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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

Bijural Amendments Back on Parliament's Agenda

Bill C-48, the *Technical Tax Amendments Act, 2012*, was introduced in the House of Commons on November 21st. The bill includes long awaited bijural amendments to the *Income Tax Act* (Canada).[1] The bijural amendments will come into force on Royal Assent.

In most cases, the proposals operate to correct current semi-bijural drafting in the *Income Tax Act*, whereby common law terms are used in the English version – to the exclusion of appropriate civil law terminology - and civil law terms are used in the French version – to the exclusion of appropriate common law terminology.

The bijural amendments proposed in Bill C-48 concern the concepts of "joint and several liability" / "solidary liability", "tangible property" / "corporeal property", "intangible property" / "incorporeal property", "personal property" / "movable property", "real property" / "immovable property", and "interest" / "right." As well, the existing definition of "interest in real property" is amended, and a separate concept of "real right in immovables" is added to better envisage civil law rights in immovable property.[2]

These amendments are described in greater detail in explanatory notes published by the Minister of Finance.[3] The notes make clear that the amendments are part of the harmonization initiative and are not intended to change the current application of the amended provisions.

In reading the newly harmonized measures, recall the following drafting norms. First, where the concepts used in civil law and common law have distinct names, unique to a particular legal system, the appropriate words are added to the provisions concerned. For example, where reference is made in English to "tangible property," the civil law term "corporeal property" is added, and, in French, the common law term "*bien tangible*" is added to existing occurrences of the civil law term "*bien corporel*."

Second, where the concepts used in civil law and common law have distinct names in one language but a common name in the other, the distinct names will both appear in the version where they differ, and only the common term will appear in the other language. For example, "hypothec" will be added in English to occurrences of the common law term "mortgage." There is however no need to harmonize the French version of the Act as the French term "*hypothèque"* (currently in use) is appropriate in both legal systems.

Third, where the concepts used in civil law and common have distinct names, but the concept

[1] RSC 1985, c 1 (5th Supp), as amended. Unless otherwise stated, statutory references throughout are to the "Act." The proposed bijural measures had been included in two earlier bills that died on the order paper. The measures were first introduced on November 22, 2006 as part of Bill C-33.

[2] See subsection 248(4) and new subsection 248(4.1).

[3] See the explanatory notes released with the *Notice of Ways and Means Motion* tabled in the House of Commons on October 24, 2012.

from one legal system may also have a legal meaning in the other system, it may be necessary to limit the scope of application of the common concept. For example, in civil law, one refers to a "right" (*droit*) in property while in common law one refers to an "interest" (*intérêt*) in property. However, the term "right" (*droit*) also has a legal meaning in common law. As such, additions of the words "right" in English and "*droit*" in French, will sometimes explicitly state that the words are added for civil law purposes only.

Easing of Common Law Criteria for Gifts in Certain Circumstances

Bill C-48 also includes another measure that has its basis in Canadian legislative bijuralism. In prior issues of *The Link*,[4] we have pointed out the substantive differences between the common law and the civil law concepts of gift, chief among them being that at common law a transfer of property will not qualify as a gift if the purported donor receives any manner of consideration. In contrast, under the *Civil Code of Québec*, remunerative gifts are permitted.[5]

Part 5 of Bill C-48 proposes the addition of a new concept of "eligible amount" to be used in computing the corporate deduction[6] and individual tax credit[7] for certain types of gifts and in computing the deduction for political contributions.[8] Essentially, the eligible amount will be the amount by which the value of any gift or monetary contribution exceeds the amount of any advantage in respect of the gift or monetary contribution.[9]

Most interesting from a bijuralism point of view is new subsection 248(30):

> *The existence of an amount of an advantage in respect of a transfer of property does not in and of itself disqualify the transfer from being a gift to a qualified donee if*
>
> *(a) the amount of the advantage does not exceed 80% of the fair market value of the transferred property; or*
>
> *(b) the transferor of the property establishes to the satisfaction of the Minister that the transfer was made with the intention to make a gift.*

This amendment will be particularly welcome to taxpayers in common law provinces, as they introduce a more flexible notion of gift than otherwise exists at common law, though evidence of donative intent remains essential. The explanatory notes make clear that the civil law – common law differences in the area of gift are the main impetus for the changes. The changes are generally applicable to specified types of gifts and monetary contributions made after December 20, 2002.

Jurisprudence

Provincial Superior Courts Confronted by Rectification Requests

It seems that provincial superior courts are hearing rectification requests with increasing frequency. This article highlights three recent cases: from the superior courts of British Columbia, Quebec and Nova Scotia (the latter two decisions denying rectification).

On January 26, 2012, the British Columbia Supreme Court for a second time authorized the rectification of the trust deed of The McPeake Family Trust.[10] On both occasions, the rectifications were sought to remove language that would allow for the application of the subsection

[4] See "Common Law Meaning of 'gift' " *The Link*, No. 36 (July 2011) 3-4 and "Commercial Motivation Does Not Invalidate Common Law 'gift' " *The Link*, No. 37 (December 2011) 1-2.

[5] Articles 1806 and 1810 of the *Civil Code of Québec*.

[6] See proposed amendments to paragraph 110.1(1)(*a*)(charitable gifts); paragraph 110.1(1)(*b*) (gifts to Her Majesty); paragraph 110.1(1)(*c*) (gifts to institutions); and paragraph 110.1(1)(*d*) (ecological gifts).

[7] See proposed amendments at subsection 118.1(1) to the definitions of "total charitable gifts," "total Crown gifts," "total cultural gifts," and "total ecological gifts."

[8] See proposed amendment to subsection 127(3). Subsection 127(3) provides a deduction for monetary contributions referred to the *Canada Elections Act* to registered parties, candidates and, after 2003, to registered associations as well.

[9] See proposed subsections 248(31) and (32).

[10] *McPeake v. Canada (Attorney General)*, 2012 BCSC 132. The decision was not appealed.

75(2) attribution rules. At issue were reassessments issued in 2003 by the Canada Customs and Revenue Agency (as it then was) against the trust and Mr. Barry McPeake for their 1997 – 2001 taxation years.

In granting rectification, Madam Justice Dorgan found that the common law requirements for rectification were met in the circumstances:

> *[44] (…) the petitioners in this case have deliberately pursued the maximization of capital gains exemptions and the corollary avoidance thereby of tax from the trust's inception. As in Juliar, the desired tax consequences of the trust were not incidental to the trust's formation but arguably the reason for its formation. This finding of specific intention and the timing of its formation are sufficient to allow for rectification in this case.*

In *FNF Canada Company*,[11] the taxpayer sought an order (i) rectifying its share register to show that it issued common shares in consideration of advances received from Fidelity National Financial Inc. to finance a 2003 asset purchase and (ii) to reflect later payments made by the taxpayer on behalf of the lender as a return of capital. In dismissing the application, the NSSC concluded that

> *[o]n the evidence, the applicants have not demonstrated on convincing proof the intention that Fidelity National's payment would constitute invested capital which could be repaid as a return of paid up capital*.[12]

Lastly, in *Mac's Convenience Stores inc. c. Couche Tard inc.*,[13] the Quebec Superior Court denied a taxpayer's request for declaratory judgment annulling a $136,000,000 dividend declared and paid (the "Dividend") and replacing it with a reduction in paid-up capital. The dividend payment had the unanticipated consequence of triggering the thin capitalization rules[14] which resulted in the denial of an interest expense deduction totalling $22,655,691 over three taxation years.[15] The Attorney General of Canada and the Deputy Minister of Revenue of Québec intervened in the matter**.**

The Superior Court of Quebec first determined that Quebec civil law applied to the matter despite the fact that Mac's is incorporated under the Ontario *Business Corporations Act* and has its head office in Ontario. Justice Hallée concluded that the facts surrounding internal decision-making and especially the decision to declare the dividend rendered Quebec civil law applicable.[16]

Having then considered the decisions of the Quebec Court of Appeal in *Québec v. Services environnementaux AES inc*.[17] and *Riopel c. L'Agence du revenu du Canada*,[18] the Superior Court concluded that the sought declaratory judgment could not be granted as there was no discrepancy between the parties' intention (to declare a dividend) and the instrument reflecting that intention.

The Court also held that even if the conditions for rectification were met, the remedy sought by the petitioners was inappropriate. The petitioners wanted to do more than simply correct a written instrument. They wished to replace it with three other documents to which another person – not party to the litigation – would have to give their consent retroactive to April 25, 2006.[19]

The *Mac's Convenience Stores* decision has been appealed to the Quebec Court of Appeal, but the matter is currently held in abeyance pending the Supreme Court of Canada's decision in the appeals of *Services environnementaux AES inc.* and *Riopel*.

[11] 2012 NSSC 217. The decision was not appealed.
[12] *Ibid* at para [31].
[13] 2012 QCCS 2745, judgment dated June 19, 2012.
[14] Subsection 18(4).
[15] *Supra* note 13 at para [16].
[16] *Ibid* at para [40].
[17] 2011 QCCA 394 (under appeal to the Supreme Court of Canada docket #34235, judgment reserved). An unofficial English translation of this judgment is available at http://www.jugements.qc.ca/php/resultat.php?liste=65356019.
[18] 2011 QCCA 954 (under appeal to the Supreme Court of Canada docket # 34393, judgment reserved).
[19] *Supra* note 13 at paras [87] *et seq.*

Case Update – Appeals before the Supreme Court of Canada

On November 8th, the Supreme Court of Canada heard the appeals of the Agence du revenu du Québec in the *Services environnementaux AES inc.* and *Riopel* matters.[20] The Attorney General of Canada intervened in the appeals. Judgment was reserved.

Last summer, the Supreme Court of Canada granted Envision Credit Union's request for leave to appeal.[21] At issue is whether or not there was a flow through of the undepreciated capital cost balances of predecessor corporations to the amalgamated entity. The tentative hearing date has been set for March 19, 2013.

Research

The Program of Research Contracts Comes to an End

In 2000, the Department of Justice Canada launched the *Program of Research Contracts on Canadian Bijuralism.* The main purpose of this Program was to promote among law students the development of expertise pertaining to federal legislative interpretation regarding questions that arise when federal law and provincial private law interact in a context where civil law, common law and Aboriginal legal rules coexist. After twelve years and some thirty-four contracts on various subjects, it is time to turn the page. The *Program of Research Contracts on Canadian Bijuralism* is no more.

Publication

Rectification and Judicial Correction

For an analysis of the role of rectification in common law and the emerging remedy of "judicial correction" in Quebec civil law, see the recently published article by Guy Gagnon, Chia-yi Chua, Jeffrey T. Love and Lindsay Hollinger: "Rectification and Judicial Correction: Practical Issues" in *Report of Proceedings of the Sixty-Third Tax Conference*, 2011 Conference Report (Toronto: Canadian Tax Foundation, 2012) 34:1-58.

[20] *Supra* notes 17 and 18, respectively. For a summary of the Quebec Court of Appeal decision in *Services environnementaux AES inc.*, see "Rectification Achieved Under the Rules of the Civil Code of Quebec" *The Link*, No. 36 (July 2011) 4.

[21] Docket #34619. For a discussion of the Federal Court of Appeal decision, see "Relevance of Corporate Law Principles Confirmed" *The Link*, No. 38 (June 2012) 3-4.