D), which justified *Juliar*'s modified threshold for rectification (para [21]).

Dissociation Limited by the Charter: Solicitor-Client Privilege Prevails

Parliament has the power to dissociate from provincial law in the exercise of its federal legislative jurisdiction. However, two 2016 decisions of the Supreme Court of Canada make clear that attempts at dissociation cannot result in a non-justifiable infringement of rights protected by the *Canadian Charter of Rights and Freedoms*.

Subsection 232(1) of the *Income Tax Act*[6] defines "solicitor-client privilege" by reference to those communications that are privileged in the superior court of the "province where the matter arises" but specifically deems accounting records of a lawyer,[7] including vouchers and cheques, not to be a solicitor-client communication. In Quebec, this privilege is referred to as the professional secrecy of lawyers and notaries. In bijuralism terms, subsection 232(1) displays both an element of complementarity (deference to provincial rules) and an element of dissociation (exclusion of any privilege that might apply to a lawyer's accounting records).

In *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20[8] and *Canada (National Revenue) v Duncan Thompson*, 2016 SCC 21,[9] the Supreme Court of Canada held that the exclusionary language at subsection 232(1) concerning lawyers' accounting records is unconstitutional. In *Chambre des notaires*, the Court wrote:

> *[6] A requirement under the ITA constitutes a seizure within the meaning of s. 8 of the Charter. The seizures made in this case are unreasonable and are contrary to that section, because the requirement scheme and the*

[6] RSC 1985, c 1 (5th Supp), as amended (hereinafter the "Act"). Unless otherwise stated, statutory references throughout are to the Act.

[7] Subsection 232(1) defines "lawyer" to mean advocates and notaries in the province of Quebec and barristers and solicitors in other provinces.

[8] In *Chambre des notaires*, the Canada Revenue Agency sought information in the context of audits and collection actions against clients of notaries.

[9] In *Duncan Thomson*, the CRA's request was made as part of its efforts to enforce payment of the personal tax debt of Mr. Thompson (a lawyer).

> *exception for accounting records do not provide adequate protection for the professional secrecy of notaries and lawyers. The procedure set out in the ITA does not require that the client, who is the holder of the privilege, be informed of the requirement or of any proceeding brought by the CRA to obtain an order to provide information or documents. The procedure also places the entire burden of protecting the privilege on the notary or lawyer. Finally, the AGC and the CRA have not established that it is absolutely necessary here to impair professional secrecy. Because the impugned provisions do not minimally impair the right to professional secrecy, they also cannot be saved under s. 1. …*

Two other decisions of the Court in 2016 are of interest in this context. In *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, the Court affirmed that in Quebec (as in other provinces):

> *[71] Litigation privilege is a class privilege that is distinct from solicitor-client privilege and is subject to certain defined exceptions that do not apply in this case. Given the absence of clear, explicit and unequivocal language in the ADFPS providing for the abrogation of this privilege, it may be asserted against the syndic, …*

In *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, the Court held that language in legislation requiring public bodies to disclose records "[d]espite . . . any privilege of the law of evidence"[10] is not sufficient to mandate the production of materials subject to solicitor-client privilege:

> *[2] … It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection.*

While these Supreme Court decisions establish a high threshold for legislators seeking to overcome solicitor-client privilege, we note in closing the decision *Iggillis Holdings Inc. v Canada (Minister of National Revenue)*, 2016 FC 1352. Here, the Federal Court held that advisory common interest privilege is not a recognized component of solicitor-client privilege. This decision is under appeal (A-465-16).

[10] Subsection 56(3) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.

The Civil Code and the Delay for Claiming Quebec Sales Tax Rebates

In *ARQ v Larocque*, 2016 QCCA 556,[11] the Quebec Court of Appeal held that prescription provisions in the *Civil Code of Québec* do not extend the two-year period in which a taxpayer must apply for rebates under *An Act respecting the Quebec Sales Tax*.[12]

The Quebec Court of Appeal rejected the taxpayer's argument that the Civil Code played a suppletive role in the circumstances:

> (our translation)
>
> *[50] In this matter, the trial judge decided that, in the presence of a provincial law, it is appropriate to have recourse to the provisions of the* Civil Code of Québec *that allow for the suspension of prescription when the impossibility in fact to act is demonstrated.*
>
> *[51] He is correct to say that it is possible to have recourse to the* Civil Code of Québec *to interpret Quebec tax laws. To begin with, the preliminary provision sets out the jus commune, which is not limited to private law. The* Civil Code of Québec *is of general application and suppletive and, as such, it is a normative complement and a conceptual reservoir for specific laws.*
>
> *…*
>
> *[57] In such a context, I fail to see how it is necessary to draw on the provisions of the* Civil Code of Québec *to allow the taxpayer to call for the suspension of the period to claim a tax rebate on the basis of impossibility to act, since the legislator did not see fit to so provide. The* Civil Code of Québec *plays a suppletive role in tax matters, but only when it is necessary to supplement the law. It cannot serve to create tax advantages or innovate beyond what was the legislator's intention.*
>
> *[58] In my opinion, courts must favour a coherent interpretation of tax laws and take*

[11] Reversing the decision of the Court of Quebec dated August 22, 2014 (Justice Faullem). The request for leave to appeal was dismissed by the Supreme Court of Canada, on November 10, 2016 (docket #37043).

[12] CLRQ c T-0.1, as amended.

> *into account efforts at harmonization in the consumption tax context, considering moreover the role of the Government of Quebec in the collection of the GST in Quebec.*
>
> *…*
>
> *[61] As well it strikes me as contrary to the desire for coherence to allow a taxpayer to justify a late sales tax rebate application to the ARQ based on the impossibility to act without being able to use the same justification when applying for a GST rebate. Indeed, the federal and provincial laws which are the bases for these requests each constitute a complete and coherent set of provisions.*

The Court's observations on the desirability of coherent rules for the application of the GST and the QST, both of which are administered by the *Agence du revenu du Québec*, are interesting.

Tax Court of Canada's Role in Private Law Matters

The decisions in *Durocher v The Queen*, 2016 FCA 299, aff'g 2015 TCC 297, delineate the Tax Court of Canada's jurisdiction to address private law matters. They also confirm that deeming provisions in the Act generally have no role to play in the interpretation of provincial legislation.

At issue in *Durocher* was the validity of a unanimous shareholders agreement. If valid, the shares of Gestion RJCG Inc. ("Gestion RJCG") were not qualified small business corporation shares[13] when they were sold by family trusts on April 28, 2006. Specifically, certain options granted to Aviva Canada Inc. under the unanimous shareholders agreement would have resulted in Gestion RJCG losing its status as a Canadian-controlled private corporation.[14]

The taxpayers (beneficiaries of the family trusts that sold the shares) argued that the unanimous shareholders agreement options were a nullity as they contravened section 148 of Quebec's *Act respecting the distribution of financial products and services*[15] (the ARDFPS). The options being null, there is no basis upon which to impute share ownership to non-residents under paragraph 251(5)(b) of the Act, and no loss of Canadian controlled private corporation status.

In the Tax Court of Canada, Justice Rip conceded that only the Quebec Superior Court has jurisdiction to declare a contract null. However, he also explained that a Tax Court judge must consider the "*bona fides* of contracts, including the validity of a contract and any of its provisions."[16] The Federal Court of Appeal agreed:

> *[41] … As the TCC judge explains at paragraphs 45 and 46 of his reasons, he would have been required to pronounce on the nullity of the option for the sole purpose of determining the validity of the assessments under appeal.*
>
> *[42] Thus, the role of the TCC, when addressing an argument based on nullity in an appeal under the ITA, cannot be assimilated to that of the Superior Court, which has the jurisdiction to "declare" null and void a contract for all legal purposes under articles 33, 35 and 142 the* Code of Civil Procedure, *C.Q.L.R. c. C-25.01 (compare, see* Markou v. The Queen, *2016 TCC 137, paras. 7–21 where the TCC had to deal with a similar problem in a case arising in a common law province).*

The Tax Court of Canada found that the options were valid under the ARDFPS. The Court found that federal income tax rules imputing ownership of shares governed by unexercised options do not apply in determining whether there was a contravention of section 148 of the ARDFPS. Furthermore, the Court found that the ARDFPS provided its own sanctions in the event of contraventions, sanctions that did not include nullity. The Federal Court of Appeal offered the following comments on the limited scope of statutory deeming provisions:

> *[48] I begin the analysis by emphasizing the particular nature of a deeming provision. As the Supreme Court noted in* R. v. Verrette, *[1978] 2 S.C.R. 838, at page 845, "[a] deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is." …. However, in areas*

[13] Defined at subsection 110.6(1).
[14] Defined at subsection 125(7).
[15] CLRQ c D-9.2.
[16] Paras [45-46].

unaffected by a legal fiction, the actual situation stands. For the purposes of the ARDFPS, the actual situation was and remained that Aviva had not exercised its option.

Defining "debt" in a Bijural Landscape

In *Barejo Holdings ULC v The Queen*, 2015 TCC 274, the Tax Court of Canada was asked to determine whether two contracts (entitled "Notes") issued and guaranteed by affiliates of two Canadian banks, constitute "debt" for purposes of the Act. Justice Boyle held that the Notes were debt. The Federal Court of Appeal affirmed the Tax Court's conclusion.[17]

Of particular interest in the bijuralism context are Justice Boyle's comments on the challenges of interpretation:

> *[6] The key constraint, limitation or qualification on the Court's ability to answer the reference question as framed is that it asks if the Notes are debt for purposes of the Act.*
>
> *[7] Firstly, to answer such a broad question it would be necessary to presume or to be satisfied that the word debt, and similar words such as indebtedness, debtor, debt obligation, et cetera, has the same meaning in each of the many provisions of the Act in which it is used without being defined. That is not necessarily the case. It is certainly possible that there may be some differences to the meaning of the term, depending upon the surrounding text and overall context of a particular provision or régime in the Act. The Court does not herein propose to preclude that as a possibility.*
>
> *[8] Secondly, as a general principal, the provisions of the Act apply to transactions, contracts and relationships that are most often the subject of provincial legislative jurisdiction. The proper characterization of a commercial, contractual, business, work, or family relationship for purposes of the application of the federal Act will generally need to be determined in accordance with, or least after considering, the provincial law applicable to the relationship or transactions.*
>
> *[9] This limitation is compounded by the fact that Canada is a bijural common-law/civil law country and, in this case, the Appellant has some direct or indirect connections to the province of Quebec.*
>
> *[10] It is not clear that there is a federal meaning of the concept of debt, and neither of the parties asked the Court to adopt one. There is arguably some support in the Supreme Court of Canada decision in* Vancouver Society of Immigrant and Visible Minority Women v. M.N.R. *[1999] 1 S.C.R. 10 for the proposition that a common-law term used in the Act, like "charity" in that case, could or should perhaps be recognized to have a uniform federal meaning that may not accord precisely with provincial meanings. I was not asked to and do not propose to take that route in this reference.*
>
> *[11] The Court's answer to the question therefore does not preclude the possibility that in different or more particularized circumstances, the characterization of an obligation or relationship as debt could be further influenced by applicable provincial law.*
>
> *[12] This last limitation would be even further compounded by the fact that, in this particular case, the Notes themselves are expressly to be governed by and interpreted and enforced in accordance with the laws of England, as are the two Note Purchase Agreements. No expert evidence was provided to the Court on the English law applicable to the Notes or other agreements, or their interpretation or enforcement. This generally means that the Court is to assume that English law thereon is the same as Canadian law.*
>
> *[13] In short, the Court in this case is answering the particular question referred to it as best it can. However, the general meaning ascribed to the term debt herein will not necessarily apply in all cases. In the hearing of any other particular case, this Court may give a somewhat different or more nuanced meaning to the term debt depending upon the text and context of a particular provision or régime in the Act, specific provincial or other applicable laws that are relevant to the interpretation of a contract or the characterization of a relationship, or the possible relevance of purpose, objective or intention to the application of the provision or the interpretation or characterization of the contract or relationship, among other things.*

[17] 2016 FCA 304. The taxpayer has sought leave to appeal (Supreme Court docket # 37425).

Case Update — *Groupe Sutton-Royal Inc.*

The Supreme Court of Canada dismissed the application for leave to appeal from *Groupe Sutton-Royal Inc. (Syndic de)*, 2015 QCCA 1069.[18] The Quebec Court of Appeal highlighted the bijural vocation of federal legislation and confirmed that Quebec civil law has no concepts equivalent to those of constructive and implied trusts which, in common law provinces, might have protected the brokers' rights.[19]

Case Update — *French*

In *French v The Queen*, 2016 FCA 64, rev'g 2015 TCC 35, the Federal Court of Appeal allowed the taxpayer's appeal and dismissed the Crown's interlocutory motion to strike a portion of the taxpayer's pleadings. The taxpayer argued that Parliament intended a uniform meaning of gift, based on Quebec civil law, applicable across Canada (para [1]).

The Court of Appeal's decision means that the meaning of "gift" in the context of federal rules on charitable giving will now be fully addressed at trial. The Court also had this comment on the quest for uniformity in the application of federal legislation:

> *[43] Finally, the Tax Court judge found that a quest for uniformity in the application of federal legislation is not, in and of itself, a sufficient reason for disregarding the applicable private law. I agree. The objective of sections 8.1 and 8.2 of the* Interpretation Act *is to recognize the role of the civil law and the common law in the application of federal legislation which necessarily entails the possibility of diverging results.*[20]

Legislation

New Harmonization Proposals – Public Consultation ended May 1st

On February 1st, the Department of Justice Canada launched a public consultation, seeking comments on the *Fourth series of proposals to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law*. The proposals affect 51 federal statutes. The most significant and extensive changes are to legislation governing financial institutions (the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*).

Amendments to the English Version of the Civil Code of Québec

An Act to ensure better consistency between the French and English texts of the Civil Code, SQ 2016, c 4 was assented to and came into force on April 6, 2016. The amendments affect over 360 articles of the Civil Code (mostly in the English version).

[18] Application dismissed May 5, 2016, Supreme Court docket #36618, under the name *Lambros Demos v Demers Beaulne Inc.*

[19] See: "No Constructive or Implied Trusts under the Civil Code" *The Link* No. 43 (December 2015) 2.

[20] For a summary of the Tax Court of Canada's decision, see "Taxpayers outside Quebec Cannot Rely on the Civil Code to Validate a Gift" *The Link* No. 43 (December 2015) 1.

Publications

About Hypothecs on Monetary Claims and Statutory Ratification

Note recent articles by **Michel Deschamps,** "Les sûretés sur les dépôts bancaires et autres créances pécuniaires" (2016) 75 *Revue du Barreau* 433-471, which examines the new hypothecs on monetary claims, that came into force on January 1, 2016; and **Jeff Oldewening, Rachel A. Gold and Chris Sheridan**, "Statutory Ratification" in Corporate Tax Planning feature (2016) 64:1 *Canadian Tax Journal* 293-325, which considers other means of correcting tax planning errors.