

THE HARMONIZATION OF FEDERAL TAX LEGISLATION

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Introduction*

The harmonization project in the area of federal tax legislation is being pursued as part of a process of legislative revision designed to ensure that civil law and common law are adequately reflected in both language versions. This process is not to be confused with the harmonization of Quebec tax laws with federal fiscal legislation¹, nor with the commodity tax harmonization work².

In the fall of 1999, Tax law was identified as one of the key areas requiring harmonization no less than regulatory law and trade law. The Department of Justice Canada, in cooperation with the Department of Finance Canada and the Canada Customs and Revenue Agency, plans, in the next few years, to address the harmonization of tax laws and regulations³. The harmonization of fiscal legislation is a practical undertaking, not a Byzantine and academic exercise. Taxpayers, program managers, Canada Customs and Revenue Agency officials, to name but a few, are routinely faced with harmonization problems on a daily basis. Harmonization is designed to ensure effective enforcement of federal fiscal legislation in civil law as well as common law jurisdictions. Considering that fiscal legislation has major patrimonial consequences, it is important to ensure that these laws are correctly understood and applied by all Canadians, whatever the legal system they are governed by.

The first part of this article will deal with certain aspects of harmonization in a fiscal context, or to be more specific, with situations of complementarity and uniformity, whereas the second part will deal with the harmonization work, more specifically the harmonization methodology used, the characterization of problems and the various solutions being considered. The final part of the text will deal with a number of specific harmonization issues raised by the tax community on which the federal government will focus in the coming months.

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¹ Process by which the Quebec government aligns its tax measures on those of the federal government by making the required adjustments.

² Harmonized Sales Tax: refers to the replacement, by a single harmonized tax on added value, of the retail sales taxes of Nova Scotia, New Brunswick, Newfoundland and Labrador, as well as the federal Goods and Services Tax in these provinces.

³ Department of Justice Canada, Backgrounder "A Bill to harmonize federal law with the civil law of the Province of Quebec" (accompanying the press release issued when Bill S-22 *A First Act 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* was tabled, 11 May 2000).

PART ONE: ASPECTS OF HARMONIZATION IN FISCAL LEGISLATION

When Parliament legislates measures in one of its areas of competence in accordance with section 91 C.A. 1867, such as, for example, taxation (91(3) C.A. 1867), it refers on many occasions to private law concepts that come under provincial authority in accordance with subsection 92(13) C.A. 1867. Complementarity is thus achieved between provincial private law and federal legislation. On the other hand, Parliament also has the power, under the constitution, to create any rule of law that does not lie within its competence where such rules are accessory or ancillary to one of its powers provided for in 91 C.A. 1867. The federal legislator typically takes this course so as to ensure consistency on the national level in the application of the law. There is thus dissociation between provincial private law and federal legislation.

For more details regarding the harmonization process, see M^e Louise Maguire Wellington's article in issue no. 4.

1.1 The *Interpretation Act*

S-4 proposes additions to the federal *Interpretation Act*, mainly the new sections 8.1 and 8.2, which officially enshrine the principle of complementarity of provincial private law:

Section 8.1 "Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied."

Section 8.2 "Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces."

Mr. Henry Molot's article in issue no. 5 discusses this section of Bill S-4 in greater depth.

In addition to the principle of complementarity, may we mention here and now that these new provisions establish other major interpretation rules, especially in the context of fiscal law. On the one hand, section 8.1 attributes an evolutionary character to private law expressions of the provinces used in federal acts. For example, while the *I.T.A.* uses the term *privilège* and makes no reference to the new terminology of the *Civil Code of Quebec*, the interpreter of the clause will need to update the terminology used in the Act and replace the term *privilège* by *priorité* or *hypothèque légale* as the case may be.

On the other hand, section 8.2 of the *Interpretation Act* specifies that where a text uses civil law as well as common law terms, the former will be applicable in Quebec and the latter (common law) in the other provinces. Thus, a British Columbia taxpayer who comes across the term "immovable" in the *I.T.A.*, could not assume, based on the dictionary definition, that the legislator has incorporated into it a new concept which might entitle him, among other things, to claim a capital cost allowance or investment tax credit on property located in British Columbia. "Immovable", a civil law term, would apply only to Quebec taxpayers if it were to be used in the *I.T.A.*⁴

⁴ Note: the term *immovable* is already used in the *Excise Tax Act*.

1.2. Certain judgments rendered in fiscal matters involving the concepts of complementarity and uniformity

In the context of the application of Canadian fiscal laws, the courts generally recognize the principle of complementarity of the provincial private law whenever a private law concept is not defined in tax legislation. On the other hand, even where such a private law concept is not defined, a certain line of cases recommends uniform application of federal tax legislation Canada-wide, irrespectively of provincial private law. There is consequently a cleavage between these two major trends, and case law on this issue does not always allow the identification of clear rules.

A brief review of a number of jurisprudential decisions will help identify the issues involved in the process of harmonization of federal tax legislation.

1.2.1 Examples of cases where complementarity between provincial private law and federal fiscal law was recognized

Failing a text to the contrary, it is usually to the fundamental law of the individual provinces that we must turn to interpret a private law concept used in federal statutes. This principle was commented upon in the following terms by professors Jean-Maurice Brisson and André Morel, in the context of fiscal law enforcement:

The most persuasive example of this is undeniably the *Income Tax Act* (and tax legislation in general). One is even tempted to say that the *Income Tax Act* is superimposed on juridical acts subject to the civil law in virtually all of its provisions, so that consequences suitably adapted to its purpose may be drawn from those transactions.

[...]

It can be concluded, therefore, that the *Income Tax Act*, a public law statute *par excellence*, is in principle ineffective without indirectly referring to the civil law. If, for example, the Act were to provide “no special definition of the word ‘sale’ or any special meaning [...] one must consider that word in the light of the law of the Province of Quebec as applied to the relationship created by the agreement. [*Olympia and York Developments Ltd. v. The Queen*, [1981] 1 F.C. 691, 697]”⁵

Professors Morel and Brisson further note as follows:

The same is true with respect to the process of compulsory execution of the federal government’s tax claims, which necessarily presupposes that one resort indirectly to the Civil Code in determining the respective rights of the parties in seized property.⁶

The principle of complementarity of federal and provincial legislation has often been articulated by Canadian courts. The following excerpt from Justice Décary’s decision,⁷ dealing with the complementary relationship between fiscal legislation and provincial law is a landmark in judicial history:

⁵ J.-M. Brisson and A. Morel, “Federal Law and Civil Law: Complementarity, Dissociation”, in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies* (Ottawa: Department of Justice Canada, 1999) at 246.

⁶ Ibid. at 246. On the subject of collection, the *I.T.A.* contains many specific provisions for particular rules of enforcement, which has led the courts to conclude that in matters of collection, the *I.T.A.* is a self-contained code. In this connection, see the *Marcoux* decision discussed under the following topic.

⁷ *R. v. Lageux*, 74 D.T.C. 6569 at 6572 (F.C.T.D.). See also comments of Justice Bastin (in dissent) in *Kingsdale Securities Co. Ltd. v. M.N.R.*, 74 D.T.C. 6674 at 6692 (F.C.A.) [hereinafter *Kingsdale Securities*].

In my opinion fiscal law is an accessory system, which applies only to the effects produced by contracts. Once the nature of the contracts is determined by the civil law, the *Income Tax Act* comes into effect, but only then, to place levy. Application of the *Income Tax Act* is subject to a civil determination, whether such a determination be according to civil or common law. There is no need, in deciding as to the nature of the contracts, to have recourse to the theory popular in fiscal law of form and substance, if the private law of the place where the contract was concluded, which is the Civil Code in the case at bar, contains provisions the effect of which is comparable to that theory.

The same principle is taken up by Justice Addy of the Federal Court Trial Division in the matter of *Olympia and York Developments Ltd. v. R.*⁸ The court had to determine whether there had been sale of a property and, if not, whether the transactions had resulted in a disposition within the meaning of tax legislation. The Honourable Justice Addy began by noting as follows:

It is evident that the rights of the parties to the contract and all matters governing various agreements and legal relations arising from the actions of the parties to those agreements must be determined in accordance with the law of the Province of Quebec.

The rights of the parties arise out of the agreement filed as Exhibit 1 and full consideration must be given to its terms. Since there is no special definition of the word "sale" or any special meaning to be attached to it in the *Income Tax Act*, one must consider that word in the light of the law of the Province of Quebec as applied to the relationship created by the agreement (Exhibit 1).⁹

He continues later in the same vein, dismissing the principles of common law that had been submitted to him to define the concept of sale.

It now remains to be considered whether, in the light of these findings, a sale has taken place according to the laws of the Province of Quebec.

I have considered without applying them the following cases: *Cornwall v. Henson* ((1899) 2 Ch. 710); *Trinidad Lake Asphalt Operating Company, Limited v. Commissioners of Income Tax for Trinidad and Tobago* ((1945) H. of L. A.C. 1); *Buchanan v. Oliver Plumbing & Heating Ltd.* ((1959) O.R. (C.A.) 238); together with the passages in 19 C.E.D., Chapter IX and Halsbury's, Third Edition, Volume 34 referred to by counsel. These, of course, constitute exclusively English common law jurisprudence on the subject. The law of real property is one of the areas where common law and civil law principle's are most likely to be at variance or at least to flow from different fundamental premises. At common law, the nature of the relationship existing between a vendor and purchaser of real estate under given circumstances is governed to a large extent by the distinctions between legal and equitable ownerships, estates and remedies and by the principles applicable to various categories of trusts and trustees. None of these concepts even exist in civil law. To seek by way of common law jurisprudence to reach a solution to the present issue would be to venture out on a perilous journey over rocky and tortuous roads, fraught with pitfalls, which would lead to a mere cul-de-sac, if one were fortunate.¹⁰

The principle of complementarity of provincial private law had already been spelled out in 1960 in *Perron v. MNR*,¹¹ a case involving the concept of disposition (before the definition was introduced in the legislation). A review of the jurisprudence and doctrine in support of the complementarity principle, which was then applicable in the matter, is summarized in the following terms by the judge:

⁸ 80 D.T.C. 6184 (F.C.T.D.) [hereinafter *Olympia and York*].

⁹ *Ibid.* at 6187.

¹⁰ *Ibid.* at 6189-6190.

¹¹ 60 D.T.C. 554 (T.A.B.).

In the case of *His Majesty the King and Dominion Engineering Company Limited* (1944) S.C.R. 371, 376 (2 DTC 674), the Honourable Mr. Justice Rand expressed the following opinion:

...If income tax is a creation of the Act which imposes it, that Act must apply within the framework of the civil laws governing legal relationships between individuals. The tax is grafted, as it were, on the legal tree which covers with its shadow the rights and obligations arising from the contracts. Simon's *Income Tax*, Vol. 1, p. 48, No. 62, states: "Taxation law does not exist in vacuo. It has regard to situations and transactions the exact force and effect of which are determined and regulated by the general law. It is true that for particular purposes a taxing statute may build on a basis of hypothesis, as in the case of those sections of the *Income Tax Act, 1952*, which deem income arising under a settlement (as specially defined) to be the income of the settler notwithstanding express provision to the contrary of the governing document. This artificial treatment is, of course, confined by the legislature to the purposes of the *Income Tax Act*; the general law is otherwise in full force, so that even in the case of these sections it is important in the first place to construe the settlement according to the correct legal principles in order to see whether and in what manner the sections apply.

In other cases, it is vital that the true legal position of the taxpayer in relation to a transaction giving rise to an item of apparent income should be appreciated before any attempt is made to apply the taxing Act to the case.

That opinion reflects the obiter dictum of the Honourable Mr. Justice Williams in *Tweddle v. Federal Commission of Tax* 7 A.T.D. 186, 190:

It is not suggested that it is the function of income tax Acts or of those who administer them to dictate to taxpayers in what business they shall engage or how to run their business profitably or economically. The Act must operate upon the results of a taxpayer's activities as it finds them.

It should be remembered that the legal relationships of the parties to a contract and the consequences of that contract must be respected by the persons responsible for administering the *Income Tax Act*. What must be taken into account above all are the real nature of the contracts and their effects on the contracting parties and on third parties, with respect to the general law of the place—common law, or Quebec Civil Law, as the case may be.¹²

The courts have also applied provincial private law in many other tax areas despite the balkanization that such an approach could lead to. Some judgments of the Supreme Court of Canada highlight this tendency. Examples that come to mind are the judgment delivered in *Continental Bank Leasing Corporation v. R.*¹³ where the law of the province of Ontario was applied so as to determine if a partnership had been created. We recall also the decision in *Sura v. R.*¹⁴ where the Supreme Court applied the provisions of the *Civil Code of Lower Canada* dealing with the matrimonial regime of community of property in a dispute on income-splitting between the spouses.

Case law also provides many examples of the application of provincial private law in matters involving the transfer of property. In the Federal Court of Appeal case of *Brouillette v. R.*,¹⁵ dealing with the fiscal impact of the transfer of shares to a minor, the dispute was settled on the basis of the

¹² Ibid. at 556-557.

¹³ 98 D.T.C. 6501 (S.C.C.).

¹⁴ 62 D.T.C. 1005 (S.C.C.). See also *Côté v. R.*, 99 D.T.C. (F.C.A.); *Dumais v. M.N.R.*, 89 D.T.C. 5543 (F.C.T.D.).

¹⁵ 99 D.T.C. 5458 (F.C.A.).

civil law applicable at the time of the transaction. The transfer to a trust created on behalf of the minor was deemed to have been effected on the child's behalf within the meaning of subsection 73(5) of the old *I.T.A.* The comments of the court on the role of the federal legislator deserve to be underscored:

[Translation] The legislator is deemed to know the existing law. It must have known, in 1987, that at least in Quebec the transfer of property to a minor could be effected via a trust under section 981a. of the *Civil Code of Lower Canada*. Since subsection 73(5) applied both to minor and major children, the legislator was not required to say that if minor children were concerned, the transfer should be made in accordance with the procedures applicable in the case of a transfer to a minor child. ... The legislator wanted to specifically ensure that the transfer for the benefit of a presumably minor child in all provincial jurisdictions is not jeopardized by the differences in form that might exist by virtue of applicable provincial laws.¹⁶

In the same vein, the judgment of the Federal Court of Appeal in *Hillis v. R.*¹⁷ applies the law of the province of Saskatchewan to determine if there was irrevocable vesting within the meaning of subsection 70(6) of the *I.T.A.* As a final comment, we should mention the judgment rendered in the matter of *Furfaro-Siconolfi v. R.*,¹⁸ where the provisions of the *Civil Code of Lower Canada* served as a legal basis to rule on the actual time when a transfer takes place between spouses.

1.2.2 Examples of cases where uniformity prevailed

Professors Jean-Maurice Brisson and André Morel appropriately sum up the other trend that derives from fiscal case law:

In opposition to the commonly held view that the complementarity of provincial private law with federal private law legislation is accepted failing any provision to the contrary, it is sometimes suggested that federal legislation should be applied in the same way everywhere, in the interests of uniformity. [...] For the same reason it has sometimes been considered appropriate to interpret the *Income Tax Act* as overriding the civil law, using a common law rationale, to avoid giving the Act a broader scope within Quebec than it would have in some other province.¹⁹

In the judgment rendered by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v. MNR*,²⁰ the principle of complementarity of provincial private law was entirely discarded in the field of characterization of charitable organizations. Mr. Justice Gonthier expresses himself in no uncertain terms as follows:

It is well-known that the *I.T.A.* does not define "charity" or "charitable", other than to define "charity" to mean "a charitable organization or charitable foundation", which are themselves defined terms. Instead, as the Federal Court of Appeal stated in *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340, at p. 347, "the Act" appears clearly to envisage a resort to the common law for a definition of "charity" in its legal sense as well as for the principles that should guide us in applying that definition.

[...]

¹⁶ Ibid. at 5461-5462.

¹⁷ 83 D.T.C. 5365 (F.C.A.). See also, for example, *Boger Estate v. R.*, 91 D.T.C. 5506 (F.C.T.D.).

¹⁸ 90 D.T.C. 6237 (F.C.T.D.).

¹⁹ Brisson and Morel, *supra* note 5 at 257-258.

²⁰ 99 D.T.C. 5034 (S.C.C.).

Parliament has, in effect, incorporated the common law definition of charity into the *I.T.A.*, and in doing so, has implicitly accepted that the courts have a continuing role to rationalize and update that definition to keep it in tune with social and economic developments. I note in passing that the definition of "charity" or "charitable" under the *I.T.A.* may not accord precisely with the way those terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law. The *I.T.A.*'s conception of charity, by contrast, is uniform federal law across the country.²¹

In another case dealing with donations in the area of tax,²² the civil law of the province of Quebec had been set aside in favour of the uniform application of federal legislation. The issue was to determine whether the conveyance concluded between a father and his son constituted a donation in respect of the difference between the fair market value and the purchase price. While it is probable that the benefit conferred constituted a donation under Quebec law, the Court decided that no donation was involved within the meaning of the *I.T.A.*, since the Act had to be interpreted uniformly across Canada:

In the present case we are dealing with a taxing statute which must be applied in the same manner throughout Canada and as the former Chief Justice Jackett stated, in dealing with different sections of the *Income Tax Act* even if the sale at an undervaluation constituted an indirect gift for the purposes of Article 712 of the *Quebec Civil Code*, this should not be taken to extend the application of Section 111 of the *Income Tax Act* in a litigation in that case in the Province of Quebec beyond what it would be in another Province.²³

In *Marcoux v. Canada*,²⁴ the plaintiff invoked, against a garnishment made under subsection 224(1) of the *I.T.A.*, exemption from seizure of the supplementary retirement benefits under the *Civil Code* and the *Code of Civil Procedure* of the province of Quebec. The court dismissed the submission that civil law was applicable in respect to the procedures initiated under subsection 224(1) in the following terms:

Mais il y a davantage. Les tribunaux ont maintes fois décidé de l'autonomie des lois fiscales, dont la *Loi de l'impôt sur le revenu*, les qualifiant de « code complet ». Au nom de l'uniformité d'application de cette loi fédérale et de l'égalité des contribuables devant le fisc, j'estime que par les termes du paragraphe 224(1) de la *Loi de l'impôt sur le revenu*, le législateur fédéral a créé un mécanisme unique qui confère à sa disposition une autonomie véritable par rapport au droit privé.

The same reasons had been invoked by Mr. Justice Denault of the Federal Court in a decision involving the Quebec Ministry of Revenue and dealing with the application and enforcement of the *Excise Tax Act*.

La *Loi sur la taxe d'accise*, tout comme la *Loi de l'impôt sur le revenu*, L.R.C. 1985 (5^e supp., ch. 2), contient en effet un code complet de perception des impôts en vertu duquel, après avoir reçu un avis de cotisation, un contribuable peut loger un avis d'opposition et en appeler éventuellement devant la Cour canadienne de l'impôt. Il n'est donc pas du ressort de cette Cour de décider du montant de la cotisation et des dépenses auxquelles un contribuable peut prétendre avoir droit.²⁵

²¹ Ibid. at 5057.

²² *Gervais v. R.*, 85 D.T.C. 5004 (F.C.T.D.).

²³ Ibid. at 5008.

²⁴ 2000 D.T.C. 6010 (F.C.T.D.). This judgment has been appealed.

²⁵ *MRQ v. Marcel Grand Cirque Inc.*, 98 D.T.C. 6565 (F.C.T.D.).

It is not only the civil law of the province of Quebec which is set aside in the name of uniformity of enforcement. In the matter of *Markevich v. R.*²⁶, the law of British Columbia was discarded:

However, in my view even though the liability of the taxpayer to pay money due under the *Income Tax Act* is a debt to the Crown, and debt is a common law concept, there is no reason of policy for subjecting its enforceability to provincial law when this will detract from the uniform application of the statute without any justification. Indeed, if the law of British Columbia applies to the debt in question here it would be extinguished altogether.

Moreover, I note that in *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue)* (S.C.C.; January 28, 1999) (since reported, 99 DTC 5034), Gonthier J. said that, even though the *Income Tax Act* did not define the term “charitable”, but left it to the courts to elaborate, the statute’s conception of charity is uniform federal law across the country and does not accord precisely with the way these terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law.

In my opinion, therefore, the *Income Tax Act* should be interpreted as creating a federal cause of action in the event that a taxpayer fails to pay tax duly assessed.²⁷

The majority decision of the Federal Court of Appeal in the matter of *Construction Bérou Inc. v. R.*²⁸ highlights the tensions between the objectives of recognition and uniformity of private law. In this matter, the taxpayer had signed leasing agreements in respect of the financing of trucks. He deemed himself owner of the assets for the purposes of capital cost allowance and investment tax credit since, in his opinion, he had acquired these assets within the meaning of common law. This position was challenged by the Department on the ground that in civil law only the holder of the title-deed may be deemed the owner, so that only the financial lessor could be the owner and thus claim the capital cost allowance and investment tax credit. The appellant argued that the law should apply in a consistent manner and claimed the same tax benefits it would have been entitled to under common law had it been the real owner (beneficial ownership).

The Justices Létourneau and Desjardins interpreted the provisions of the law governing leases in such a way as to ensure a measure of horizontal equity between Quebec taxpayers and those in the common law provinces. To achieve this outcome, the two judges equated the lessee/lessor situation with that of legal/beneficial owner under the common law. Based on the decisions in *Olympia and York Developments Ltd.*²⁹ and *Wardean Drilling Limited*,³⁰ the Justices adapted these common law principles so as to produce, in civil law, a result similar to that of other Canadian provinces. Mr. Justice Létourneau, in *Bérou*, explained why under the circumstances the uniformity of fiscal law prevails over compliance with the civil law:

²⁶ 99 D.T.C. 5136 (F.C.T.D.).

²⁷ *Ibid.* at 5145.

²⁸ 99 D.T.C. 5841 (F.C.A.) [hereinafter *Bérou*].

²⁹ *Olympia and York*, *supra* note 8.

³⁰ 59 D.T.C. 5194 (Ex. Ct.).

En somme, au terme de ces deux arrêts il y a, en vertu de la Loi, disposition ou acquisition d'un bien aux fins d'allocation du coût en capital lorsque les attributs ou accessoires normaux du titre, tels la possession, l'usage et le risque sont transférés. Je suis d'accord avec cette interprétation légale donnée à des fins fiscales au terme « acquis » que l'on retrouve dans la définition de « biens amortissables ». Sur le plan pratique, cette interprétation a le mérite de reconnaître, pour une législation fiscale d'application pancanadienne, une réalité commerciale transfrontalière et d'éviter de s'enterrer dans un légalisme indu, sectoriel et par surcroît stérile et inéquitable à une époque où le droit civil tend à se rapprocher de la common law. Il est tout de même significatif que le législateur, qui modifie annuellement la Loi pour, entre autres motifs, changer une disposition législative lorsque l'interprétation qui lui a été donnée ne permet pas de rencontrer les objectifs poursuivis, n'ait pas cru bon de répudier cette interprétation vieille de 30 ans. En outre, cette interprétation est conforme à l'intention législative exprimée au paragraphe 248(3) de la Loi, laquelle vise, comme je l'ai déjà mentionné, à assimiler le « beneficial ownership » d'un bien à diverses formes de propriété propres au droit civil du Québec.³¹

Mr. Justice Noël, for his part, has refuted this interpretation. In his dissent, he analyzed the civil law of the province of Quebec and, using it as a basis, was unable, despite the unfairness of the situation for Quebec taxpayers, to conclude that acquisition had taken place.

While the decisions discussed above are fairly recent, the principle of uniformity has been invoked for many years for the purpose of setting aside the private law of the provinces. For example, in 1971, in *Rosenstone v. DNR*,³² it was for the sake of horizontal equity and uniform application of tax legislation that emphyteusis was treated as a leasehold tenure (leasehold interest):

To be equitable, an income tax law must apply in general to the entire nation. In the present case it would not be fair because taxpayers in the Province of Quebec would enjoy an advantage that taxpayers in other provinces would not have. I feel it is clear that the legislator intended to include all leases, even emphyteusis, which is a lease by which "the proprietor of an immovable conveys it for a time to another, the lessee subjecting himself to make improvements, to pay the lessor an annual rent, and to such other charges as may be agreed upon" (*Civil Code*, Article 567).³³

1.3 Harmonization issues in the area of tax

These few judgments highlight the existence of some tension between the acknowledgement of the peculiarities of private law in the provinces and uniform application of fiscal legislation. In the area of harmonization of tax laws, three objectives are being pursued: uniformity of treatment, respect of the civil law of the province of Quebec and reduction of the caseload of litigation. The harmonization expert will be responsible for finding the golden mean between horizontal equality (same fiscal treatment regardless of the law system applicable) and respect of the two major legal systems, that is, the civil law and the common law:

Our goal is legal duality, not necessarily uniform application of a rule across Canada; it is to be achieved through respect for the nature and uniqueness of the concepts and principles of each legal system. The fact that each of the provincial legislators can adopt legal policies different from those of the other provinces and from those of Parliament provides the key justification of federalism.

[...]

³¹ Id., p. 5844.

³² 71 D.T.C. 688 (T.A.B.).

³³ Ibid. at 690-691.

In fact, if our goal is uniformity, what would be the use of our federal system and bijural culture? The need to give recognition to diversity should not however downplay the importance of demonstrating coherence and reducing conceptual and linguistic inconsistency.³⁴

While it is true that bijuralism and diversity go hand in hand, is it legitimate to believe, and can we extrapolate from the pronouncements of Justice Décaré in the *Brouillette* case, that it is incumbent on the legislator to anticipate and correct, if necessary and through explicit rules, the discrepancies of treatment resulting from the legal regimes of the different provinces? In the absence of specific rules bypassing provincial law and creating a uniform federal law, the law of each of the provinces should thus apply on a suppletive basis to complement federal legislation when it makes reference to private law notions or concepts.

1.4 The process of harmonization of fiscal legislation

On the same basis as most other federal enactments, tax legislation needs to be modernized in such a manner as to integrate the new terminology, new concepts and new institutions of the *Civil Code of Quebec*. The harmonization process in the area of tax legislation differentiates itself in two respects from that which led to the tabling of Bills C-50, S-22 and S-4. First, with regard to these three bills, it is the Minister of Justice who steered the legislative amendments within the parliamentary process. In fiscal matters, harmonization adjustments will be incorporated in the enactment on the same basis as other amendments to fiscal legislation, and responsibility for the parliamentary process will rest with the Department of Finance. This process has the benefit of being more expeditious, but with, on the other hand, more limited visibility of the harmonization changes.

Bill C-43,³⁵ tabled in the House of Commons on September 20, 2000, contains the first legislative changes resulting directly from the implementation of the *Policy on legislative bijuralism*:

- addition of “liquidator of the succession”/*liquidateur de la succession*³⁶ in both language versions;³⁷
- substitution of “joint ownership”/*propriété conjointe* for “co-ownership”/*copropriété*³⁸ in both language versions;³⁹
- addition of “hypotheque”⁴⁰ in the English-language version.⁴¹

Bill C-43 also contains amendments to legislative provisions relating to trusts and the definition of “disposition”. These amendments refer to the concept of beneficial ownership which has no

³⁴ Michel Bastarache, “Le bijuridisme au Canada” (Lunch and Learn workshop on bijuralism and judicial authority, Department of Justice, Ottawa, 4 February 2000).

³⁵ Bill C-43, *An Act to amend the Income Tax Act, the Income Tax Application Rules and certain Acts related to the Income Tax Act*, 2nd session, 36th Parl., 1999-2000 [hereinafter Bill C-43].

³⁶ See new subsection 104(1) of the *I.T.A.* and the explanatory note, published June 12, 2000, which reads as follows: “One of the amendments to the subsection is the addition of “liquidateur de succession” to the list of persons deemed to be trusts or estates pursuant to the Act. The amendment aims to ensure that the Act reflects both the Quebec civil law and the law governing the other provinces”.

³⁷ The reasons for the change are fully explained in the section dealing with terminological obsolescence.

³⁸ See new paragraph 107.4(1)(e) of the *I.T.A.*

³⁹ The reasons for the change are fully explained in the section dealing with the neutral or generic term.

⁴⁰ See new clause 108(2)(b)(iii)(D) and subsection 248(1) “disposition”, subclause (b)(i) and paragraph (l) *I.T.A.*, and the explanatory notes to these provisions.

⁴¹ The reasons for the change are fully explained under the heading *Doublet*.

equivalent in civil law. Why were these provisions not harmonized right away in Bill C-43? It is because they deal with complex notions for which there are no equivalents in civil law. They will be ultimately harmonized, but in-depth research is required before any amendments are proposed. Those harmonization problems for which solutions have been identified will be corrected in due course as new legislative proposals are introduced. These changes are clearly identified in the explanatory notes, as was the case for the harmonization changes made in the *Notice of ways-and-means*, Motion of June 5, 2000, now Bill C-43.

The second aspect which differentiates the harmonization process in fiscal matters from that which has prevailed for Bills C-50, S-22 and S-4 is that, in the fiscal area, comprehensive review of an Act such as the *I.T.A.* is not possible because of the significant number of new provisions adopted annually. The approach proposed for fiscal legislation involves reviewing the new legislation starting with budget 2000, with correlative changes to existing statutes being made gradually as scheduled.

1.5 Harmonization methodology of fiscal legislation

The first stage of the harmonization methodology involves identifying points of contact with the private law. We will not outline here the methodology set out by M^e Louise Maguire Wellington in her article in issue no 4.

Once the points of contact have been identified, the harmonization expert then proceeds to track cases of complementarity or dissociation. When a complementarity relation is identified, the harmonization expert moves to the next step which is the characterization of the problem. In presence of a relation of dissociation, which occurs when the federal law sets up its own rules of private law, there is no harmonization of the provisions where these concepts are referenced.

Subsequently, the harmonization expert characterizes the harmonization problem and proposes one or more solutions. Finally, recommendations are submitted to the Department of Finance for incorporation in legislative provisions.

PART TWO: STUDY TOPICS AND AREAS

This second Part of this article provides an overview of the topics and concepts that have been identified as irritants to the tax community in respect of the application of federal tax legislation in Quebec. It also presents problems arising from the implementation of the harmonization program in the area of fiscal legislation which require in-depth analysis.

2.1 *Propriété effective/beneficial ownership*

Federal tax legislation frequently uses the concepts of “beneficial ownership”/*propriété effective*. These concepts that originate from the common law have no equivalent in civil law, which makes problematic the application in Quebec of provisions where they are used, as is apparent in numerous doctrinal critiques on this issue.⁴² These concepts occur in a variety of contexts, including

⁴² See, among others: Jean-Pierre Bonin and Julie Lebreux, “Les fiducies et les récentes modifications législatives applicables aux fiducies personnelles (legislative proposals of December 23, 1998, and the Federal Budget, February 16, 1999)”, in *Colloque 88 — La fiducie : le véhicule fiscal du nouveau millénaire* (Montreal: APFF, 2000); Diane Bruneau, “La rétroactivité des contrats en droit civil-impact fiscal”, (1991) 39:3 Can. Tax J., at 536; Guy Fortin, “Economic Reality Versus Legal Reality; Planning for Trusts: Deemed Dispositions on January 1, 1999; Subsection 107(4.1) of the *Income Tax Act*” (1996 Tax Conference, CTF, 1997) 5:1-39; Jean-Marie Fortin, Catherine La Rosa, “Partage des biens en cas de dissolution”, in *Congrès 1996* (Montreal: APFF, 1997) at 8:1-86; Bernard

that of the transfer of property to a trust, guarantees, concepts of disposition and acquisition, international fiscal agreements, rules limiting the choice of jurisdictions, etc.

While there is a presumption that equates certain legal institutions of the civil law to beneficial ownership in paragraph 248(3)(f) of the *I.T.A.*, such expressions remain vague for Quebec civil law experts.

2.1.1 Trusts

The comments of M^e Maurice Regnier on the *Legislative proposals relating to trusts*, which were taken up in Bill C-43, reveal frustration within the tax community in Quebec with regard to the legislative fiscal provisions dealing with trusts:

Comme telles ces mêmes propositions sur les fiducies sont une initiative heureuse pour les provinces anglaises, car elles suppriment plusieurs ambiguïtés découlant de l'apport de biens à une fiducie que le cédant peut révoquer en tout temps et dont il est le seul bénéficiaire. Comme le fiduciaire est effectivement un prête-nom, on se souvient que le texte fiscal n'y voit pas de disposition et, en conséquence, une réalisation des biens.

Malheureusement, ces règles sont inapplicables aux fiducies du Québec, lesquelles diffèrent essentiellement des « *trusts* » anglais. Aussi, perpétue-t-on les concepts de « *legal ownership* » et de « *beneficial ownership* », qu'on traduit par l'expression « propriété effective », toutes des expressions qui n'ont aucun sens pour un juriste du Québec. On fait une tentative de réconciliation de cette notion de propriété effective avec celle de « *beneficial ownership* », mais elle se révèle un pur emplâtre, une pièce mal collée sur les fiducies du Québec.

Mais il y a plus. Comme condition additionnelle pour éviter toute disposition, on ajoute que le fiduciaire doit être un mandataire à l'égard du bien qu'il a reçu. Cette condition s'explique par une ambivalence reconnue par la jurisprudence anglaise sur la possibilité qu'une personne puisse cumuler les doubles attributs de fiduciaire et d'agent. Dans le cadre du *Code civil du Québec*, cette situation n'a aucun sens. Une personne peut être soit un fiduciaire, soit le mandataire d'un tiers, mais pas les deux. Les biens du mandant n'appartiennent pas à son mandataire, tandis que ceux de la fiducie ne peuvent appartenir qu'à cette dernière.

En somme, on a construit un échafaudage qui tente de codifier pour les neuf provinces du Canada la situation d'absence de disposition malgré le transfert à un « *trust* », mais qui ne tient aucunement debout pour les six millions de Québécois. Il n'est pas trop d'espérer qu'après un quart de siècle de ce régime dit de la réforme fiscale, les Finances diffèrent quelque peu leur boulimie d'amendements pour se sensibiliser aux particularités du droit québécois⁴³.

Many authors have noted the absence of equivalence in fiscal legislation between these common law and civil law concepts (especially since the coming in force of the *Civil Code of Quebec* which allows more extensive use of the trust in this province). Can a trustee act both as a trustee and agent in Quebec civil law? Is there an equivalent to the concept of "bare trust" in Quebec civil law? Is there a disposition, within the meaning of fiscal legislation, when an individual transfers assets to a trust and the transaction is subject to the civil law? Can the fundamental differences

Goulet, "Amortissement fiscal : vue d'ensemble", (1995) 17:1, *Revue de planification fiscale et successorale*, at 13-82; Luc Martel, "Mise à jour sur l'exonération du gain en capital", in *Congrès 1992* (Montreal: APFF, 1993) at 591-670; Pierre Martel, "Acquisition de contrôle d'une corporation : analyse de concept", in *Congrès 1993* (Montreal: APFF, 1994) at 8:1-31; Michael Mcauley, "Storm Clouds over Quebec Trust Law" (1994 *Journées d'études fiscales — La planification successorale*, CTF, 1995) T.A.B. 1; André Morrissette, "Fiducies", *Colloque 63 — Réforme du Code civil et son impact sur l'impôt sur le revenu* (Montreal: APFF, 1993); Maurice Régnier, "De la morosité", (1998) R.ATF.S. 20:1; Manon Thivierge, "Forclusion d'hypothèques et reprise de biens", in *Congrès 1996* (Montreal: APFF, 1997).

⁴³ Maurice RÉGNIER, "De la morosité", *Revue de planification fiscale et successorale*, volume 20, no. 1, Montreal, APFF, 1998.

between the civil law trust, based on the concept of a separate patrimony and the common law trust, based on that of dual ownership between the trustee and beneficiaries, be resolved in a fiscal context?

Despite the administrative position of the Canada Customs and Revenue Agency on these issues, which attempts to smooth over the differences between the common law provinces and Quebec, taxpayers of this province will only rejoice at the idea that solutions, reflecting the peculiarities of the civil law of the province of Quebec, are currently being analyzed and will be presented to the tax community in the coming months.

2.1.2 Security interest and the field of security

In common law, the right of ownership may be subdivided into a set of multiple rights ranging from a simple interest as a lessee to a fee simple, which is the most complete interest in a property. Thus, a person is said to own an interest in a property rather than the property per se. This principle derives from the doctrine of tenures and estates going back to the Middle Ages and the feudal system. The right of ownership can therefore be split into multiple interests and, as such, the security interest is no more than an interest in the property which exists independently from the other rights. On the contrary, in Quebec civil law there is no such fragmentation of the right of ownership for the purpose of securing the right or interest of a creditor. Although the creditor may, in specific cases, acquire a real right in the debtor's property, this does not constitute a form of right of ownership within the meaning contemplated in common law (beneficial ownership and legal ownership).

On the one hand, it is appropriate to question the approach of referring to such concepts while taking into account the two legal systems, in each language version. On the other hand, and more specifically, it is important to ensure that the mechanisms of deemed trust for the purposes of guaranteeing source deductions, provided for example in subsection 227(4) of the *I.T.A.*, are well adapted to Quebec civil law. To that end, it is necessary, among other things, to ensure that the beneficial right provided for in the French version of subsection 227(4.1) of the *I.T.A.*, in favour of Her Majesty, has as wide a scope and applies in the same way in Quebec civil law as the term beneficial ownership of Her Majesty in common law. On this score, we note that the Federal Court has recently affirmed, in a motion to oppose seizure of movables,⁴⁴ that the presumed trust of Her Majesty confers on Her Majesty a beneficial right in a trust whose patrimony is separate from that of the execution debtor. Her Majesty is deemed to hold such a beneficial right of ownership in the property despite any other guarantee, including a mortgage. In the same vein, what to say of garnishment, provided for in subsection 224(1.2) of the *I.T.A.* for the purposes of levying source deductions? Does it apply uniformly in Quebec civil law and the common law?

Moreover, federal tax legislation uses several terms to define the right or interest encumbering a property for the purpose of securing payment of a debt or performance of an obligation. Whether we think of *garantie*, *sûreté* or again the new definition of *droit en garantie*⁴⁵ proposed in subsection 123(1) of the *Excise Tax Act*, these terms are used indifferently as equivalent to the concepts of

⁴⁴ *In the matter of the Income Tax Act et al. v. Les Entreprises Forestières P.S. Inc. and Newcourt Financial Ltd.*, 20 September 2000, A.-1223-00 (F.C.T.D.).

⁴⁵ See the new definition proposed in subsection 123(1) of the *Excise Tax Act* (Bill C-24, *An Act modifying the Excise Tax and a Related Act, the Bankruptcy and Insolvency Act, the Budget Implementation Act, 1997, the Budget Implementation Act, 1998, the Budget Implementation Act, 1999, the Canada Pension Plan, the Companies' Creditors Arrangement Act, the Cultural Property Export and Import Act, the Customs Act, the Customs Tariff, the Employment Insurance Act, the Excise Act, the Income Tax Act, the Tax Court of Canada Act and the Unemployment Insurance Act*, 2nd session, 36th Parl., 1999-2000 (passed by the House of Commons and submitted to the Senate for adoption).

“security interest”, “security” or even “guarantee”.⁴⁶ The whole corpus of federal legislation would benefit not only from harmonization but also uniformization in this field.⁴⁷

2.1.3 Acquisition and disposition of property

The concepts of legal ownership and beneficial ownership are, in the common law, key to determining the time of acquisition of a property. Are these common law concepts applicable in Quebec for the purpose of determining, among other things, if a transaction subject to a leasing agreement is equivalent to an acquisition as defined in tax legislation? A number of authors have also raised the problems encountered in the application of these very concepts, not only in the context of leasing, but also of company takeovers, agreements with retroactive effect and mortgage/*hypothec* foreclosures.⁴⁸

2.2 Partnerships

Partnerships are a major fiscal vehicle of the *I.T.A.*⁴⁹ However, since the concept of partnership is not defined therein,⁵⁰ it is necessary to have recourse to the private law of the provinces to determine, in a given situation, if a partnership has been formed.⁵¹

Partnerships in the common law provinces and those in the province of Quebec are quite similar. In Quebec civil law, a partnership agreement is defined as being “by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits”.⁵²

In the common law provinces, a partnership is generally defined as being “the relation that subsists between persons carrying on a business in common with a view to profit”.⁵³

The first problem in connection with partnerships resides in the difficulty of determining if an agreement entered into by individuals earning income in common truly constitutes a partnership agreement. On the one hand, the agreement concluded by the taxpayers may prove to be a kindred legal institution such as co-ownership, joint possession or nominal expenditure company. In the context of Canadian bijuralism, this problem is exacerbated by the existence of entities similar to the partnership such as a joint venture, a consortium, a Nova Scotia Unlimited Liability Corporation,⁵⁴ etc. The label might also prove problematic in the context of the international tax system when taxpayers use hybrid entities, hailing from foreign legal institutions akin to partnership.

⁴⁶ For example: sections 122.61(4); 223(5); 13(21.2)(c); 74.5(7); 79(3); 94(6); 96(2.2)(f); 224(1.3) *I.T.A.*

⁴⁷ See *The Royal Bank of Canada v. The Queen*, [1999] 2818 E.T.C.

⁴⁸ *Supra* note 42.

⁴⁹ See sections 96 ff of the *I.T.A.*

⁵⁰ Subsection 102(1) of the *I.T.A.* defines the concept of “Canadian partnership” without however actually providing a definition of “partnership”.

⁵¹ Revenue Canada, Interpretation Bulletin IT-90, “What is partnership?” (9 February 1973); *M.N.R. v. Strauss*, [1960] C.T.C. 86 (Ex. Ct.); *Cole v. M.N.R.* [1964] C.T.C. 219 (Ex. Ct.); *Northern Sales (1963) Ltd. v. M.N.R.*, [1973] C.T.C. 239 (F.C.); *Derby Development Corp. v. M.N.R.*, [1964] Ex. C.R. 78; *Graves v. Her Majesty the Queen*, 90 D.T.C. 6300 (F.C.T.D.).

⁵² See art. 2186 C.C.Q.

⁵³ *Partnerships Act*, R.S.O. 1990, c. P-5, s. 2.

⁵⁴ Under the *Nova Scotia Companies Act*, R.S.N.S. 1989, c. 81, it is possible to set up a joint stock company.

The second problem relating to partnerships has to do with the issue of determining if the partnership benefits from a legal personality separate from that of its members. For the purposes of income calculation, paragraph 96(1)(a) of the *I.T.A.* specifically provides that a partnership is deemed to be “a distinct person residing in Canada”. On the other hand, for the other purposes of the Act, except as otherwise specified, a partnership does not have legal personality. The partnership is a vehicle for the partners and, as such, is exempted from filing tax returns, even though it is expressly subject to other obligations of compliance and filing of certain returns.

The treatment of a partnership not as a taxable entity, but as a vehicle, arises from the fact that in provincial private law the legal personality of a partnership is not generally recognized. Ms. Prieur noted in this connection:

La volonté législative [de ne pas reconnaître la personnalité juridique à la société de personnes] est appuyée sur les règles civiles qui, tant au niveau de la common law que du droit civil québécois, considèrent qu'une société de personnes n'est pas une personne morale distincte mais un simple véhicule intermédiaire qui naît sans aucune procédure formelle mais selon les agissements des parties en cause.⁵⁵

On the other hand, it goes without saying that a general conclusion of this nature does not have unanimous support, especially since the coming in force of the *Civil Code of Quebec*. In fact, the existence of the legal personality of a partnership is very much disputed in doctrine and case law.

In the matter of *Ville de Québec v. Cie d'immeubles Allard Ltée*,⁵⁶ the Quebec Court of Appeal has recently ruled that a partnership does not have a patrimony separate from that of its partners. M^e Marquette noted in this connection:

Si les conséquences de cette décision, notamment en matière fiscale [...], n'ont pas manqué d'alerter les juristes, c'est que cette question n'a pas seulement un intérêt théorique [...] mais également des incidences pratiques sur les modalités de fonctionnement des sociétés.⁵⁷

In connection with this decision he also noted that:

[Cette affaire] aura un impact significatif sur le plan fiscal. En effet, si les associés sont présumés détenir directement *en indivis* les biens de la société de personnes, que faire des dispositions fiscales relatives aux transferts d'actifs entre les associés et la société de personnes? Ainsi, la caractérisation civile des attributs de la société de personnes a un impact significatif sur la fiscalité.⁵⁸

The judgment rendered in *Fournier v. Sous-ministre du Revenu du Québec*⁵⁹ highlights, in the income tax environment, the problem of whether or not a partnership has legal personality. In this matter, the Quebec Ministry of Revenue had sent a notice of assessment to the law firm “Fournier Demers & associés”. The partners of the firm then challenged the notice of assessment on the ground that it had not been sent to the appropriate party, a partnership not being a person within the meaning of the Act. The Ministry dismissed the legal argument put forward by the partners of the law

⁵⁵ Nicole Prieur, “Règles fiscales affectant les sociétés de personnes”, (1998) 20:2 *Revue de planification fiscale et successorale* 305-409, at 314.

⁵⁶ [1996] R.J.Q. 1566 (C.A.).

⁵⁷ Charles P. Marquette, “Les sociétés de personnes — Aspects civils” (1998), vol. 20, no. 2, *Revue de planification fiscale et financière*, CD-ROM: La Collection APFF (North York: CCH, 2000).

⁵⁸ *Ibid.*

⁵⁹ (12 December 1998) 450-02-000281-892, REBJ 98-11410 (Côté J.C.Q.).

firm, ruling that the partnership constitutes a body corporate separate from the partners. The Quebec Court, relying on the judgment rendered by the Quebec Court of Appeal in the case *Ville de Québec v. Cie d'immeubles Allard Ltée*, concluded that, under the authority of the *Civil Code of Lower Canada*, the partnership did not have legal personality and, therefore, could not be a taxpayer as defined in the Act. The Court however noted: [translation] "It should be underscored that the Court applies the provisions of the *Civil Code of Lower Canada*, and it is within the realm of belief that the situation would be different under the authority of the *Civil Code of Quebec*."⁶⁰

Professor Charlaïne Bouchard⁶¹ of the Law Faculty of Laval University moreover notes that a partnership is endowed with a separate patrimony.

If the argument claiming that a partnership has a patrimony separate from its members were to be ultimately confirmed by the Courts, it might be possible to claim that a Quebec-based partnership is a person and therefore a taxpayer⁶² for all the purposes of the Act, which would mark a considerable change in the application of the *I.T.A.* to partnerships. Moreover, this conclusion would lead to fundamental divergences between the treatment of partnerships in the common law provinces, where they are always devoid of a separate legal personality, and partnerships in Quebec.

So as to make the use of partnerships, as tax vehicles, less reliant on the uncertain evolution of doctrine and case law, it might be desirable to extend the presumption contained in paragraph 96(1)(a), relative to the separate personality of a partnership, to all the purposes of the Act and not to limit it to income calculation. Ms. Prieur noted in this respect:

La première présomption consiste à considérer la société de personnes comme si elle était une personne distincte. Aurait-il été plus efficace de l'inscrire immédiatement comme une « personne » à la définition du paragraphe 248(1) *L.I.R.* et d'éviter ces présomptions?⁶³

2.3 Right or interest in property/*droit dans ou sur un bien*

The problems regarding the concepts of real and personal property (common law) and of movables and immovables (civil law) will be studied in depth with a view to determining the similarities and differences between the two major legal systems. Adjustments might be made to the provisions referring to these concepts so that the said provisions have a similar scope across Canada, to the extent that is possible.

Moreover, in common law there are differences between the terms "right in property" and "interests in property". In French common law, the corresponding concepts are *droit dans ou sur un bien* and *intérêt dans un bien*. Yet only "rights"/*droits* are recognized in the civil law, not *intérêts* "interests"/*intérêts*. The question is how to harmonize the provisions that refer to the above-mentioned common law concepts without unduly expanding them or making them asymmetric? To highlight the problem, let us take the example of paragraph 85(1.1)(f) of the *I.T.A.* and apply to it some of the solutions recommended in Bill C-50 and S-4:

⁶⁰ *Ibid.*, at 2.

⁶¹ Charlaïne Bouchard, "Le fondement du patrimoine autonome des sociétés de personnes", (1996), *Cours de perfectionnement du Notariat*, no. 2, at 31-53.

⁶² See definition of "taxpayer" in subsection 248(1) of the *I.T.A.*

⁶³ Prieur, *supra* note 56.

85(1.1) Definition of “eligible property”	85(1.1) Définition de « bien admissible »
For the purposes of subsection (1), “eligible property” means	Pour l'application du paragraphe (1), « bien admissible » s'entend :
(f) an inventory (other than real property <u>or an immovable</u> , an interest <u>or a right</u> in real property <u>in an immovable</u> or an option in respect of real property <u>or an immovable</u>);	f) d'un bien à porter à l'inventaire, à l'exception d'un bien immeuble <u>ou bien réel</u> , d'un droit <u>ou d'un intérêt</u> sur un tel bien et d'une option y afférente;

The addition to the French-language version of the common law concepts *bien réel* and *intérêt sur un bien réel*, and of the civil law ones of “immovable” and “right in an immovable” to the English-language version, should be made in such a way as to prevent the “rights”/*droits*, as defined in the common law, from being referred to since only the “interests”/*intérêts* are concerned in the provision. The addition of “right in real property” would be manifestly problematic, since it would extend the scope of the provision to possibly include the term “licence”.

2.4 “Leasehold interest”/*Tenure à bail*

Tax legislation draws on the concept of “leasehold interest”/*tenure à bail* in a variety of contexts, namely in the environment of “principal residence” and “capital cost allowance”. This concept is unknown in Quebec civil law, since it is specific to the common law. The harmonization of provisions referring to these concepts will allay the uncertainty surrounding their application in the civil law context, an uncertainty which persists despite the efforts of the Canada Customs and Revenue Agency to define the concept.⁶⁴

Several solutions are available to the harmonization expert to correct this unijuralism. It might be possible to find a concept in Quebec civil law equivalent to that of *tenure à bail*. The *bail* of the *Civil Code of Quebec* is definitely one of the options to consider. It will be necessary, however, to examine whether the ownership right conferred by the common law “leasehold interest” is key to the application of tax law, in which case any comparison with the civil law *bail* will prove impossible. Another approach to solving the problem would be to adopt a definition that might be given to the concept of *tenure à bail*. An exact characterization of the legal reality that lies behind this common law expression might help the Quebec taxpayer to delimit its scope.

Another problem which the harmonization team will address is that of equating the term “emphyteutic lease”/*bail emphytéotique* (now emphytéose) to “leasehold interest”/*tenure à bail*. This position is articulated in subsection 4 of Interpretation Bulletin IT-324⁶⁵ and complies with the Federal Court of Appeal judgment in the case *Rudnikoff v. Queen*, 75 D.T.C. 5008. On page 5011, the Chief Judge of the Federal Court of Appeal expressed the following opinion:

⁶⁴ Revenue Canada, *Interpretation Bulletin* IT-464R “CCA—Leasehold interests” (25 October 1985), par. 3: “A leasehold interest is the interest of a tenant in any leased tangible property. A tenant who leases property acquires a leasehold interest in that property regardless of whether or not any capital cost is incurred in respect of that interest. However, a depreciable property is not considered to have been acquired until a capital cost has been incurred in respect of that property. It is necessary to determine with regard to certain apparent leasing agreements, whether these agreements are in substance leasing agreements or agreements either for the purchase of the property or for loans. ...”

⁶⁵ Revenue Canada, *Interpretation Bulletin* IT-324 “Capital cost allowance—Emphyteutic lease” (25 May 1976).

“There is, nevertheless, a distinction between ownership as defined in art. 406 cc. Namely: “the right of enjoying and disposing of things in the most absolute manner...” and “ownership” as given to an emphyteutic lessee, just as there is a difference between the rights of an ordinary lessee and an emphyteutic lessee. In the latter comparison, however, there is one common factor and that is the existence of a lease. In my opinion this common factor is sufficient to bring the emphyteutic lease within the term “leasehold interest” as used in the Regulations and I share this view with the Trial Judge.”

However, this opinion does not appear to be shared by all civil law experts. In a text dealing with “emphyteusis”/*emphytéose*⁶⁶, M^e François Frenette, of the Law Faculty of Laval University, argues that [translation] “the relation between “emphyteusis”/*emphytéose* and “leasing”/*louage* is at most verbal and is inadequate to veil the facet of reality ingrained in the right of emphyteusis”. In this respect, it will be necessary, therefore, to determine if equating emphyteusis with *tenure à bail* is consonant with the concepts found in the *Civil Code of Quebec*. In the affirmative, so as to impart a definite attribute to this administrative and jurisprudential rule, it might be possible to incorporate such equation in the *I.T.A.*

2.5 Implicit dissociation

The *I.T.A.* provides the standard example of a federal public law act that is superposed on to private law relations. As mentioned several times in the foregoing, when a provision of federal law draws on a private law concept without defining it or imparting to it a specific meaning, it is necessary to have recourse to the private law in force in the particular province. The federal government has nevertheless the power to create and define legal concepts or institutions regardless of their usual meaning in civil law or common law. Admittedly, the principle of complementarity of the civil law, when the concepts are not defined in fiscal legislation, is recognized in tax case law⁶⁷. Nevertheless, certain concepts, including those of “employee”/*employé*, “independent contractor”/*travailleur autonome*, “residence”/*résidence* or “charity”/*organisme de bienfaisance*, while not defined in the Act, are systematically interpreted and applied in Quebec in the light of the common law concepts established by the federal courts. The principles derived from the judgments in *Wiebe Door Services Ltd. v. D.N.R.*⁶⁸ (characterization of a worker), *Thomson v. D.N.R.*⁶⁹ (residence) or *Pemsel v. Special Commissioners of Income Tax*⁷⁰ (charity) are now applicable uniformly across Canada, although they refer to private law concepts that sometimes vary substantially from the civil law to the common law.

This particular situation requires thinking on the system used as a backdrop to the federal tax legislation where certain private law concepts are concerned. Is there, in some specific cases, an autonomous federal tax law based on the common law that might forthwith discard the peculiarities of provincial law and especially that of Quebec civil law? In the affirmative, how are we to differentiate the concepts or principles in respect of which there is dissociation (explicit or implicit) from those for which there is complementarity? Is it necessary, in these particular cases, to provide for specific interpretation rules or even to define certain concepts in the Act?

⁶⁶ François Frenette, *L'emphytéose*, in *Chambre des Notaires du Québec, Répertoire de droit Nouvelle Série*, Volume 1, Biens — Doctrine — Document 1, at 31.

⁶⁷ See, among others, *Queen v. Lagueux & Frère Inc.*, 74 D.T.C. 6569, at 6572 (F.C.T.D.); *Kingsdale Securities*, *supra* note 7 at 6692; *Olympia and York*, *supra* note 8 at 6187.

⁶⁸ 87 D.T.C. 5026 (F.C.A.).

⁶⁹ [1946] C.T.C. 51 (C.S.C.).

⁷⁰ [1891] A.C. 531 (H.L.).

2.6 The concepts of *mandataire* and “agent”

Federal tax laws frequently refer to the concept of *mandataire* in the French version and that of “agent” in the English version. In common law and civil law, these concepts cover cases where a person acts on behalf of another. Yet, in each of the legal systems, these terms have a special scope. Thus, in civil law, the mandate is an institution that has a specific framework in articles 2130 to 2185 of the *Civil Code of Quebec*, while the common law concept of “agency” seems to have a wider scope or, at least, does not seem the most appropriate equivalent.

In fact, when a federal act, like the *I.T.A.*, pairs the terms “agent”/*mandataire*, the four legal audiences in Canada are likely to interpret these concepts in divergent ways, with all the consequences that might result on the fiscal level. Francophone civil law experts will refer to the *Civil Code* institution, while their anglophone counterparts will need more often than not to interpret the term “agent” which, although used in the *Civil Code*, does not in fact translate the concept *mandataire*. The common law audience, for its part, will refer more to the *agency* relation or even to the generic and current meaning of the term “agent”.

These studies will attempt to determine if precisions are required in this area. The reviews and recommendations on this issue will have a focus not only on domestic law, but also on the international level where these same expressions are found in many fiscal agreements.

2.7 Harmonization and international law

The fiscal agreements signed between Canada and other countries contain references to a number of private law concepts, including *employé*, *agent*, *mandataire*, *biens immobiliers*, “immovable property”. According to what legal system are these terms and expressions to be interpreted? For example, when it is necessary to characterize a resident of Canada and Quebec as an employee or an agent enjoying independent status, what legal rules are applicable? What happens in the case of a resident of another province?

In a similar vein, a resident of Canada (as defined in fiscal law) may choose to put in place an entity, under the legislation of another country, which is unknown in Canadian and provincial legislation. For the purpose of determining the fiscal implications of transactions involving a foreign or unknown entity or the fiscal treatment of income therefrom, it is appropriate first and foremost to qualify the intents of Canadian fiscal law. What legal system should serve as a basis for qualifying foreign entities? Quebec civil law? Common law? What factors are considered in choosing the particular legal system?

Finally, the process of harmonization of tax legislation with the civil law of the province of Quebec will impact not only on tax laws but also on the agreements signed between Canada and other countries. Are there changes or precisions to be made to the *Income Tax Conventions Interpretation Act* so as to ensure its effective application in the framework of harmonization of federal tax legislation? Does the adoption, in internal tax legislation, of terminology that is different from that used in fiscal agreements have an impact?

2.8 Licence

Federal tax laws, more specifically those relating to commodity taxes, refer to the concept of “licence” but, we may ask, what is a “licence”? In common law the term “licence” is generally defined

as an act giving rise to a right of use without however creating a right of exclusive ownership nor an interest in the property:

A licence is in the nature of a right or privilege to enter upon and use the grantor's land in a certain manner or for a specified purpose. It is a personal right between the licensor and licensee and does not create any estate or interest in the land.⁷¹

Let us take, for example, paragraph 25(f) of Schedule V of the Excise Tax Act, which lists exempt supplies and reads as follows:

The supply of immovables by a public service agency (except a financial institution or government), excluding the following items:

(f) immovables, excluding temporary housing, supplied either by lease for a period of at least one month, or by **licence**, where the supply is made as part of the operation of a business by the agency;

An understanding of the scope of the concept of licence and of the inherent differences that make it distinct from a lease proves to be very important in the circumstances surrounding this provision. In the case of a lease for a term of one month or more, the supply is exempt, whereas it is not the case where the legal instrument is characterized more as a licence, whatever the duration. In the province of Quebec, when a public services agency grants such right of use to Quebec taxpayers, is the supply of service exempt or taxable under the *Excise Tax Act*? This issue has been studied by *Revenu Québec*, in its capacity as administrator of the *Excise Tax Act* in Quebec.⁷²

The issue submitted to the tax authorities was to the effect of knowing whether the supply by a marina of seasonal mooring rights—use of a mooring pontoon for the season—was taxable (lease of less than a month) or tax exempt (licence or lease of one month and more). From the outset, *Revenu Québec* dismissed the possibility in Quebec of supply by licence of an immovable, this concept being non-existent there; the *Revenu Québec* analysis consequently dealt with lease alone. It concluded that the mooring pontoon was supplied under a lease of over 30 days, so that the supply was tax exempt. The relevant excerpt from the letter of interpretation is reproduced below:

[Translation] In civil law, contrarily to what prevails in common law, the fact that use of a property is granted exclusively or not changes nothing to the qualification of the agreement. The contractual terms and obligations may differ, but the agreement will continue to qualify as a lease agreement.

Based on the facts submitted, we are of the opinion that seasonal use of a mooring pontoon constitutes supply by lease of an immovable property for a period of over one month, which supply is not covered under the exception in paragraph (f), section 25, of part VI of schedule V of the federal Act. Consequently, such supply is exempt unless it is covered under one or the other of the remaining exceptions listed in section 25, part VI, schedule V of the federal Act.

The above example clearly shows that harmonization of the concept of *licence* is essential if the legislator wants to restore some equity between Quebec taxpayers and those of the common law provinces.

Conclusion

⁷¹ Canadian Bar Association, *Dictionnaire de la Common Law : Droit des biens et droit successoral/Canadian Common Law Dictionary: Law of Property and Estates* (Cowansville, Que.: Yvon Blais, 1997).

⁷² Interprétation technique 98-0102933 — Fourniture de droits d'amarrage saisonniers, online: *CCH Tax Works* (29 September 1998).

The program for the harmonization of fiscal legislation is taking off. One of its key objectives is to bring solutions to the more acute problems arising from the interaction between fiscal legislation and the civil law of the province of Quebec. In response to the comments of many authors in the province of Quebec, we may confirm that the Departments of Justice and Finance Canada, as well as the Canada Customs and Revenue Agency, are receptive to the peculiarities of the law of the province of Quebec and will work in consultation with the fiscal and university communities to adapt tax legislation to the Francophone and anglophone civilian reality of Quebec.

The Department of Justice has drawn up, in the light of recent doctrine and jurisprudence, a list of the harmonization problems that require special attention. Practitioners, professors and tax experts are encouraged to submit to the Department of Justice, through the APFF committee created for this purpose, any interaction problem between the civil law of the province of Quebec and federal tax legislation. The approaches to the solution of the various problems will be discussed in consultation with all the stakeholders of the tax community in the framework of the Symposium on the Harmonization of Fiscal Legislation to be held in the autumn of 2001.