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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.

Legislation

Bill S-12 Receives First Reading in the House of Commons

Following its adoption by the Senate on December 14, 2010, Bill S-12, the *Federal Law–Civil Law Harmonization Act, No. 3*, was introduced and received first reading in the House of Commons on December 15th. Further progress of this bill now awaits the reconvening of the House of Commons on January 31, 2011.

In the course of the Senate's consideration of the bill, the Standing Senate Committee on Legal and Constitutional Affairs heard from a number of witnesses. Among them was the **Honourable Robert Nicholson** P.C., M.P., Minister of Justice and Attorney General of Canada, who appeared before the committee on December 1, 2010, accompanied by three other representatives of the Department of Justice: **John Mark Keyes**, Canada's Chief Legislative Counsel, **Marc Cuerrier**, Senior General Counsel, Legislative Revision Services Group, and **Luc Gagné**, General Counsel and Director, Legislative Bijuralism Team.

Other witnesses to appear before the Senate committee were: **Patric Besner**, of the Canadian Bar Association, Québec Branch, **Josée Forest-Niesing,** President of the *Fédération des associations de juristes d'expression française de common law inc*., and **Danielle Manton**, Executive Director, *Association des juristes d'expression française de l'Ontario*. Appearing in their personal capacities were **Sébastien Grammond**, Dean and Associate Professor, Faculty of Law (Civil Law Section), University of Ottawa, **Stéphane Rousseau**, Professor**,** Faculty of Law, Université de Montréal, and **Aline Grenon**, Professor, Faculty of Law (Common Law Section), University of Ottawa.

Revised transcripts of the testimony heard by the standing committee on December 1, 2, 8 and 9th, on the matter of Bill S-12, are available on line, in both official languages.[1] They make interesting reading for those with an interest in bijuralism.

New Quebec Business Corporations Act

Quebec's new *Business Corporations Act*, S.Q. 2009, ch. 52 (the "QBCA"), will come into force on February 14, 2011.[2] The new statute will replace Part I (sections 1 to 123.0.1) and Part IA (sections 123.1 to 123.172) of the Quebec *Companies Act*, R.S.Q., ch. C-38.[3] This is the first major reform of Quebec corporate law since 1981.

On February 14, 2011, companies constituted, continued or resulting from an amalgamation under Part IA of the *Companies Act* will automatically become business corporations

[1] http://www.parl.gc.ca/common/Committee_SenProceed.asp?Language=E&Parl=40&Ses=3&comm_id=11.

[2] Government of Quebec, Decree 908-2010, November 3, 2010.

[3] Section 728 QBCA.

governed by the QBCA.[4] The fate of Part I companies is, however, different. Companies constituted, continued or resulting from an amalgamation under Part I of the *Companies Act* must, no later than February 14, 2016, send articles of continuance under the QBCA to the enterprise registrar. Part I companies that do not file articles of continuance within the mandated time-frame, will be considered dissolved as of February 14, 2016.[5] Part I will continue to apply, until February 14, 2016, to companies constituted, continued or resulting from an amalgamation under Part I before February 14, 2011.[6]

Finally, it is important to reiterate that the QBCA replaces only Parts I and IA of the *Companies Act*.[7] Thus, Parts II (Joint Stock Companies) and III (Legal Persons or Associations Having No Share Capital, Constituted or Continued by Letters Patent) of the *Companies Act* remain in force. The transitional rules to the QBCA provide that Parts I and IA of the *Companies Act* will continue to have effect insofar as they are necessary for the application of Parts II and III or for the purposes of any other Act that provides for their application.[8]

Jurisprudence

Flow-through of Tax Attributes Achieved Through Provincial Law

The recent decision in *Envision Credit Union v. The Queen*[9] illustrates the suppletive character of provincial law – the hallmark of Canadian bijuralism – which in this case led to the appropriate tax result (at least from the point of view of the federal legislator), despite clever tax planning.

Where an amalgamation meets the conditions of section 87 of the *Income Tax Act* (Canada),[10] the amalgamated corporation is deemed to be a new corporation but there is also a flow though of various tax accounts of predecessor corporations to the new corporation, for example undepreciated capital cost balances of the predecessor corporations. However, for section 87 to apply, all property of the predecessors immediately before the amalgamation must become property of the entity formed on the amalgamation ("Amalco").

In *Envision Credit Union*, tax planning had been undertaken to ensure that the amalgamation would not qualify for the application of ITA section 87, so that the Amalco (being Envision Credit Union, the "Taxpayer") might, *inter alia*, be able to claim capital cost allowance based on the original capital cost of assets to the predecessor corporations, rather than the undepreciated capital cost of such assets (which would reflect depreciation already claimed by the predecessors in respect of the assets). The Taxpayer argued that, where section 87 does not apply, the property of the predecessor corporations and related capital cost would flow through to the amalgamated company but that the tax history of the predecessors, which would include depreciation actually claimed by the predecessor corporation, does not flow through to Amalco.

The Tax Court of Canada ("TCC") addressed two main issues: Was section 87 successfully circumvented? If so, do the tax accounts flow through to the Amalco on some other basis?

On the first issue, the TCC found that the taxpayer's endeavour to avoid the application of section 87 was successful, as "all property of the predecessors immediately before the merger" did not become property of the Amalco. In structuring matters so that Amalco would be off-side section 87, each of the predecessor credit unions transferred an interest in certain real property to 619547 B.C. Ltd., a newly incorporated entity. The transfer was to take effect at the very moment of the amalgamation, such that not all the property of the predecessor "immediately before the merger" became property of Amalco.[11] In embarking on his

[4] Section 716 QBCA.
[5] Section 715 QBCA.
[6] Section 728 QBCA, paragraph 3.
[7] Section 728 QBCA, paragraph 1.
[8] Section 728 QBCA, paragraph 2.
[9] 2010 TCC 576.

[10] R.S.C. 1985, c. 1 (5th Supplement), hereinafter the "ITA." Unless otherwise stated statutory references throughout are to the ITA.
[11] This conclusion is based on the assumption that, immediately before the amalgamation, the sold property

analysis, Justice Webb quotes the reasons of Justice Noël in *Hewlett Packard (Canada) Ltd. v. The Queen*,

> *Although the civil law and the common law notions of ownership stem from different roots, there is one basic rule that is common to both systems: ownership passes when the parties intend it to pass.*[12]

There followed an interesting review of how a transfer of property can be effected. Ultimately the Court gave effect to the parties' intentions to transfer surplus real property at the moment of the amalgamation, such that Amalco never acquired a beneficial interest therein, and thereby excluding the application of section 87.[13]

On the second issue, namely what happens to the undepreciated capital cost balance on an amalgamation that is not subject to the rules at section 87, the Crown fared better, Justice Webb finding that the undepreciated capital cost balances did flow through to Amalco, relying first and foremost on the Supreme Court of Canada's decision in *The Queen v. Black and Decker*.[14] The Court reached this conclusion despite the appellant's assertion that "for federal tax purposes a Provincial statute that deems an Amalco to be a continuation of its predecessors cannot have the effect of flowing through notional federal tax accounts."[15] In the result, provincial law had precisely that effect.

The decision has been appealed to the Federal Court of Appeal (A-479-10).

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was still property of the predecessor corporation, with the divestiture occurring on the amalgamation and the property having never become property of Amalco. One might ask, however, who disposed of the property at that time: If the predecessor corporations, then arguably the assets were no longer their property "immediately before" the amalgamation.

[12] *Supra* note 9, at para [32].

[13] *Supra* note 9, at para [51].

[14] [1975] 1 SCR 411.

[15] *Supra* note 9, at para [71] *et seq.*