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# The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism

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## ABSTRACT

In order to apply the federal Income Tax Act (ITA), Canadian courts must first characterize the transactions and amounts to which different tax consequences apply. For this purpose, they have generally followed the rule laid down in the *Duke of Westminster* case that “the legal rights and obligations of the parties” are to be “ascertained upon ordinary legal principles,” notwithstanding their economic substance or commercial reality.

In Canada, the Constitution Act, 1867 allocates general jurisdiction over these private law rights and obligations to provincial governments under their exclusive authority to make laws in relation to “Property and Civil Rights.” Pursuant to this constitutional division of powers, private law is generally governed by the Civil Code in Quebec and the common law and applicable provincial statutes in the rest of the country. In this respect, Canada may be described as a “bijural” country in which two legal systems coexist within a single state. Correspondingly, “bijuralism” refers both to the coexistence of two legal traditions within a single state and to the sharing of values and traditions associated with these two legal systems.

Notwithstanding exclusive provincial jurisdiction over property and civil rights, the federal government may adopt independent private law rules when legislating in areas within its own jurisdiction. As the Constitution Act, 1867 authorizes the federal government to raise revenues “by any Mode or System of Taxation,” Parliament may for this purpose rely on the legal rights and obligations defined by the law of the relevant province or enact specific private law rules that differ from provincial private law.

Where federal legislation relies on the private law of the applicable province to complete or supplement federal law, the relationship between the federal statute and this private law is characterized as one of “complementarity.” Where federal legislation disregards the private law of the relevant province, relying on other legal concepts or rules adopted at the federal level, a relationship of “dissociation” exists between the federal statute and provincial private law. Although relationships between federal statutes and provincial private law may be explicit where a federal statute expressly

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incorporates or derogates from provincial private law, these relationships are often implicit and judicially established, and therefore are a matter of statutory interpretation.

This article examines the relationship between the ITA and provincial private law, evaluating judicial decisions and statutory provisions according to the goals of Canadian bijuralism expressed in the policy on legislative bijuralism adopted by the federal Department of Justice in June 1995, the preamble to the first Federal Law-Civil Law Harmonization Act, No. 1, and new sections 8.1 and 8.2 of the federal Interpretation Act.

The first part of the article reviews notable cases in which Canadian courts have recognized a relationship of complementarity between the ITA and provincial private law, looking at cases arising in Quebec in which courts have relied on the civil law, and cases arising in the rest of Canada in which courts have looked to the common law and applicable provincial statutes.

The second part of the article considers cases in which Canadian courts have dissociated the interpretation of the ITA from provincial law, examining key legal concepts that have been interpreted with little or no regard for the private law of the applicable province, such as the concepts of a gift and a charitable purpose or activity, the distinction between an employee and an independent contractor, the meaning of an individual's residence, and the concepts of an acquisition and a disposition of property.

The third part of the article explains the goals of Canadian bijuralism set forth in the Department of Justice policy on legislative bijuralism and recent legislative initiatives, and the implications of these developments for the interpretation and amendment of the ITA. With respect to statutory interpretation, it is argued, new section 8.1 of the Interpretation Act mandates a reconsideration of several cases in which courts have dissociated the interpretation of the ITA from provincial private law. Where complementarity with provincial private law produces unacceptable differences in tax consequences among different provinces, however, the article proposes specific legislative amendments.

**KEYWORDS:** BIJURALISM ■ TAX LAW ■ STATUTORY INTERPRETATION ■ CASES ■ BILINGUALISM ■ BICULTURALISM

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## INTRODUCTION

In order to apply the federal Income Tax Act,<sup>1</sup> one must first characterize the transactions and amounts to which different tax consequences apply. As a general rule, Canadian courts have followed English decisions holding that these transactions and amounts are to be understood according to “the legal rights and obligations of the parties ascertained upon ordinary legal principles,” notwithstanding their economic substance or commercial reality.<sup>2</sup> As the Supreme Court of Canada emphasized in a recent decision,

this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer’s *bona fide* relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer’s legal relationships must be respected in tax cases.<sup>3</sup>

As a result, it follows, applications of the ITA typically involve both the public law of the statute itself and the private law by which a taxpayer’s *bona fide* legal relationships are defined.<sup>4</sup>

In Canada, the Constitution Act, 1867 allocates general jurisdiction over private law to provincial governments under their exclusive authority to make laws in relation to “Property and Civil Rights.”<sup>5</sup> As a general rule, the private law of Quebec is governed by the Civil Code,<sup>6</sup> while that in the other provinces (“the common law provinces”) is governed by both the common law and applicable provincial statutes.<sup>7</sup> In this respect, Canada may be described as a “bijural” country,

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1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the ITA”).

2 *Inland Revenue Commissioners v. Westminster (Duke)*, [1936] AC 1, at 20-21 (HL), per Lord Tomlin. This general principle is subject to specific anti-avoidance rules such as those in ITA subsections 6(3) and 16(1) and section 68, which may apply “irrespective of . . . the form or legal effect” of a contract or agreement, and to the general anti-avoidance rule (GAAR) in ITA section 245, which permits an assessment of tax consequences to deny a tax benefit that would otherwise result from transactions and arrangements entered into primarily for the purpose of obtaining the tax benefit.

3 *Shell Canada Limited v. The Queen et al.*, 99 DTC 5669; [1999] 4 CTC 313, at paragraph 39 (SCC), per McLachlin J.

4 See, for example, Alban Garon, “The Civil Law’s Place in Federal Tax Legislation,” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism. Collection of Studies in Canadian Tax Law* (Montreal: Association de planification fiscale et financière, 2002), 1:1-8, at 1:2: “Federal tax legislation is part of public law. . . . However, that legislation deals with private law concepts and relationships.”

5 The Constitution Act, 1867, 30 & 31 Vict., c. 3, as amended, section 92(13) (formerly the British North America Act).

6 Civil Code of Québec, SQ 1991, c. 64, as amended (herein referred to as “the CCQ”).

7 For a brief discussion of the characteristics and context of these two legal systems in Canada, see Marie-Claude Gervais and Marie-France Séguin, “Some Thoughts on Bijuralism in Canada and the World,” in *The Harmonization of Federal Legislation with the Civil Law of the*

in which two legal systems coexist within a single state.<sup>8</sup> Correspondingly, “bijuralism” may be defined narrowly as “the coexistence of two legal traditions within a single state,”<sup>9</sup> and more broadly as “the sharing of values and traditions” associated with each of the two legal systems.<sup>10</sup>

Notwithstanding exclusive provincial jurisdiction over property and civil rights, it is generally recognized that the federal government may “enact rules of private law for its own purposes when legislating in areas within its jurisdiction”<sup>11</sup>—which rules are paramount to the extent of any inconsistency with provincial law.<sup>12</sup> As the Constitution Act, 1867 permits the federal government to raise revenues “by any Mode or System of Taxation,”<sup>13</sup> it thus follows that Parliament may, for this purpose, explicitly adopt or implicitly rely upon the private law of different provinces or “enact specific rules that are incompatible with the private law rules of one or more or all of the provinces.”<sup>14</sup> Where federal legislation relies on a term or concept specific to one of Canada’s two main legal traditions, the legislation may be described as “unijural.”<sup>15</sup> Alternatively, federal rules may draw upon civil and common law to create a mixed system of law,<sup>16</sup> or introduce autonomous terms and concepts that transcend both legal systems.<sup>17</sup>

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*Province of Quebec and Canadian Bijuralism. Second Publication* (Ottawa: Department of Justice, 2001), booklet 2, 3-6.

8 Ibid., at 1. Given the presence of aboriginal law as well as differences between common law provinces, the authors note that in the Canadian context it might be more appropriate to speak of “plurijuralism” or “legal pluralism” rather than bijuralism.

9 Ibid.

10 Michel Bastarache, “Bijuralism in Canada,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 7, booklet 1, 19-26, at 25. See also France Allard, “The Supreme Court of Canada and Its Impact on the Expression of Bijuralism,” *ibid.*, booklet 3, 1-25, at 2: “[B]ijuralism is based on a dialogue between cultures, a mutual recognition of the other, a complementary relationship between the rules specific to each one and their interpretation with respect to the other.”

11 Jean-Maurice Brisson and André 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, 1999), 217-64, at 224. For a brief discussion of this ancillary power, see Catherine Valcke, “Quebec Civil Law and Canadian Federalism” (1996) vol. 21, no. 1 *Yale Journal of International Law* 67-121, at 98-101.

12 A good example is section 427 of the federal Bank Act, SC 1991, c. 46 (formerly section 178 of the Bank Act, RSC 1985, c. B-1), which establishes a security interest that corresponds neither to common law nor to civil law concepts. See R.A. Macdonald, “Security Under Section 178 of the Bank Act: A Civil Law Analysis” (1983) vol. 43, no. 5 *Revue du barreau* 1007-1104.

13 Constitution Act, 1867, section 91, class 3.

14 Brisson and Morel, supra note 11, at 223.

15 Louise Maguire Wellington, “Bijuralism in Canada: Harmonization Methodology and Terminology,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 7, booklet 4, 10.

16 See the discussion of “mixed law” in Gervais and Séguin, supra note 7, at 7.

17 Brisson and Morel, supra note 11, at 237.

Where federal legislation adopts or relies upon the private law of the relevant province in order to complete or supplement federal law, a relationship of “complementarity” exists between the federal statute and this private law.<sup>18</sup> On the other hand, where federal legislation disregards the private law of the applicable province, relying on other legal concepts or independent rules enacted at the federal level, a relationship of “dissociation” exists between the federal law and the province’s private law.<sup>19</sup> While a relationship of complementarity or dissociation may be explicit where a statute either expressly incorporates or specifically derogates from provincial private law,<sup>20</sup> these relationships are often implicit and judicially established.<sup>21</sup> In these circumstances, therefore, the relationship between federal legislation and provincial private law is ultimately a matter of statutory interpretation.

This article examines the relationship between the ITA and provincial private law, evaluating judicial decisions and statutory provisions in light of the goals of Canadian bijuralism, as expressed in the policy on legislative bijuralism adopted by the Department of Justice in June 1995,<sup>22</sup> the preamble to the first Federal Law-Civil Law Harmonization Act, No.1,<sup>23</sup> and recent amendments to the federal Interpretation Act.<sup>24</sup> The first part of the article reviews cases in which Canadian courts have recognized a relationship of complementarity between the ITA and provincial private law, relying on the latter to determine the application of the former. The second part of the article examines cases in which Canadian courts have dissociated the ITA from provincial private law, assessing tax consequences with little or no regard for the private law of the applicable province. The third part of the article reviews the origins and aims of Canadian bijuralism and its implications for the interpretation and amendment of the ITA. The fourth and last part offers conclusions and recommendations.

## COMPLEMENTARITY

Since the application of the ITA depends on “legal rights and obligations . . . ascertained upon ordinary legal principles,”<sup>25</sup> which are generally defined by provincial private law, it is not surprising that Canadian courts and commentators have

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18 Maguire Wellington, *supra* note 15, at 4.

19 *Ibid.*, at 5.

20 See Brisson and Morel, *supra* note 11, at 219-25.

21 See *ibid.*, at 228-39, and the brief discussion of “implicit dissociation” in Marc Cuerrier, “The Harmonization of Federal Tax Legislation,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, *supra* note 7, booklet 7, 18-19.

22 Excerpted in Maguire Wellington, *supra* note 15, at 22-23.

23 SC 2001, c. 4.

24 RSC 1985, c. I-21, as amended, sections 8.1 and 8.2 (added by SC 2001, c. 4, section 8, proclaimed in force June 1, 2001).

25 *Duke of Westminster*, *supra* note 2, at 20-21.

often affirmed a principle of complementarity between this statute and provincial private law. This part of the article surveys a number of income tax cases in which this principle has been expressed or applied, examining cases in which courts have relied on the civil law of Quebec as well as those relying on judge-made common law and/or statutory rules in other provinces.

### Complementarity with the Civil Law of Quebec

One of the earliest cases to affirm a principle of complementarity between the ITA and the civil law of Quebec is *Perron v. MNR*.<sup>26</sup> *Perron* involved a taxpayer who sold a hotel in 1956, but repossessed the property under a resolutive clause of the contract when the purchaser failed to make payments and made an assignment under the Bankruptcy Act. When the minister imposed recaptured depreciation on a disposition of the hotel, the taxpayer argued that the resolutive clause effectively dissolved the contract, thereby nullifying the disposition. On appeal, the Tax Appeal Board held that the tax issue turned on the legal relationships established by the private law of Quebec:

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. . . .

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.<sup>27</sup>

Citing article 1088 of the Civil Code of Lower Canada,<sup>28</sup> which declared that “[a] resolutive condition, when accomplished, . . . obliges each party to restore what he has received, and replaces things in the same state as if the contract had not existed,” the board allowed the taxpayer’s appeal.

Another expression of this principle appears in *The Queen v. Lagueux & Frères Inc.*,<sup>29</sup> in which the taxpayer sought to deduct rental payments on logging equipment that it had leased under contracts including an option to purchase the equipment on favourable terms at the end of the leases. Upholding the minister’s assessment, which disallowed the deductions on the basis that the transactions were properly characterized as sales, not leases, the court emphasized that this

26 60 DTC 554; (1960), 25 Tax ABC 166.

27 *Ibid.*, at 556-57; 176-77.

28 LC 1865, c. 41, entitled An Act Respecting the Civil Code of Lower Canada (herein referred to as “the CCLC”).

29 74 DTC 6569; [1974] CTC 687 (FCTD).

result depended not on statutory or judicial anti-avoidance rules favouring substance over form, but on the actual legal relationships established under the civil law. According to Décarry J,

the nature of the rights and obligations created by the contracts concluded by the defendant must be arrived at by reference to the provisions of the *Civil Code*.

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 fiscal consequences on those contracts. Without a contract, without a law and an obligation, there can be no fiscal 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.<sup>30</sup>

Relying on CCLC article 1013, which gave priority to the “common intention” of the parties over the contract’s “literal meaning,” the court characterized the agreements as “conditional sales, on a suspensive condition, and not leases.”<sup>31</sup>

Yet another expression of complementarity in the context of Quebec’s civil law system can be found in *Olympia & York Developments Ltd. v. The Queen*.<sup>32</sup> In that case, the taxpayer sought during the years 1970 to 1973 to deduct capital cost allowance on an apartment complex, possession of which it had conveyed to a purchaser in 1969 pursuant to a sales agreement delaying transfer of title until 1974. Addressing the minister’s argument that the taxpayer had sold the building in 1969 (whereupon it could no longer deduct capital cost allowance), the court explained that this issue must be decided according to the civil law of Quebec:

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. . . . Since there is no special definition of the word “sale” or any special meaning 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.<sup>33</sup>

Moreover, the court explained, for this purpose English common law cases on the meaning of the word “sale” were not relevant:

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30 Ibid., at 6572; 691.

31 Ibid., at 6573; 693.

32 80 DTC 6184; [1980] CTC 265 (FCTD).

33 Ibid., at 6187; 269.

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 exists 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.<sup>34</sup>

Although ultimately dismissing the taxpayer's appeal on the basis that the 1969 transaction amounted to a "disposition" within the meaning of the ITA,<sup>35</sup> the court rejected the minister's argument that the property was "sold" in 1969. On the contrary, Addy J concluded, on the basis of the applicable civil law, "if the purchaser and the unpaid vendor have agreed that, until payment a sale would not have taken place between them, there is no sale at law but merely an executory contract that at some future date upon payment being received a sale will then take place."<sup>36</sup>

While each of these cases concerned private law governing contractual relationships, others applying a principle of complementarity between the ITA and the civil law of Quebec have involved the law of property. In *Sura v. MNR*,<sup>37</sup> for example, where the taxpayer argued that the community of property regime in the CCLC permitted him to split his salary and rental income with his wife, the Supreme Court of Canada relied on the civil law itself, which recognized the husband as the paramount administrator of the community's property, to conclude that the taxpayer alone was taxable on the income of the community.<sup>38</sup> According to the court,

if it is true, as I believe it to be, that the wife is co-owner of the community property, it is also true that she does not have the exercise of the plenitude of the rights which ownership normally confers (406 C.C.). Her right is formless, dismembered, inferior even to the right of one who has bare ownership of property in which another has a life interest. Her right is stagnant, nearly sterile, because it is unproductive for the duration of the life of the husband. It is only at the dissolution of the community that the wife is vested with the plenitude of her rights of ownership, which brings with it the *jus utendi, fruendi et abutendi*, of which her married status has temporarily deprived her.<sup>39</sup>

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34 Ibid., at 6190; 272-73.

35 Ibid., at 6193; 277-78. This aspect of the decision, which incorporated common law concepts in order to determine the concept of a disposition for tax purposes, is examined below in the context of dissociation, under the heading "Acquisition and Disposition of Property."

36 Supra note 32, at 6192; 276.

37 62 DTC 1005; [1962] CTC 1 (SCC).

38 In addition to the civil law, the court relied on the scheme of the ITA, which, it held, did not tax "the ownership of property" but instead levied tax on each taxpayer on "the income received by the person who is the legal beneficiary from employment, businesses, property, or ownership." Ibid., at 1006; 4.

39 Ibid., at 1008-9; 8.



Subsequent cases have generally arrived at the same conclusion, based on the judgment in *Sura* and the legal consequences of the CCLC and the CCQ.<sup>40</sup> In 1990, however, this case law was displaced by an amendment to the ITA deeming property of the community to be owned by the spouse who owned it before it became subject to the community or, in any other case, by the spouse who administers the property.<sup>41</sup>

Other decisions have relied on the civil law of Quebec to determine when or whether property has been transferred to a spouse so as to trigger the attribution of income and capital gains,<sup>42</sup> or joint and several liability for tax debts owing by the transferor at the time of the transfer.<sup>43</sup> In *Garant v. The Queen*,<sup>44</sup> for example, Rouleau J rejected the minister's application of the attribution rules in ITA subsections 74(1) and (2) (as they then read) on the basis that, under the civil law, no transfer of property had taken place when the taxpayer and his spouse changed their matrimonial regime from community of property to separation of property. Similarly, in *Furfaro-Siconolfi v. The Queen*,<sup>45</sup> where the taxpayer received \$30,000 from her husband in October 1983 at a time when he was liable to pay taxes under the Act, the court relied on the civil law to conclude that the taxpayer was not jointly and severally liable for her husband's tax debts, on the grounds that the payment did not actually transfer property but instead settled a debt that the husband had assumed as part of a marriage contract executed in September 1977. According to Pinard J,

as it was a marriage contract concluded in Quebec between Quebecers who subsequently married in Quebec, the provisions of the *Civil Code of Lower Canada* must be considered. . . .

It is by the operation of arts. 777, 782, 878, 788, 795, 817, 819, 821, 822 and 1085 of the *Civil Code of Lower Canada* that the gift of \$30,000 stipulated in the marriage contract here had the effect of transferring ownership of the money to the plaintiff when the contract was signed on September 2, 1977.<sup>46</sup>

40 See, for example, *No. 738 v. MNR* (1962), 28 Tax ABC 227; *T.A. Bedford v. MNR* (1964), 35 Tax ABC 397; *MNR v. Faure Estate*, 77 DTC 5228; [1977] CTC 340 (SCC); *Lachapelle v. MNR*, 82 DTC 1593; [1982] CTC 2556 (TRB); *Béique v. The Queen*, 81 DTC 5050; [1981] CTC 75 (FCA); *The Queen v. Dumais*, 89 DTC 5543; [1990] 1 CTC 342 (FCTD); *G. Coriandoli v. Canada*, [1995] 2 CTC 2919 (TCC); and *Coté v. The Queen*, 2000 DTC 6188; [2000] 4 CTC 78 (FCA). In *Dumais*, supra, the court also emphasized that this result would ensure that all taxpayers in the federation would be treated equally. For an opposing result, in which the court interpreted the Civil Code to require a capital gain to be split equally between spouses, see *Laporte v. MNR*, 84 DTC 1208; [1984] CTC 2260 (TCC).

41 ITA subsection 248(22), added by SC 1991, c. 49, section 192(18), as amended by SC 1994, c. 7, schedule II, section 192(18), applicable after July 13, 1990.

42 See ITA subsections 74.1(1) and 74.2(1).

43 ITA section 160.

44 85 DTC 5408; [1985] 1 CTC 153 (FCTD).

45 90 DTC 6237; [1990] 1 CTC 33 (FCTD).

46 *Ibid.*, at 6239-40; 37-38.

Since the taxpayer's husband did not owe any taxes in September 1977, the subsequent payment in October 1983 was excluded from the operation of ITA section 160.<sup>47</sup>

Other cases have referred to the civil law of Quebec in order to determine whether a taxpayer has entered into a valid partnership,<sup>48</sup> become entitled to a payment such that an amount can be characterized as an amount receivable,<sup>49</sup> received taxable alimony or a non-taxable compensatory allowance,<sup>50</sup> made a gift for the purpose of the charitable contributions deduction,<sup>51</sup> or performed services as an employee or as an independent contractor.<sup>52</sup> In the latter two circumstances, however, courts have also relied on common law principles to interpret the applicable legal concept, thereby dissociating the meaning of these concepts for tax purposes from the meaning established by the civil law of Quebec.

### Complementarity with the Private Law of Other Provinces

While the earliest and most explicit expressions of complementarity appear in cases involving the ITA and the civil law of Quebec, this principle has also been expressed and applied in cases involving the private law of other provinces. As in the Quebec cases, some of these cases involve the law of contractual relationships, while others concern the law of property. Yet others refer to provincial statutes governing corporate law and limitations of actions.

47 For other cases in which courts have relied on the civil law of Quebec to determine the application of the joint and several liability rule in ITA section 160, see, for example, *D'Aoust v. The Queen*, 98 DTC 1344; [1998] 3 CTC 2309 (TCC); *MacDougall v. The Queen*, 98 DTC 2180; [1998] 4 CTC 2474 (TCC); and *Martel v. The Queen*, 98 DTC 2012; [1999] 2 CTC 2497 (TCC).

48 See, for example, *No. 71 v. MNR* (1952), 7 Tax ABC 165; *Ste-Marie v. MNR*, 56 DTC 211; (1956), 15 Tax ABC 46; *Derby Development Corporation v. MNR*, 63 DTC 1171; [1963] CTC 269 (Ex. Ct.); *Vaintrub v. MNR*, 64 DTC 227; (1964), 35 Tax ABC 74; *Entreprises Blaton-Aubert Société Anonyme v. MNR*, 69 DTC 121; [1969] Tax ABC 68; *Hollinger v. MNR*, 73 DTC 5003; [1972] CTC 592 (FCTD); aff'd. 74 DTC 6604; [1974] CTC 693 (FCA); *The Queen v. Poulin*, 76 DTC 6381; [1976] CTC 620 (FCTD); *Beausoleil et al. v. MNR*, 76 DTC 1113; [1976] CTC 2142 (TRB); *Marinis v. MNR*, 78 DTC 1609; [1978] CTC 2821 (TRB); *Lobé v. MNR*, 79 DTC 880; [1979] CTC 3107 (TRB); *Cornforth v. The Queen*, 82 DTC 6058; [1982] CTC 45 (FCTD); *Dufresne v. MNR*, 83 DTC 238; [1983] CTC 2270 (TRB); *Bédard v. MNR*, 84 DTC 1204; [1984] CTC 2239 (TCC); *Péloquin v. MNR*, 84 DTC 1857; [1984] CTC 2950 (TCC); *Ryan v. MNR*, 92 DTC 2027; [1992] 2 CTC 2288 (TCC); *Waxman et al. v. The Queen*, 97 DTC 705; [1997] 2 CTC 2723 (TCC); *McKeown v. The Queen*, 2001 DTC 511; [2001] 4 CTC 2197 (TCC); and *Drolet v. The Queen*, 2001 DTC 3770(S); 2001 CarswellNat 1729 (TCC).

49 *MNR v. Colford Contracting Co. Ltd.*, 60 DTC 1131; [1960] CTC 178 (Ex. Ct.); aff'd. 62 DTC 1338; [1962] CTC 546 (SCC).

50 *Savard v. MNR*, 90 DTC 1476; [1990] 1 CTC 2576 (TCC).

51 See, for example, *Aspinall v. MNR*, 70 DTC 1669; [1970] Tax ABC 1073; *Paradis v. R.*, [1997] 2 CTC 2557 (TCC); *Slobodrian v. R.*, [1998] 3 CTC 2654 (TCC); *Plante v. R.*, [1999] 2 CTC 2631 (TCC); *The Queen v. Langlois*, 2000 DTC 6612 (FCA); *The Queen v. Côté et al.*, 2000 DTC 6615 (FCA); and *The Queen v. Duguay et al.*, 2000 DTC 6620; [2002] 1 CTC 8 (FCA).

52 See, for example, *Braive v. MNR*, 81 DTC 748; [1981] CTC 2790 (TRB); *Tedco Apparel Management Services Inc. v. MNR*, 91 DTC 1413; [1991] 2 CTC 2669 (TCC); and *Wolf v. The Queen*, 2002 DTC 6853 (FCA).

One of the most notable examples of complementarity between the ITA and the private law of a province other than Quebec is the Supreme Court of Canada decision in *Continental Bank Leasing Corporation v. The Queen et al.*,<sup>53</sup> in which the minister disallowed a tax-deferred transfer of depreciable property under ITA subsection 97(2) on the basis that the taxpayer had not disposed of the property to a valid partnership as required by the provision. As the ITA does not define the legal concept of a partnership for the purpose of this or other provisions, the court looked to the Ontario Partnerships Act<sup>54</sup> and the common law on which this statute is based to determine whether the disposition qualified for the rollover. Bastarache J reasoned:

Section 2 of the *Partnerships Act* defines partnership as “the relation that subsists between persons carrying on a business in common with a view to profit.” This wording, which is common to the majority of partnership statutes in the common law world, discloses three essential ingredients: (1) a business, (2) carried on in common, (3) with a view to profit. . . .

The existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended. As stated in *Lindley & Banks on Partnership* (17th ed. 1995), at p. 73: “in determining the existence of a partnership . . . regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case.” . . .

In cases such as this, where the parties have entered into a formal written agreement to govern their relationship and hold themselves out as partners, the courts should determine whether the agreement contains the type of provisions typically found in a partnership agreement, whether the agreement was acted upon and whether it actually governed the affairs of the parties.<sup>55</sup>

Although concluding that “the parties created a valid partnership within the meaning of s. 2 of the *Partnerships Act*,”<sup>56</sup> Bastarache J (dissenting) relied on section 34 of this Act, which stipulates that a partnership is “dissolved by the happening of any event that makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership,” to conclude that the partnership was dissolved on account of a prohibition in the federal Bank Act against banks acquiring or holding an interest in or otherwise investing in a partnership. Also relying on provincial law, the majority concluded that the Bank Act did not render the partnership “unlawful” within the meaning of section 34 of the Partnerships Act.<sup>57</sup>

53 98 DTC 6505; [1998] 4 CTC 119 (SCC).

54 RSO 1980, c. 370.

55 *Continental Bank*, supra note 53, at 6514; 133-34.

56 *Ibid.*, at 6514; 134.

57 In addition to the Supreme Court of Canada decision in *Continental Bank*, a number of cases in common law provinces have referred to provincial partnership statutes in order to determine whether a business was carried on in a partnership. See, for example, *Sunshine Uniform Supply*

Another example of complementarity between the ITA and the private law of a province other than Quebec is the decision in *MNR v. Wardean Drilling Ltd.*,<sup>58</sup> in which the taxpayer sought in computing its income for its 1963 taxation year to deduct capital cost allowance on a drilling rig purchased in that year under a binding contract, but not delivered until 1964. As eligibility to claim capital cost allowance turns on the acquisition of the property by the taxpayer, and the ITA does not define the concept of an acquisition, the court referred to the Alberta Sale of Goods Act<sup>59</sup> to determine when the rig was acquired. According to Cattanach J,

[t]his appeal was argued by both parties on the assumption that the contracts here in question are subject to the laws of the Province of Alberta. I think that assumption is correct. Both parties were resident in Alberta where the contracts were negotiated.

Sections 20 and 21 of the Alberta *Sale of Goods Act* (chapter 295, R.S.A. 1955) outline the time of transfer of property in goods and rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Section 20 reads as follows:

20. (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Section 21(1) reads as follows:

21. (1) Unless a different intention appears the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule I. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed.

Rule II. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them

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(1983) *Limited v. The Queen*, 2000 DTC 6127; [2000] 2 CTC 107 (FCTD) (Manitoba); *Bow River Pipelines Limited v. The Queen*, 2000 DTC 6090; [2001] 1 CTC 198 (FCA) (Alberta); *Vantem Holdings Ltd. et al. v. The Queen*, 98 DTC 1335; [1998] 1 CTC 2821 (TCC) (British Columbia); *Schultz et al. v. The Queen*, 95 DTC 5657; [1996] 2 CTC 127 (FCA) (Ontario); *Kucbirka v. The Queen*, 91 DTC 5156; [1991] 1 CTC 339 (FCTD) (Saskatchewan); and *Graves et al. v. The Queen*, 90 DTC 6300; [1990] 1 CTC 357 (FCTD) (Nova Scotia). See also *Backman v. The Queen*, 2001 DTC 5149; [2001] 2 CTC 11 (SCC) and *Spire Freezers Ltd. et al. v. The Queen*, 2001 DTC 5158; [2001] 2 CTC 40 (SCC), in each of which the Supreme Court of Canada relied on the common law concept of a partnership to determine the existence of partnerships located in Texas and California respectively.

58 69 DTC 5194; [1969] CTC 265 (Ex. Ct.).

59 RSA 1955, c. 295.

into a deliverable state, the property does not pass until the thing is done and the buyer has notice thereof.<sup>60</sup>

Relying on evidence indicating that title was to pass “as of date shipment,” the court held that property did not pass until 1964:

Property in the rig could have passed forthwith had the parties so intended. But the parties did not so intend. It was agreed, as evidenced by the note on page 5 of the invoice . . . that “Title to pass and notes issued as of date shipment.” Delivery or shipment was not until February 18, 1964 and accordingly property in the rig did not pass to the respondent until that date.

It is my opinion that neither Rule I nor Rule II set forth in section 21 of the *Sale of Goods Act* is applicable to the circumstances of this particular contract but rather that the intention of the parties as to when property in the rig was to pass is determined by the terms of the contract in accordance with section 20 of the *Sale of Goods Act*.<sup>61</sup>

Similarly, in *West Kootenay Power and Light Company Limited v. The Queen*,<sup>62</sup> the court relied on provincial sale of goods legislation to determine whether estimated charges for delivered but unbilled electricity must be included in computing the taxpayer’s income for each of the taxation years at issue. Referring to sections 31 and 32 of the British Columbia Sale of Goods Act<sup>63</sup> for the proposition that “[w]here property is sold, delivered and consumed, the rendering of an account is not a precondition to the right to payment,”<sup>64</sup> the court held that the estimated revenues were amounts receivable within the meaning of ITA paragraph 12(1)(b), which must be included in computing the taxpayer’s income in each of the years at issue.

Yet another example of complementarity between the ITA and the private law of contractual relationships is the majority judgment in *Will-Kare Paving & Contracting Limited v. The Queen*,<sup>65</sup> which examined the statutory requirement that property be used primarily for the purpose of “manufacturing or processing goods for sale or lease” in order to qualify for accelerated capital cost allowance for class 39 property and investment tax credits under ITA subsection 127(5).<sup>66</sup> The taxpayer, which operated a paving business, claimed the benefit of both tax incentives on the grounds that it manufactured asphalt, which it sold to customers in connection with paving services. The minister reassessed on the basis that the paving contracts were for the

60 *Wardean Drilling*, supra note 58, at 5198; 271-72.

61 *Ibid.*, at 5198; 272-73.

62 92 DTC 6023; [1992] 1 CTC 15 (FCA).

63 RSBC 1979, c. 370.

64 *West Kootenay*, supra note 62, at 6030; 25.

65 2000 DTC 6467; [2000] 3 CTC 463 (SCC).

66 See class 39 of schedule II of the Income Tax Regulations, the investment tax credit in ITA subsection 127(5), and the definitions of “investment tax credit” and “qualified property” in subsection 127(9).

supply of services, not for the sale of goods. Noting that “the concepts of a sale or a lease have settled legal definitions,”<sup>67</sup> Major J held that the interpretation of these words in the relevant provisions of the ITA should be governed by their commercial meaning rather than their ordinary or plain meaning:

[I]n drafting the manufacturing [or] processing incentives to include reference to sale or lease, Parliament has chosen to use language that imports relatively fine private law distinctions. Indeed, the Act is replete with such distinctions. Absent express direction that an interpretation other than that ascribed by settled commercial law be applied, it would be inappropriate to do so.

To apply a “plain meaning” interpretation of the concept of a sale in the case at bar would assume that the Act operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the Act, are well-defined. See *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298. See also P.W. Hogg, J.E. Magee and T. Cook, *Principles of Canadian Tax Law* (3rd ed. 1999), at p. 2, where the authors note:

The *Income Tax Act* relies implicitly on the general law, especially the law of contract and property. . . . Whether a person is an employee, independent contractor, partner, agent, beneficiary of a trust or shareholder of a corporation will usually have an effect on tax liability and will turn on concepts contained in the general law, usually provincial law.<sup>68</sup>

Referring to “common law and sale of goods legislation,”<sup>69</sup> which distinguishes between contracts for the sale of goods and contracts for work and materials,<sup>70</sup> the court dismissed the taxpayer’s appeal on the basis that the property in respect of which the taxpayer had claimed the two tax incentives “was used primarily in the manufacturing or processing of goods supplied through contracts for work and materials, not through sale.”<sup>71</sup>

Turning from the law of contractual relationships to the law of property, again courts have relied on the private law of provinces other than Quebec in order to determine liability under the ITA. In *Drescher v. The Queen*,<sup>72</sup> for example, where the taxpayer argued that interest income on term deposits should be split with his

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67 *Will-Kare*, supra note 65, at paragraph 29.

68 *Ibid.*, at paragraphs 30 and 31.

69 *Ibid.*, at paragraph 35.

70 According to A.G. Guest, ed., *Benjamin’s Sale of Goods* (London: Sweet & Maxwell, 1974), at 37, “[w]here work is to be done on the land of the employer or on a chattel belonging to him, which involves the use or affixing of materials belonging to the person employed, the contract will ordinarily be one for work and materials, the property in the latter passing to the employer by accession and not under any contract of sale.”

71 *Will-Kare*, supra note 65, at paragraph 36.

72 85 DTC 5064; [1985] 1 CTC 229 (FCTD).

spouse and daughter on the basis that the term deposits were purchased with the proceeds of a jointly acquired lottery ticket, the court looked to the private law of Manitoba to determine the appropriate result. According to Muldoon J,

the determination of interests in the goods or property is established according to the law of property (including equity where applicable) of the province in which the goods or property are located. Manitoban jurisprudence is of persuasive authority here.

Law and equity are both applicable in Manitoba to the determination of a question of property and interest in a winning ticket leading to property and interest in the prize money and interest generated thereby.<sup>73</sup>

Rejecting the minister's argument, based on *Sura*, that the income should be attributed to the legal recipient of the income irrespective of the beneficial ownership of property, the court held for the taxpayer on the basis that he had acted as "a trustee of convenience for and with the knowledge and consent of his wife and their daughter."<sup>74</sup>

Consistent with this decision, other cases in the common law provinces also have relied on equitable principles in order to attribute income for the purposes of tax. In *Feder v. MNR*,<sup>75</sup> for example, where the minister assessed the taxpayer on the profit from a sale of land held in his name alone, the Tax Review Board accepted the taxpayer's argument that the income should be split equally with his wife on the basis that half the property was subject to a constructive trust in her favour.<sup>76</sup> Likewise in *Stockman v. R*,<sup>77</sup> the court allowed the taxpayer to deduct half the rental losses from property, legal title to which was held by her former husband, on the basis that the former husband held the property subject to a constructive trust in the taxpayer's favour. In other cases, the finding of a constructive trust was used to prevent a deemed disposition on death under ITA subsection 70(5),<sup>78</sup> and to preclude the application of the attribution rule in former subsection 74(2) on a capital gain from shares where the taxpayer had transferred legal title to the shares to his wife.<sup>79</sup> Although taxpayers have also failed to establish the existence of a constructive or resulting trust on several occasions,<sup>80</sup> these judgments have uniformly assumed

73 Ibid., at 5071; 238-39.

74 Ibid., at 5072; 239.

75 81 DTC 307; [1981] CTC 2330 (TRB).

76 For a similar result where a capital gain was divided equally among four taxpayers on the basis that the two husbands held their shares subject to resulting trusts in their wives' favour, see *Fernando et al. v. The Queen*, 97 DTC 1376; [1997] 3 CTC 2850 (TCC).

77 [1996] 1 CTC 3001 (TCC).

78 *Anderson Estate v. The Queen*, 95 DTC 758; [1995] 1 CTC 2454 (TCC).

79 *Holizki v. The Queen*, 95 DTC 5591; [1995] 2 CTC 420 (FCTD); aff'd. 98 DTC 6530; [1998] 3 CTC 125 (FCA).

80 See, for example, *Boles v. MNR*, 82 DTC 1643; [1982] CTC 2638 (TRB); *Erickson v. MNR*, 88 DTC 1705; [1988] 2 CTC 2380 (TCC); *Harms v. MNR*, 89 DTC 705; [1990] 1 CTC 2010

that these equitable principles can be used to determine the application of various rules under the ITA.<sup>81</sup>

Other decisions have relied on common law property concepts to determine whether property has been transferred to a spouse or another non-arm's-length person in order to trigger the joint and several liability rule in ITA section 160. In *Gardner v. MNR*,<sup>82</sup> for example, where the minister assessed the taxpayer for tax debts owing by her husband when he executed a quit claim deed removing his name from title to their jointly owned residence, the court allowed the taxpayer's appeal on the grounds that the taxpayer was the beneficial owner of the property, that her husband held legal title solely to enable the taxpayer to obtain mortgage financing, and that the quit claim merely transferred legal title without affecting beneficial ownership.<sup>83</sup> Similarly, in *Savoie v. The Queen*,<sup>84</sup> the court limited the application of section 160 to half the value of property transferred to the taxpayer by her husband at a time when he was liable to pay taxes, on the basis that the property was subject to a constructive or resulting trust in her favour. In *Biderman et al. v. The Queen*,<sup>85</sup> moreover, where the taxpayer was indebted to the revenue authorities at the time of his wife's death, the court looked to the common law to determine whether the taxpayer had effected a valid disclaimer of his inheritance and whether such a disclaimer could avoid the application of section 160 on the resulting distribution of this property to his children. Although concluding that the taxpayer had not effected a valid disclaimer, the court suggested in obiter that because "a disclaimer operates by way of avoidance, and not by way of disposition,"<sup>86</sup> a valid disclaimer would prevent joint and several liability.<sup>87</sup>

Yet other cases have considered provincial statutes governing succession to property to determine whether taxpayers have satisfied the statutory requirements to defer tax on testamentary transfers of property to a spouse or farm property to a child.<sup>88</sup> In *Boger Estate v. The Queen*,<sup>89</sup> for example, the court relied on Alberta's

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(TCC); *Nelson et al. v. MNR*, 91 DTC 37; [1990] 2 CTC 2525 (TCC); *Gosse v. The Queen*, 93 DTC 1017; [1993] 2 CTC 2205 (TCC); *Karavos v. The Queen*, 96 DTC 1001; [1996] 1 CTC 2206 (TCC); *Collins v. The Queen*, 96 DTC 1034 (TCC); aff'd. 98 DTC 6281 (FCA); and *Landry v. The Queen*, 2000 DTC 1460 (TCC). In some of these cases, courts have questioned whether it is appropriate to inquire into the existence of a constructive trust in the context of a proceeding concerning income tax.

81 For a critical examination of this case law, see Catherine Brown and Cindy L. Rajan, "Constructive and Resulting Trusts: Challenging Tax Boundaries" (1997) vol. 45, no. 4 *Canadian Tax Journal* 659-89.

82 88 DTC 1649; [1988] 2 CTC 2285 (TCC).

83 For a similar result, see *Linke v. The Queen*, 94 DTC 1549; [1994] 2 CTC 2117 (TCC).

84 93 DTC 552; [1993] 2 CTC 2330 (TCC).

85 2000 DTC 6149; [2000] 2 CTC 35 (FCA).

86 *Re Paradise Motor Co., Ltd.*, [1968] 2 All ER 625, at 632 (CA).

87 *Biderman*, supra note 85, at paragraph 46.

88 See ITA subsections 70(6) and (9).

89 93 DTC 5276; [1993] 2 CTC 81 (FCA).



Devolution of Real Property Act<sup>90</sup> to conclude that a beneficial interest in farm property had been “transferred or distributed” to the taxpayer’s children, as required by ITA subsection 70(9), notwithstanding that the property was sold by the taxpayer’s estate before its distribution to the children. Likewise, in *Hillis et al. v. The Queen*,<sup>91</sup> where the taxpayer died intestate in February 1977, the Federal Court of Appeal considered two Saskatchewan statutes—The Intestate Succession Act<sup>92</sup> and The Dependents’ Relief Act<sup>93</sup>—to determine when the taxpayer’s property “vested indefeasibly” in the taxpayer’s spouse for the purpose of the rollover in ITA subsection 70(6), which at the time required such vesting “within 15 months after the death of the taxpayer or such longer period as is reasonable in the circumstances.”<sup>94</sup> Although agreeing that The Intestate Succession Act vested \$10,000 and one-third of the residue in the taxpayer’s spouse immediately after the taxpayer’s death, the court split on the effect of an order made under The Dependents’ Relief Act in December 1979, with Heald J concluding that the court should respect provincial law giving the order retroactive effect to the date of the taxpayer’s death,<sup>95</sup> and the other judges holding that the statutory order did not effect an indefeasible vesting within 15 months.<sup>96</sup> Notwithstanding this conclusion, the rollover was permitted

90 RSA 1980, c. D-34.

91 83 DTC 5365; [1983] CTC 348 (FCA).

92 RSS 1978, c. I-13, formerly RSS 1965, c. 126.

93 RSS 1978, c. D-25, formerly RSS 1965, c. 128, as amended by SS 1967, c. 23.

94 As it currently reads, subsection 70(6) requires such vesting “within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer’s legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances.”

95 *Hillis*, supra note 91, at 5376; 361: “Parliament contemplated that the law of the provinces in respect of the disposition of property on or after death, being matters relating to property and civil rights, would apply so as to control the application of subsection 70(6) in accordance with the law of the particular province concerned. . . . Subsection 4(2) deems, on the facts of this case, the intestate taxpayer to be a testator providing for the distribution of his estate as on an intestacy. Subsection 14(1) provides that where, as here, a Court order has been made, the deemed disposition by will (pursuant to subsection 4(2)) ‘. . . shall have effect, and shall be deemed to have had effect from the testator’s death, as if it had been executed with such variations as are specified in the order, for the purpose of giving effect to the provision for maintenance made by the order.’ . . . In view of the provisions of subsections 4(2) and 14(1) *supra*, I conclude that subject order vested the entire estate of the deceased taxpayer in the widow which vesting is deemed to have had effect from the taxpayer’s death.”

96 See *ibid.*, per Clement DJ, observing, at 5370; 353, that the retroactive effect of the order was “for the purpose of giving effect to the provisions for maintenance made by the order,” and concluding, at 5369; 353, that “fictions for provincial purposes” cannot affect the application of the ITA, which “takes its operation in the realities of the circumstances, subject only to such directives as it may itself prescribe”; and, per Pratte J, at 5374; 358: “It is only when the disclaimers were executed and the Court order was pronounced that Mrs. Hillis became entitled to the whole of her husband’s estate with retroactive effect to the date of his death. If, therefore, the disclaimers and the Court order had, as contended by the appellants, the effect of vesting the estate in Mrs. Hillis, that effect did not take place within 15 months after the death of Mr. Hillis.”

on the basis that the property vested indefeasibly in the spouse within a reasonable period of time.<sup>97</sup>

In addition to cases involving the private law of contractual relationships and property, others have applied a principle of complementarity by relying on provincial statutes governing corporate law and limitations of actions. In *The Queen v. Kalef*,<sup>98</sup> for example, the Federal Court of Appeal referred to the Ontario Business Corporations Act, 1982<sup>99</sup> to determine whether the taxpayer was subject to ITA section 227.1, which makes directors of a company that has failed to pay its own taxes or those that it is required to deduct at source “jointly and severally liable, together with the corporation, to pay that amount and any interest or penalties related thereto.” On reviewing the two statutes, McDonald JA held:

The *Income Tax Act* neither defines the term director, nor establishes any criteria for when a person ceases to hold such a position. . . . While it may be open to Parliament to expressly deviate from the principles of corporate law for the purposes of the *Income Tax Act*, I do not think such an intention should be imputed. Given the silence of the *Income Tax Act* I think the guidance of the applicable corporate legislation, in this case the *Ontario Business Corporations Act*, should be taken.<sup>100</sup>

Concluding on this basis that the taxpayer continued to occupy the position of a director even after a trustee in bankruptcy was appointed and took control of the company’s assets to the exclusion of its directors, the court rejected the taxpayer’s argument that the minister’s action was subject to the limitation rule in ITA subsection 227.1(4), which prohibits any action under subsection 227.1(1) where it is commenced more than two years after the director last ceased to be a director.

Likewise, in *The Queen v. Wheeliker*,<sup>101</sup> the Federal Court of Appeal looked to the Nova Scotia Companies Act<sup>102</sup> to decide whether the taxpayers, who were not de jure directors, were nonetheless jointly and severally liable under ITA section 227.1 on the basis that they served as de facto directors of a non-profit company that had failed to remit employees’ taxes that it had deducted at source. Echoing the passage from *Kalef* quoted earlier, Noël JA (Desjardins JA concurring) explained that because the ITA does not define “director” for the purpose of either this provision or the ITA as a whole, “it is therefore appropriate to look to the Corporation’s incorporating legislation for guidance as to who is a ‘director’ for the purposes of section 227.1.”<sup>103</sup> Although concluding on this basis that de facto directors are not subject to section 227.1, the court nonetheless held that the taxpayers were liable

97 Ibid., at 5371; 355.

98 96 DTC 6132; [1996] 2 CTC 1 (FCA).

99 SO 1982, c. 4.

100 *Kalef*, supra note 98, at 6134-35; 4-5.

101 99 DTC 5658; [1999] 2 CTC 395 (FCA) (sub nom. *The Queen v. Corsano et al.*).

102 RSNS 1967, c. 42.

103 *Wheeliker*, supra note 101, at 5661; 400.

under the common law principle that “a person who has not obtained the requisite qualifications . . . is prevented from pleading this failure in order to escape liability attaching to a director.”<sup>104</sup> Concurring in the ultimate outcome, Létourneau JA would have included de facto directors within the scope of section 227.1 on the basis that the absence of any qualification to the word “director” in the provision suggested that “Parliament intended the word to cover all types of directors known to the law in company law, including, amongst others, *de jure* and *de facto* directors.”<sup>105</sup> Like the majority, however, Létourneau JA affirmed the view that, in determining whether the taxpayers were directors for the purpose of ITA section 227.1, it was necessary “to look at the body of law which can provide the answer to the silence of the Act”—namely, the Nova Scotia Companies Act and broader common law principles governing the characterization of de facto directors.<sup>106</sup>

Yet another example of complementarity with provincial corporate law legislation is the Federal Court of Appeal decision in *Dale et al. v. The Queen*,<sup>107</sup> in which the minister disallowed a tax-deferred transfer of property to a corporation under ITA subsection 85(1) on the basis that the consideration for the property transferred did not include validly issued shares. Concluding that the invalid issuance of shares had been cured by a subsequent retroactive declaration of validity under section 44 of the Nova Scotia Companies Act,<sup>108</sup> a majority of the court allowed the taxpayer’s appeal. Significantly, the court emphasized:

If the legislature of a province authorizes its courts to deem something to have occurred on a date already past, then it is not for the Minister to undermine the legislation by refusing to recognize the clear effect of the deemed event.<sup>109</sup>

Whether this conclusion is consistent with that of the majority in *Hillis* is doubtful.<sup>110</sup>

Finally, in *Joe Markevich v. The Queen*,<sup>111</sup> the Federal Court of Appeal relied on a six-year limitation period in the British Columbia Limitation Act<sup>112</sup> to conclude that the revenue authorities could not in 1998 pursue a tax debt that first arose when the minister issued a notice of assessment on June 17, 1986. Observing that ITA section 222, which declares taxes and other amounts payable under the ITA to be “debts due to Her Majesty and recoverable as such in the Federal Court of any

104 Ibid., at 5662; 403.

105 Ibid., at 5664; 406.

106 Ibid., at 5664; 407.

107 97 DTC 5252; [1997] 2 CTC 286 (FCA).

108 RSNS 1989, c. 81.

109 *Dale*, supra note 107, at 5256; 296.

110 In response to the minister’s argument that the court was bound by the conclusion in *Hillis*, supra note 91, Robertson JA (Décary JA concurring) stated in *Dale*, supra note 107, at 5257; 297, that the *Hillis* decision was “a fragmented one which, respectfully, reveals no discernible ratio.”

111 2001 DTC 5305; [2001] 3 CTC 39 (FCA) (leave to appeal to SCC granted December 6, 2001).

112 RSBC 1996, c. 266, section 3(5).

other court of competent jurisdiction,” is silent on the subject of any limitation period, the court referred to section 32 of the Crown Liability and Proceedings Act<sup>113</sup> to conclude that the revenue authorities were subject to the applicable provincial limitation period. More generally, the court suggested, while the ITA “may exclude application of general legal principles, rules and remedies,” this can be accomplished only by “express language or a necessary implication to that effect.”<sup>114</sup> As section 222 was silent on the subject, it followed that “Parliament intended the question of limitations to be governed by the laws of general application.”<sup>115</sup> Finally, the court added, while it might be considered unacceptable to permit different limitation periods to apply in different provinces, “it is open to Parliament to amend the *Income Tax Act* to effect the result it considers appropriate.”<sup>116</sup>

The Supreme Court of Canada dismissed the taxpayer’s appeal, with a majority of the court concluding that collection of the taxpayer’s federal tax debt was subject to the six-year limitation period in section 32 of the Crown Liability and Proceedings Act in respect of a cause of action arising “otherwise than in a province.”<sup>117</sup> In a concurring judgment, Deschamps J would have applied the limitation period in the British Columbia Limitation Act on the basis that the cause of action arose in the province of British Columbia.<sup>118</sup>

## DISSOCIATION

In contrast to the many cases in which Canadian courts have affirmed or applied a principle of complementarity between the ITA and provincial private law, others have interpreted various concepts and provisions in the ITA without regard to the private law of the applicable province, thereby dissociating these concepts and provisions from the private law rules, principles, and concepts by which they might otherwise be interpreted. This part of the article examines a number of these

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113 RSC 1985, c. C-50. Section 32 provides, “Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province.”

114 *Markevich*, supra note 111, at paragraph 25.

115 *Ibid.*, at paragraph 16.

116 *Ibid.*, at paragraph 29.

117 *The Queen v. Markevich*, 2003 SCC 9. According to Major J, because tax debts arising under the ITA are “owed to the federal Crown, which is not located in any particular province and does not assume a provincial locale in its assessment of taxes,” it follows “on a plain reading” of section 32 of the Crown Liability and Proceedings Act that the resulting cause of action arises “otherwise than in a province.” *Ibid.*, at paragraph 39. In addition, he concluded, “in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province,” it was reasonable to presume that “Parliament intended for limitation provisions to apply uniformly throughout the country with regard to proceedings of the kind at issue in this appeal.” *Ibid.*, at paragraph 40.

118 *Ibid.*, at paragraphs 53 to 56.

concepts and provisions, and key judicial decisions in which they have been subject to interpretation. Although some of these cases dissociate the ITA from the private law of all provinces, most involve dissociation between the ITA and the civil law of Quebec.

## Gift

The concept of a “gift” appears in several provisions of the ITA. The most notable of these are sections 110.1 and 118.1 granting a deduction or credit for “the fair market value of a gift” to a qualified donee, and paragraphs 69(1)(b) and (c) deeming property that is transferred “by way of gift” to have been disposed of by the transferor and acquired by the transferee at fair market value. As with many other private law concepts on which it relies, the ITA does not define the word “gift.”<sup>119</sup>

In the absence of a statutory definition, one might expect Canadian courts to refer to provincial private law in order to determine the characteristics of a gift for the purposes of the ITA. Indeed, in common law provinces, courts have generally defined a gift as “a voluntary transfer of property from one person to another gratuitously and not as the result of a contractual obligation without anticipation or expectation of material benefit.”<sup>120</sup> Although this definition is occasionally characterized as the “ordinary” meaning of the word “gift” as opposed to a “technical” or legal interpretation,<sup>121</sup> the judicial and dictionary authorities on which it is based suggest that the source of the concept is in fact the common law of England and the United States.<sup>122</sup> On this basis, courts in common law provinces have generally disallowed deductions for charitable contributions where the taxpayer has received any consideration in return, notwithstanding that the value of the donation exceeded the consideration received.<sup>123</sup>

119 For a useful analysis of judicial decisions that have interpreted the concept of a gift for the purposes of the ITA, see Blake Bromley, “Flaunting and Flouting the Law of Gift: Canada Customs and Revenue Agency’s Philanthrophobia” (2002) vol. 21, no. 3 *Estates, Trusts & Pensions Journal* 177-208.

120 *Woolner v. A.G. of Canada et al.*, 99 DTC 5722; [2000] 1 CTC 35, at paragraph 7 (FCA). For similar definitions, see *The Queen v. Zandstra*, 74 DTC 6416, at 6419; [1974] CTC 503, at 508 (FCTD); *The Queen v. McBurney*, 85 DTC 5433, at 5435; [1985] 2 CTC 214, at 218-19 (FCA); *The Queen v. Burns*, 88 DTC 6101, at 6103; [1988] 1 CTC 201, at 205 (FCTD); aff’d. 90 DTC 6335; [1990] 1 CTC 350 (FCA); *The Queen v. Friedberg*, 92 DTC 6031, at 6032; [1992] 1 CTC 1, at 2 (FCA); and *Pustina et al. v. The Queen* (sub nom. *W/bent v. The Queen*), 96 DTC 1594, at 1602; [1996] 3 CTC 2542, at 2558 (TCC); aff’d. 2000 DTC 6001; [2000] 1 CTC 329 (FCA).

121 See, for example, *McBurney*, supra note 120, at 5435; 218: “The word ‘gifts’ is not defined in the statute. I can find nothing in the context to suggest that it is used in a technical rather than in its ordinary sense.”

122 See the authorities cited in *Zandstra*, supra note 120, and *McBurney*, supra note 120. For explicit recognition of the common law basis of this test, see *Woolner*, supra note 120, at paragraph 7; and *Pustina*, supra note 120, at 1602; 2558.

123 See, for example, *Gaudin v. MNR*, 55 DTC 385; (1955), 13 Tax ABC 199 (sale of house for half its value); *Tite v. MNR*, 86 DTC 1788; [1986] 2 CTC 2343 (TCC) (purchase of print for an

In Quebec, on the other hand, the concept of a gift set out in the CCQ does not preclude all consideration, provided that the value of the property conveyed by the gift exceeds the value of any consideration received in return.<sup>124</sup> On this basis, where a taxpayer sold a farm to his sons for an amount less than its fair market value, the Tax Appeal Board characterized the difference as a gift for the purpose of the gift tax in ITA section 111, as it then read.<sup>125</sup> Likewise, in *Aspinall v. MNR*,<sup>126</sup> where the taxpayer purchased tickets to a ballet and reception for an amount in excess of their fair market value, the Tax Review Board held that the excess was a gift for the purpose of the charitable contributions deduction.

In *The Queen v. Littler*,<sup>127</sup> however, where the minister levied gift tax on a sale of shares to the taxpayer's son for an amount less than their fair market value, the Federal Court of Appeal dissociated the ITA concept of a gift from that in the civil law of Quebec by adopting the common law meaning of the word. Rejecting the minister's argument that the characteristics of a gift should be governed by the civil law in Quebec,<sup>128</sup> Jaccett CJ allowed the taxpayer's appeal on the basis that the civil law concept of a gift "should not be taken to extend the application of section 111 of the *Income Tax Act* in the Province of Quebec beyond what it would be in another province."<sup>129</sup> On the contrary, he concluded:

A contract of sale, which is, by definition, a transfer of property for a consideration, cannot be a gift, which is, by definition, a disposition of property without consideration. . . . While, speaking loosely, one might say that a gift was made by way of sale at an undervaluation (the gift being the benefit so conferred), in my view, the word gift in a taxing statute must be taken as referring to what is known to the law as a gift, namely, the gratuitous transfer of property and the difference between value and price is not "property" and is not something that can be transferred.<sup>130</sup>

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amount in excess of its fair market value); *Zandstra*, supra note 120 (donation to religious school attended by taxpayer's children); *McBurney*, supra note 120 (donation to religious school attended by taxpayer's children); and *Burns*, supra note 120 (donation to ski association of which taxpayer's daughter was a member).

124 CCQ article 1806 provides, "Gift is a contract by which a person, the donor, transfers ownership of property by gratuitous title to another person, the donee; a dismemberment of the right of ownership, or any other right held by a person, may also be transferred by gift." Article 1810 provides, "A remunerative gift or a gift with a charge constitutes a gift only for the value in excess of that of the remuneration or charge."

125 *Gagnon Estate v. MNR*, 60 DTC 347; (1960), 24 Tax ABC 309.

126 Supra note 51.

127 78 DTC 6179; [1978] CTC 235 (FCA).

128 In particular, the minister cited *Charlebois v. Charlebois et al.*, [1974] CA 99 (Que. CA), which considered a sale at less than fair market value to be an indirect gift under CCLC article 712.

129 *Littler*, supra note 127, at 6182; 239.

130 *Ibid.*, at 6181-82; 239.

In order to achieve uniformity in the application of the ITA throughout Canada, the court effectively ignored the civil law concept of a gift, affirming the common law definition as the only meaning “known to the law.”<sup>131</sup>

Likewise in *Gervais v. The Queen*,<sup>132</sup> where the taxpayer purchased property including buildings from his father for less than the property’s fair market value, the court adopted the common law meaning of a gift to reject the taxpayer’s argument that the capital cost of the buildings was deemed to be their fair market value under former ITA paragraph 20(6)(g) (now paragraph 69(1)(c)). Although acknowledging that the benefit conferred on the taxpayer by his father might constitute a gift under Quebec law, Walsh J concluded:

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 . . . 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. I believe the same must apply to the interpretation given to section 20(6)(c) of the Act in effect at the time in the present case and that I am governed by the decision in the *Little* case. Although the benefit conferred by the deed of sale would probably be considered as a gift in Quebec law, for income tax purposes in which the law must be interpreted consistently throughout Canada, the word “gift” in section 20(6)(c) of the Act must be given the strict and narrow interpretation given to it in the *Little* case, for income tax purposes.<sup>133</sup>

Here too, in order to achieve uniformity throughout Canada, the court dissociated the ITA concept of a gift from the civil law definition by affirming “for income tax purposes” the “strict and narrow interpretation” of the common law.

## Charity

According to ITA paragraph 149(1)(f), registered charities are exempt from income tax. In addition to this tax benefit, gifts to registered charities qualify for a deduction in the case of corporate gifts under ITA section 110.1 and a non-refundable credit for individual gifts under section 118.1.<sup>134</sup> Although the ITA generally defines a

131 In a concurring opinion, LeDain J found for the taxpayer on a narrower basis, concluding that the particular notion of an indirect gift in CCLC article 712, as it then read, “is not of such general application to the meaning of gift that it should be ascribed to the legislative intention” regarding the federal gift tax. *Ibid.*, at 6183; 242.

132 85 DTC 5004; [1984] CTC 661 (FCTD).

133 *Ibid.*, at 5008; 665-66.

134 For a critical evaluation of the non-refundable credit for individual contributions, see David G. Duff, “Charitable Contributions and the Personal Income Tax: Evaluating the Canadian Credit,” in Jim Phillips, Bruce Chapman, and David Stevens, eds., *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen’s University Press, 2001), 407-56.

“registered charity” as a charitable organization or foundation,<sup>135</sup> and defines these persons in terms of charitable activities and purposes,<sup>136</sup> it does not define the term “charitable.” The leading case on the concept of charity for tax purposes is the Supreme Court of Canada’s decision in *Vancouver Society of Immigrant and Visible Minority Women v. MNR*.<sup>137</sup>

For the purposes of this discussion, there is no need to consider the facts of the *Vancouver Society* case, except to note that it was yet another in a long line of cases in which the revenue authorities refused to register the taxpayer as a registered charity on the basis that it did not qualify under the legal definition of charity adopted by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*<sup>138</sup> and affirmed in numerous Canadian tax cases.<sup>139</sup> Although disagreeing over whether the taxpayer’s activities could be characterized as charitable under the *Pemsel* test, the court unanimously approved the relevance of this legal definition, itself derived from the common law of trusts, on the basis, as Iacobucci J explained, that the concept of a “charitable activity” in the ITA “implicitly relies upon the common law for guidance.”<sup>140</sup> According to Gonthier J,

[i]t is well-known that the ITA 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. MNR*, [1988] 2 F.C. 340, at p. 347, “the Act” appears

135 See the definition of “registered charity” in ITA subsection 248(1), and the definitions of “private foundation” and “public foundation” in ITA subsection 149.1(1).

136 See the definitions of “charitable organization” and “charitable foundation” in ITA subsection 149.1(1).

137 99 DTC 5034; [1999] 2 CTC 1 (SCC). For a critical analysis of this decision, see Mayo Moran and Jim Phillips, “Charity and the Income Tax Act: The Supreme Court Speaks,” in Phillips et al., supra note 134, at 343-70.

138 [1891] AC 531 (HL). According to Lord Macnaghten, at 583, “[c]harity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”

139 See, for example, *Towle Estate v. MNR* (sub nom. *Guaranty Trust Company of Canada v. MNR*), 67 DTC 5003; [1966] CTC 755 (SCC); *Vancouver Regional FreeNet Association v. MNR*, 96 DTC 6440; [1996] 3 CTC 102 (FCA); *Briarpatch Incorporated v. The Queen*, 96 DTC 6294; [1996] 2 CTC 94 (FCA); *Everywoman’s Health Centre Society (1988) v. The Queen*, 92 DTC 6001; [1991] 2 CTC 320 (FCA); *Reed v. The Queen*, 89 DTC 5230; [1989] 2 CTC 192 (FCTD); *N.D.G. Neighbourhood Association v. Revenue Canada, Taxation Department*, 88 DTC 6279; [1988] 2 CTC 14 (FCA); *Toronto Volgograd Committee v. MNR*, 88 DTC 6192; [1988] 1 CTC 365 (FCA); *Positive Action Against Pornography v. MNR*, 88 DTC 6186; [1988] 1 CTC 232 (FCA); *Native Communications Society of BC v. MNR*, 86 DTC 6353; [1986] 2 CTC 170 (FCA); *Scarborough Community Legal Services v. The Queen*, 85 DTC 5102; [1985] 1 CTC 98 (FCA); and *McBurney*, supra note 120.

140 *Vancouver Society*, supra note 137, at paragraph 143.



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.<sup>141</sup>

As a result, he concluded, “Parliament has, in effect, incorporated the common law definition of charity into the ITA.”<sup>142</sup>

As a “common law definition” that applies throughout Canada, the legal concept of charity affirmed by the Supreme Court of Canada in the *Vancouver Society* case is necessarily dissociated from the private law of Quebec, which recognizes the concept of a “social trust” in CCQ articles 1266 and 1270,<sup>143</sup> and the concept of a “socially beneficial purpose” in article 1256,<sup>144</sup> but does not employ the words “charity” or “charitable.” Nor does this legal definition correspond to the private law of the common law provinces, several of which have adopted statutory definitions of a charitable purpose or a charity that do not match the *Pemsel* approach.<sup>145</sup> On the contrary, as Gonthier J emphasized in the *Vancouver Society* case, since

the courts have a continuing role to rationalize and update [the legal] definition [of charity] to keep it in tune with social and economic developments . . . the definition of “charity” or “charitable” under the ITA 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.<sup>146</sup>

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141 Ibid., at paragraph 28.

142 Ibid.

143 CCQ article 1266 provides, “Trusts are constituted for personal purposes or for purposes of private or social utility.” Article 1270 provides, “A social trust is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose.”

144 CCQ article 1256 provides, “A foundation results from an act whereby a person irrevocably appropriates the whole or part of his property to the durable fulfillment of a socially beneficial purpose.”

145 See, for example, section 1(1)(c) of the Charitable Fund-Raising Act, RSA 2000, c. C-9, which defines a “charitable purpose” to include “a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business”; section 1 of the Liquor Control and Licensing Act, RSBC 1996, c. 267, which defines a “charitable purpose” to include, in addition to the *Pemsel* categories, the “advancement” of “(a) recreation; (b) sports or athletics; (c) aid to the disabled and handicapped; (d) culture; [and] (e) youth or senior citizens”; section 1(1) of the Charities Endorsement Act, CCSM, c. C60, which defines a “charitable purpose” to include “any charitable, benevolent, philanthropic, patriotic, athletic, artistic, or civic purpose and any purpose that has as its object the promotion of a civic improvement or the provision of a public service”; and the definition of “charity” in the Charities Act, RSPEI 1988, c. C-4, section 1(a), as “any person, association, institute or organization under whose auspices funds for benevolent, educational, cultural, charitable or religious purposes are to be raised.” See also the definition of “charitable purpose” in section 7 of the Charities Accounting Act, RSO 1990, c. C-10, section 7, which adopts the *Pemsel* categories, and the interpretation of this provision in *Re Laidlaw Foundation* (1984), 48 OR (2d) 549 (Div. Ct.).

146 *Vancouver Society*, supra note 137, at paragraph 28.

Thus, he concluded, the “conception of charity” in the ITA is “uniform federal law across the country.”<sup>147</sup>

### Employee/Independent Contractor

The distinction between employees and independent contractors is fundamental for federal income taxation,<sup>148</sup> resulting in significant differences in the computation of income,<sup>149</sup> in the application of tax to non-residents,<sup>150</sup> and in administrative arrangements for the payment of tax.<sup>151</sup> In contrast to the undefined words “gift” and “charitable,” the ITA defines “employment” as “the position of an individual in the service of some other person” and “employee” as “a person holding such a position.”<sup>152</sup> A “business,” on the other hand, is defined to include “a profession, calling, trade, manufacture or undertaking of any kind whatever” and, except for specific purposes, “an adventure or concern in the nature of trade,” but not an

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147 Ibid.

148 In addition to its importance for the ITA, the distinction between employees and independent contractors is central to the application of the Employment Insurance Act, SC 1996, c. 23, and the Canada Pension Plan, RSC 1985, c. C-8. Although Canadian courts apply the same tests to distinguish employees and independent contractors under all of these statutes, this article concerns itself only with the distinction drawn for purposes of the ITA.

149 While employees must compute their income under subdivision a of division B of part I of the ITA (“Income or Loss from an Office or Employment”), which allows only those deductions specifically listed in ITA section 8, independent contractors compute their income under subdivision b of division B of part I of the ITA (“Income or Loss from a Business or Property”), which permits a much broader range of deductions in computing their profit from the business. In addition, where, under the definition of “personal services business” in ITA subsection 125(7), an individual who carries on a business of providing services to a person or partnership through a corporation “would reasonably be regarded as an officer or employee of the person or partnership . . . but for the existence of the corporation,” the corporation is precluded from the reduced corporate tax rate under ITA section 125, and limited to the deductions allowed by ITA paragraph 18(1)(p). For a detailed discussion of these statutory rules and of judicial decisions in which they have been applied, see David G. Duff, *Canadian Income Tax Law* (Toronto: Emond Montgomery and Canadian Tax Foundation, 2003), chapters 4 and 5.

150 Under the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997 (herein referred to as “the Canada-US tax treaty”), for example, article XV permits each contracting state to tax non-residents who are employed in the state. In contrast, article XIV allows each contracting state to tax non-residents performing “independent personal services” in the state only if the non-resident “has or had a fixed base regularly available” in the state and “only to the extent that the income is attributable to that fixed base.”

151 See, for example, ITA paragraph 153(1)(a) and regulation 101 of the Income Tax Regulations, which make employers responsible for withholding prescribed amounts from salaries, wages, and other remuneration payable to employees and remitting these amounts to the receiver general. In contrast, ITA subsection 156(1) requires independent contractors to pay quarterly tax instalments based on taxes paid in the previous year or estimated taxes for the current year.

152 See the definition of “employment” in ITA subsection 248(1).

office or employment.<sup>153</sup> As the language of these statutory definitions is quite general, however, Canadian courts have developed a number of tests to distinguish between employees and independent contractors.<sup>154</sup> The leading case on the concept of employment for tax purposes is *Wiebe Door Services Ltd. v. MNR*.<sup>155</sup>

In *Wiebe Door*, the taxpayer carried on a business of installing and repairing overhead doors, in the course of which services were performed for the taxpayer by “a considerable number of door installers and repairers, with each of whom it [had] a specific understanding that they would be running their own businesses and would therefore be responsible for their own taxes.”<sup>156</sup> At trial,<sup>157</sup> the Tax Court considered four tests by which Canadian courts “most commonly” distinguish between employees and independent contractors, dismissing the traditional “control” test as “indecisive” on the facts of the case,<sup>158</sup> concluding that “the workers would seem to be independent contractors” under tests considering the ownership of tools and the chance of profit and risk of loss,<sup>159</sup> but ultimately holding that the

153 See the definition of “business” in ITA subsection 248(1).

154 For useful discussions of Canadian cases distinguishing between employees and independent contractors, see Marc Noël, “Contract for Services, Contract of Services—A Tax Perspective and Analysis,” in *Report of Proceedings of the Twenty-Ninth Tax Conference, 1977 Conference Report* (Toronto: Canadian Tax Foundation, 1978), 712-40; Brian J. Wilson, “Employment Status Under the Income Tax Act,” in *Income Tax and Goods and Services Tax Planning for Executive and Employee Compensation and Retirement, 1991 Corporate Management Tax Conference* (Toronto: Canadian Tax Foundation, 1992), 2:1-61; Joanne E. Magee, “Whose Business Is It? Employees Versus Independent Contractors,” *Personal Tax Planning feature* (1997) vol. 45, no. 3 *Canadian Tax Journal* 584-603; and Alain Gaucher, “A Worker’s Status as Employee or Independent Contractor,” in *Report of Proceedings of the Fifty-First Tax Conference, 1999 Conference Report* (Toronto: Canadian Tax Foundation, 2000), 33:1-98. For an excellent analysis of the relationship between these tests and the concept of employment in the CCQ, see John W. Durnford, “Employee or Independent Contractor? The Interplay Between the Civil Code and the Income Tax Act,” in *Mélanges Paul-André Crépeau* (Cowansville, QC: Yvon Blais, 1997), 273-309. For a more recent analysis, see François Auger, “Employee and Self-Employed Worker,” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism. Collection of Studies in Canadian Tax Law*, supra note 4, 3:1-82.

155 87 DTC 5025; [1986] 2 CTC 200 (FCA).

156 *Ibid.*, at 5026; 201.

157 Although unreported, the key passages from the trial decision are excerpted in the Federal Court of Appeal decision, *ibid.*, at 5026-27; 201-2.

158 *Ibid.*, at 5027-28; 202-3. According to this test, the distinction between a “contract of service” or employment and a “contract for services” with an independent contractor is that the former allows the payer to specify not only what work is to be done, but also the manner in which the work is to be carried out.

159 *Ibid.*, at 5027; 202. According to these tests, the distinction between employees and independent contractors depends not on the legal character of the contract, but on the economic substance or reality of the relationship. To the extent that individuals own the tools necessary to carry on their work, and have an opportunity to earn a profit and a risk of loss, their economic status is more like that of a business than that of an employee.

workers were employees on the basis of the so-called integration test.<sup>160</sup> According to the trial judge,

[t]he Appellant was in the business of servicing and installing overhead electronically controlled doors. All the work performed by the installers formed an integral part of the Appellant's business. Without the installers, the Appellant would be out of business. . . . In the case before me, this test tips the scales in favour of a contract of service and *not* a contract for services.<sup>161</sup>

On appeal, the Federal Court of Appeal set aside the decision and referred the matter back to the Tax Court on the basis that it had misapplied the integration test by approaching the test from the perspective of the “employer” rather than the “employee.”<sup>162</sup> More important, the court affirmed a general test, “weighing all of the relevant factors,”<sup>163</sup> including control, ownership of tools, chance of profit and risk of loss, and integration,<sup>164</sup> in order to evaluate “the total relationship of the parties.”<sup>165</sup> This general test has been affirmed in several subsequent income tax cases,<sup>166</sup> and

160 Ibid. According to this test, which emphasizes the social character of the relationship, employees carry out their work “as an integral part of the business,” while the work of independent contractors, “although done for the business, is not integrated into it but is only accessory to it”: *Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans*, [1952] 1 TLR 101, at 111 (CA).

161 *Wiebe Door*, supra note 155, at 5027; 202 (emphasis in original).

162 Ibid., at 5029-30; 205-7. The court stated (ibid., at 5029; 205), “As thus applied, this can never be a fair test, because in a factual relationship of mutual dependency it must always result in an affirmative answer. If the businesses of both parties are so structured as to operate through each other, they could not survive independently without being restructured. But that is a consequence of their surface arrangement and not necessarily expressive of their intrinsic relationship.”

163 Ibid., at 5030; 207.

164 Although the court rejected the integration test as a general test to distinguish employees from independent contractors (ibid., at 5029; 205), its subsequent comments on the proper application of the test (ibid., at 5030; 206-7) confirm the continued relevance of the test as an element in the overall determination.

165 Ibid., at 5030; 206.

166 See, for example, *Moose Jaw Kinsmen Flying Fins Inc. v. MNR*, 88 DTC 6099; [1988] 2 CTC 2377 (FCA); *Bradford v. MNR*, 88 DTC 1661; [1988] 2 CTC 2359 (TCC); *Sutherland v. The Queen*, 91 DTC 5318; [1991] 1 CTC 495 (FCTD); *Bart v. MNR*, 91 DTC 884; [1991] 1 CTC 2632 (TCC); *Tedco Apparel Management Services*, supra note 52; *Qureshi v. MNR*, 92 DTC 1150; [1992] 1 CTC 2370 (TCC); *David T. McDonald Co. Ltd. v. MNR*, 92 DTC 1917; [1992] 2 CTC 2607 (TCC); *L. Beaulieu v. The Queen*, [1993] 2 CTC 2323 (TCC); *Société de Projets ETPA Inc. v. MNR*, 93 DTC 516; [1993] 1 CTC 2392 (TCC); *Placements Marcel Lapointe Inc. v. MNR*, 93 DTC 821; [1993] 1 CTC 2506 (TCC); *G. Dorosh v. Canada*, [1995] 2 CTC 2568 (TCC); *T. Vango v. Canada*, [1995] 2 CTC 2757 (TCC); *E.W. Korpan v. Canada*, [1995] 1 CTC 2991 (TCC); *McNeil v. The Queen*, 95 DTC 702; [1995] 2 CTC 2869 (TCC); *Gitche Gumee Consultants Ltd. v. Canada*, [1995] 2 CTC 2764 (TCC); *Nelson v. The Queen*, 97 DTC 1253; [1998] 1 CTC 2008 (TCC); *MacLeod v. R.*, [1999] 4 CTC 2223 (TCC); *Benn et al. v. The Queen*, 2000 DTC 2051; [2000] 3 CTC 2001 (TCC); *Marian v. R.*, [2001] 1 CTC 2508 (TCC); *Goorab v. R.*, [2001] 3 CTC 2500 (TCC); *Criterion Capital Corporation v. The Queen*, 2001 DTC

more recently by the Supreme Court of Canada in a case involving vicarious liability in tort law.<sup>167</sup>

For the purpose of this discussion, the general test affirmed by the Federal Court of Appeal in *Wiebe Door* is of less importance than the sources of the various subordinate tests to which the general test refers. For the control test, the court cited the “traditional common-law criterion of the employment relationship” established by Baron Bramwell in *R v. Walker*,<sup>168</sup> according to whom

the difference between the relations of master and servant and of principal and agent is this:—A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.<sup>169</sup>

For the so-called economic reality or entrepreneur test, which considers both the ownership of tools and the chance of profit and the risk of loss in addition to the criterion of control, the court cited an article by William O. (later Justice) Douglas on vicarious liability in tort law,<sup>170</sup> and a decision in which the Judicial Committee of the Privy Council relied on common law principles to conclude that the respondent was not liable for municipal taxes on the basis that it carried on its operations as an agent of the Crown.<sup>171</sup> For the integration or “organization” test, the court cited Denning LJ’s judgment in *Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans*,<sup>172</sup> which considered the common law distinction between a contract of service and a contract for services in order to determine the ownership of a manuscript for the purpose of the English Copyright Act, 1911.<sup>173</sup> As a result, each of the subordinate tests to which the court referred in *Wiebe Door* derives from the common law.

In contrast to these common law tests, the civil law has consistently emphasized control or subordination as the main or sole criterion for distinguishing between employees and independent contractors. In *Quebec Asbestos Corp. v. Couture*,<sup>174</sup> for example, in which the respondent sought damages for injuries suffered from an explosion in the course of his work, the Supreme Court of Canada applied the control test alone to conclude that the appellant company was not liable on the basis that the respondent was an independent contractor. Rinfret J held:

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921; [2001] 4 CTC 2844 (TCC); and *Wolf*, supra note 52. For a detailed review of cases decided since *Wiebe Door*, see Gaucher, supra note 154, at 33:58–66.

167 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 204 DLR (4th) 542 (SCC).

168 (1858), 27 LJMC (ns) 207.

169 *Ibid.*, at 208.

170 William O. Douglas, “Vicarious Liability and Administration of Risk I” (March 1929) vol. 38, no. 5 *Yale Law Journal* 584–604 and “. . . II” (April 1929) vol. 38, no. 6 *Yale Law Journal* 720–45.

171 *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 DLR 161 (PC).

172 *Supra* note 160.

173 1 & 2 Geo. 5, c. 46.

174 [1929] SCR 166.

[TRANSLATION] A contract of employment differs from a contract of enterprise above all by the characteristic of subordination attributable to the employee. . . .

Couture carried out his work in an independent manner, without the direction and control of the company.<sup>175</sup>

Although the *Quebec Asbestos* case was decided in 1928, the emphasis on control or subordination was reaffirmed in several more recent decisions.<sup>176</sup> More important, while the CCLC did not itself define control or subordination as the key test to distinguish employees and independent contractors, this factor is central to the new CCQ, which came into force on January 1, 1994. CCQ article 2085 provides:

A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

CCQ articles 2098 and 2099, on the other hand, provide:

A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

In Quebec's civil law system, therefore, control and subordination are the key criteria by which employees are distinguished from independent contractors.

Notwithstanding the civil law, however, Canadian income tax cases in Quebec have generally applied the same tests to distinguish employees and independent contractors as the courts in the common law provinces apply, thereby dissociating the meaning of these concepts for tax purposes from their meaning under Quebec's civil law. In *Hauser v. MNR*,<sup>177</sup> for example, a case that preceded the Federal Court of Appeal decision in *Wiebe Door*, the Tax Review Board made no mention of the civil law but applied the control test, the integration test, the economic reality test, and another test looking at the work to be performed under the contract,<sup>178</sup> to

175 *Ibid.*, at 169, 170.

176 See, for example, *Hill-Clarke-Francis Ltd. v. Northland Groceries (Quebec) Ltd.*, [1941] SCR 437; *Côté v. Rbéault*, [1962] QB 797; *Hôpital Notre-Dame and Théoret v. Laurent*, [1978] 1 SCR 605; and *Brossard (Ville) v. Syndicat des employés de la ville de Brossard*, [1990] TT 337 (Qué. TT).

177 78 DTC 1532; [1978] CTC 2728 (TRB).

178 According to this "specific results" test, a contract for services normally contemplates "the accomplishment of a specified job or task and normally does not require that the contractor do anything personally," while a contract of service "does not normally envisage the accomplishment

conclude that the taxpayer was an employee not an independent contractor. A similar approach was adopted in two subsequent tax cases, each of which also preceded *Wiebe Door*.<sup>179</sup> In yet another case decided before *Wiebe Door*,<sup>180</sup> the Tax Review Board mentioned the civil law but considered a number of criteria including ownership of tools, chance of profit and risk of loss, and integration, on the basis that the various tests “expressed by doctrine and by numerous judgments in civil law, in common law and tax law . . . are all the same.”<sup>181</sup>

Since *Wiebe Door*, Canadian income tax cases in Quebec have tended to apply the general test adopted by the Federal Court of Appeal, considering each of the subordinate tests to which it referred in order to evaluate “the total relationship of the parties.”<sup>182</sup> In *Tedco Apparel Management Services Inc. v. MNR*,<sup>183</sup> for example, the court rejected the taxpayer’s argument that the control or subordination test should be given priority in Quebec on the basis that “in Quebec as in the other provinces in Canada further developments have deprived this test of its conclusive effect.”<sup>184</sup> Similarly, in *Wolf v. The Queen*,<sup>185</sup> although citing the provisions of the new CCQ, Desjardins JA relied on the various subordinate tests considered in *Wiebe Door*, on the basis that “the distinction between a contract of employment and a contract for services under the *Civil Code of Québec* can be examined in light of the tests developed through the years both in the civil law and in the common law.”<sup>186</sup> In contrast, while recognizing that both the civil and the common law look to “the terms of the relevant agreements and circumstances to find the true contractual reality of the parties,”<sup>187</sup> Décaré JA’s concurring judgment in *Wolf* emphasized that

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of a specified amount of work but does normally contemplate the servant putting his personal services at the disposal of the master during some period of time”: *Alexander v. MNR*, 70 DTC 6006, at 6011; [1969] CTC 715, at 724 (Ex. Ct.). Although the court does not cite any specific authority for this test, it refers to two common law cases on the distinction between employees and independent contractors: *Ready Mixed Concrete v. Min. of Pensions*, [1968] 1 All ER 433 (QBD); and *Market Invests. v. Min. of Social Sec.*, [1968] 3 All ER 732 (QBD).

179 *Hecht v. MNR*, 80 DTC 1438; [1980] CTC 2513 (TRB); and *Lafleur et al. v. MNR*, 84 DTC 1478; [1984] CTC 2489 (TCC).

180 *Braive*, supra note 52.

181 *Ibid.*, at 757; 2803.

182 See, for example, *Tedco Apparel Management Services*, supra note 52; *Beaulieu*, supra note 166; *Placements Marcel Lapointe*, supra note 166; and *Wolf*, supra note 52.

183 *Supra* note 52.

184 *Ibid.*, at 1431; 2695, per Tremblay TCJ. See also *Qureshi*, supra note 166, in which Tremblay TCJ emphasized (at 1158; 2383) that the determination as to whether an individual is an employee or an independent contractor must be made in accordance with the civil law in Quebec and the common law in the other provinces, but concluded (at 1159; 2384) that “the development of the law in the last 60 years, and particularly in the last 15 or 20 years, clearly indicates that the emphasis has shifted and that the test of control is no longer decisive.”

185 *Supra* note 52.

186 *Ibid.*, at paragraph 49.

187 *Ibid.*, at paragraph 113.

for tax cases arising in Quebec “[t]he test . . . is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other.”<sup>188</sup> As a result, he observed of Desjardins JA’s judgment:

I find it somehow puzzling that “control” is listed amongst the factors to be considered in an exercise the purpose of which is precisely, under the *Civil Code of Quebec*, to determine whether or not there is control.<sup>189</sup>

At least one other case has adopted a similar approach, concluding that in Quebec the characterization of an employment relationship for the purpose of the federal Employment Insurance Act should be based on the CCQ.<sup>190</sup>

## Residence

Like the concept of employment, the concept of residence is one of the most important in the ITA, governing each person’s basic liability for tax under subsection 2(1),<sup>191</sup> the imposition of taxes on non-residents under ITA subsection 2(3) and part XIII,<sup>192</sup> and numerous other rules governing the computation of a taxpayer’s income.<sup>193</sup> While the ITA defines “a reference to a person resident in Canada” as

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188 *Ibid.*, at paragraph 117.

189 *Ibid.*, at paragraph 114.

190 *Sauvé v. MNR* (1995), 132 DLR (4th) 114 (FCA).

191 Pursuant to this provision, persons resident in Canada are taxed on their worldwide income. Where Canadian income tax is payable on income subject to tax in another country, a credit in respect of the foreign tax may be deducted under ITA section 126.

192 ITA subsection 2(3) and division D of part I impose Canadian income tax on non-residents who in the taxation year were employed in Canada, carried on a business in Canada, or disposed of a taxable Canadian property. Part XIII imposes a withholding tax on certain payments to non-residents. These taxes are subject to relieving provisions in various tax treaties between Canada and other countries.

193 See, for example, ITA section 114, which provides special rules for individuals “resident in Canada throughout part of the year and non-resident in Canada throughout another part of the year”; section 128.1, which triggers a deemed disposition and reacquisition of property at fair market value when a taxpayer either becomes or ceases to be a resident of Canada; subparagraphs 20(8)(a)(ii) and 40(2)(a)(i), which prevent non-residents from deducting reserves in respect of unpaid receivables; the description of B in paragraph 40(2)(b), which limits the principal residence exemption to taxpayers resident in Canada; subsections 70(6) and 73(1), which permit tax-deferred transfers of property to a spouse or common law partner or a qualifying trust only if the spouse or common law partner or trust is resident in Canada; subsections 70(9) and 73(3), which permit tax-deferred transfers of farm property to a child only if the child is resident in Canada; the attribution rules in sections 74.1 and 74.2, which apply only while the transferee of property is resident in Canada; the definition of “Canadian partnership” in subsection 102(1), which, together with other provisions, limits the availability of various tax deferral provisions on transfers of property to or from a partnership to partnerships “all the members of which were . . . resident in Canada” at the relevant time; the definition of “Canadian-controlled private corporation” in subsection 125(7), which limits the reduced rate of corporate tax to corporations that are not “controlled, directly or indirectly in any manner



including “a person who was at the relevant time ordinarily resident in Canada,”<sup>194</sup> and contains specific rules deeming certain persons “to have been resident in Canada throughout a taxation year”<sup>195</sup> and others not to be resident in Canada,<sup>196</sup> it does not define the term “residence” itself. Nor do Canada’s international tax treaties define this term, stipulating instead that the meaning of the expression “resident of a Contracting State” is generally determined according to the domestic law of the applicable state.<sup>197</sup> In the absence of any such authoritative definition, the meaning of residence under the ITA has been defined by the courts, which have developed principles and guidelines to determine the residence of individuals, trusts, and corporations. For the purpose of this discussion, the key issue concerns the concept of individual residence.

In Canada, the leading case on the concept of individual residence is *Thomson v. MNR*.<sup>198</sup> Thomson, a Canadian citizen, left Canada in 1923 and thereafter spent

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whatever, by one or more non-resident persons”; and subsection 18(4), which limits otherwise deductible amounts in respect of interest paid or payable to specified non-residents.

194 ITA subsection 250(3).

195 ITA subsections 250(1) and (4). While the former applies to all persons, the latter applies only to corporations. Of the various circumstances listed in subsection 250(1), the most important is the rule in paragraph (a), which deems persons who have “sojourned in Canada in the year for a period of, or periods the total of which is, 183 days or more” to have been resident in Canada throughout the year.

196 ITA subsection 250(5) deems persons who would otherwise be resident in Canada not to be resident in Canada if, under a tax treaty with another country, the person is “resident in the other country and not resident in Canada.”

197 Canada-US tax treaty, supra note 150, article IV(1). Where an individual is a resident of both contracting states under their respective domestic laws, article IV(2) provides that the individual’s status shall be determined by (a) deeming the individual to be a resident of the contracting state in which the individual has a “permanent home” or, if the individual has a permanent home in both states or in neither state, in the contracting state with which the individual’s “personal and economic relations are closer (centre of vital interests)”; (b) if the contracting state in which the individual has his or her centre of vital interests cannot be determined, deeming the individual to be a resident of the contracting state in which the individual has a “habitual abode”; (c) if the individual has a habitual abode in both states or in neither state, deeming the individual to be a resident of the contracting state of which the individual is a citizen; and (d) if the individual is a citizen of both states or of neither state, settling the question by mutual agreement between the competent authorities of the contracting states. Similar provisions are found in the Convention Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed in London on September 8, 1978, as amended by the protocols signed on April 15, 1980 and October 16, 1985, articles 4(1) and (2).

198 (1946), 2 DTC 812; [1946] CTC 51 (SCC). The *Thomson* case is one of the most frequently cited in Canadian income tax law, and it is the starting point for most cases addressing the concept of individual residence. For useful summaries of these cases, see Brian G. Hansen, “Individual Residence,” in the 1977 Conference Report, supra note 154, 682-712, at 687-99; D. Bernard Morris, “Jurisdiction To Tax: An Up-Date,” in *Report of Proceedings of the Thirty-First Tax Conference*, 1979 Conference Report (Toronto: Canadian Tax Foundation, 1980), 414-44,

most of the year in the United States; however, from 1932 to 1941, he returned to Canada for several months each summer, renting a house during the summers of 1932 to 1934 and building a house in 1934, which his wife occupied year-round. Dismissing the taxpayer's appeal from an assessment imposing Canadian income tax on his worldwide income, a majority of the court held that the taxpayer was during his 1940 taxation year "residing or ordinarily resident in Canada" within the meaning of paragraph 9(a) of the Income War Tax Act.<sup>199</sup> More important, for Canadian income tax law, the court considered the concepts of "residence" and "ordinarily resident" in order to apply the statutory provision.

Although the decision is complicated by five separate opinions, one of these in dissent, the majority judgments share three important characteristics.

First, three of the four majority judgments cited English tax cases interpreting the concepts "resident" and "ordinarily resident" in the context of the UK Income Tax Act, 1918.<sup>200</sup> In the most important of these cases,<sup>201</sup> the House of Lords held that these words had "no . . . technical or special meaning,"<sup>202</sup> were used in their ordinary or "common sense,"<sup>203</sup> and involved questions of "fact and degree . . . determined on all the circumstances of the case."<sup>204</sup> According to Viscount Cave LC,

the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."<sup>205</sup>

According to Lord Buckmaster,

if residence be once established ordinarily resident means . . . no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.<sup>206</sup>

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at 415-20; Gordon C. Bale, "The Basis of Taxation," in Brian G. Hansen, Vern Krishna, and James A. Rendall, eds., *Canadian Taxation* (Don Mills, ON: DeBoo, 1981), 21-57, at 30-42; and Edwin G. Kroft, "Jurisdiction To Tax: An Update," in *Tax Planning for Canada-US and International Transactions*, 1993 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1994), 1:1-138, at 1:7-10.

199 RSC 1927, c. 97, as amended.

200 8 & 9 Geo. 5, c. 40. See the judgments cited by Kerwin, Rand, and Estey JJ in *Thomson*, supra note 198.

201 *Levene v. Inland Revenue Commissioners*, [1928] AC 217 (HL); and *Inland Revenue Commissioners v. Lysaght*, [1928] AC 234 (HL).

202 *Levene*, supra note 201, at 232, per Lord Warrington of Clyffe; and *Lysaght*, supra note 201, at 249, per Lord Warrington of Clyffe.

203 *Lysaght*, supra note 201, at 247, per Lord Buckmaster.

204 *Levene*, supra note 201, at 223, per Viscount Cave LC.

205 *Ibid.*, at 222.

206 *Lysaght*, supra note 201, at 248.

Adopting a similar understanding of the expression “ordinarily resident” as “residence in a place with some degree of continuity and apart from accidental or temporary absences,”<sup>207</sup> Viscount Cave LC also observed that the concept “differs little in meaning” from the concept of residence alone.<sup>208</sup>

Second, consistent with the English cases, the majority judgments in *Thomson* concluded that, for Canadian tax purposes as well, the words “resident” and “ordinarily resident” have no special or technical meaning, but “should receive the meaning ascribed to them by common usage.”<sup>209</sup> Referring to *The Shorter Oxford English Dictionary*, for example, Kerwin J interpreted the word “reside” as

To dwell permanently or for a considerable time, to have one’s settled or usual abode, to live, in or at a particular place<sup>210</sup>

and the word “ordinarily” as

1. In conformity with rule; as a matter of regular occurrence. 2. In most cases, usually, commonly. 3. To the usual extent. 4. As is normal or usual.<sup>211</sup>

Likewise, Kellock J cited *Murray’s New English Dictionary* in interpreting the word “reside” as “to take up one’s abode or station,” “to dwell permanently or for a considerable time,” “to have one’s settled or usual abode,” and “to live in or at a particular place,”<sup>212</sup> while Estey J referred to “dictionary and judicial comments” to conclude that “one is ‘ordinarily resident’ in the place where in the settled routine of his life he regularly, normally or customarily lives.”<sup>213</sup>

Finally, and also consistent with the English cases, the majority judgments in *Thomson* held that the assessment of an individual’s residence is mostly factual in nature, requiring that “all of the relevant factors” be “taken into consideration.”<sup>214</sup> For example, Rand J observed:

The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows . . . that in common parlance “residing” is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible

207 *Levene*, supra note 201, at 225.

208 *Ibid.* Subsequent Canadian cases have differentiated the concepts by extending the concept of “ordinarily resident” to include the situation where individuals leave the country for a year or two but maintain social or economic connections in Canada. See, for example, *Reeder v. MNR*, 75 DTC 17; [1975] CTC 2022 (TRB).

209 *Thomson*, supra note 198, at 817; 52-53, per Kerwin J.

210 *Ibid.*, at 818; 53.

211 *Ibid.*

212 *Ibid.*, at 819; 67.

213 *Ibid.*, at 813; 70.

214 *Ibid.*

to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.<sup>215</sup>

As a result, he concluded, the characterization of an individual's residence is "chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question."<sup>216</sup>

For present purposes, the specific interpretations of the words "residence" and "ordinarily resident" in *Thomson* are less important than the sources to which the majority judgments refer to support their interpretations. In contrast to the concepts of charity, gift, and employment that Canadian courts have adopted for tax purposes, these interpretations of the words "residence" and "ordinarily resident" originate not in common law concepts or principles, such as those governing an individual's domicile,<sup>217</sup> but in the ordinary meaning of the words found in dictionary definitions and "common parlance."<sup>218</sup> As a result, although commentators often refer to the "common law" meaning of residence in order to distinguish this concept from statutory deeming rules,<sup>219</sup> the tax concepts of residence and ordinary residence are unrelated to the common law that governs relationships between private persons. For the same reason, these concepts are also unconnected to the civil law of Quebec, which, like the common law, employs the concept of residence

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215 Ibid., at 815; 63-64.

216 Ibid., at 816; 64.

217 The concept of an individual's domicile is used to determine jurisdiction in private international law. In common law, this concept has been defined as the jurisdiction in which the individual "has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home": *Lord v. Colvin* (1859), 62 ER 141, at 145 (Ch.). Although the concept of residence or "habitation" is essential to the determination of an individual's domicile under common law, the latter depends crucially on the individual's intention to make the residence a "permanent home" and differs significantly from the concept of residence in that an individual may have more than one residence but only one domicile. For a useful discussion of the differences between residence for tax purposes and common law domicile, see Hansen, *supra* note 198, at 699-700.

218 Although the majority judgments also refer to English cases to establish the meaning of these words, these cases themselves reject a special or technical meaning of the words "resident" and "ordinarily resident," referring instead to dictionary definitions and adopting an ordinary or "commonsense" meaning of the words.

219 See, for example, Kroft, *supra* note 198, at 7; Peter W. Hogg, Joanne E. Magee, and Ted Cook, *Principles of Canadian Income Tax Law*, 3d ed. (Scarborough, ON: Carswell, 1999), 126-29; and Vern Krishna, *The Fundamentals of Canadian Income Tax*, 6th ed. (Scarborough, ON: Carswell, 2000), 74-76.

in order to define a person's domicile,<sup>220</sup> or to the definitions of the word "resident" in the statutes of many common law provinces.<sup>221</sup> In each case, therefore, the tax concepts of residence and ordinary residence are dissociated from provincial private law.<sup>222</sup>

### Acquisition and Disposition of Property

Another notable example of dissociation between the ITA and provincial private law involves the related concepts of an acquisition of property and a disposition of property.<sup>223</sup> For tax purposes, an acquisition of property is relevant to the characterization of "depreciable property" under ITA subsection 13(21),<sup>224</sup> upon which the right to deduct capital cost allowance is based. The concept of a disposition, on the other hand, affects the timing of tax consequences, triggering the recognition

220 CCQ article 76 provides, "Change of domicile is effected by actual residence in another place coupled with the intention of the person to make it the seat of his principal establishment." For this purpose, article 77 defines a person's residence as "the place where he ordinarily resides," adding that "if a person has more than one residence, his principal residence is considered in establishing his domicile"; and article 78 deems persons "whose domicile cannot be determined with certainty . . . to be domiciled at the place of [their] residence" and persons who have no residence to be domiciled at the place where they live or, "if that is unknown, at the place of [their] last known domicile." For a useful discussion of the concept of residence in the CCQ and its relationship to the income tax concept, see François Auger, "Study of the Dissociation Between Federal Tax Legislation and Quebec Civil Law: Residence," in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism. Collection of Studies in Canadian Tax Law*, supra note 4, 5:1-38.

221 See, for example, section 1(x) of the Alberta Health Care Insurance Act, RSA 2000, c. A-20, which defines a "resident" as "a person lawfully entitled to be or to remain in Canada, who makes the person's home and is ordinarily present in Alberta" excluding "a tourist, transient or visitor to Alberta"; section 1 of the Medicare Protection Act, RSBC 1996, c. 286, which defines a "resident" as "a person who (a) is a citizen of Canada or is lawfully admitted to Canada for permanent residence, (b) makes his or her home in British Columbia, and (c) is physically present in British Columbia at least 6 months in a calendar year" excluding "a tourist or visitor to British Columbia"; section 1(1) of the Fish and Wildlife Conservation Act, 1997, SO 1997, c. 41, which defines a "resident" as "a person whose primary residence is Ontario and who has actually resided in Ontario for a period of at least six months during the 12 months preceding the day that residence becomes material under this Act"; and section 1 of the Engineering Profession Act, RSPEI 1988, c. E-8.1, which defines a "resident" as "a person who in the settled routine of life, usually, normally and customarily lives and has his place of abode in the province."

222 For the purposes of the Quebec Taxation Act, RSQ c. I-3, as amended, section 7.14 explicitly dissociates the tax concept of residence from the meaning determined under the CCQ. This provision is discussed below in the context of Canadian bijuralism and the ITA, under the heading "Amendment."

223 For a detailed discussion of this issue, see Marie-Pierre Allard, "The Retroactive Effect of Conditional Obligations in Tax Law" (2001) vol. 49, no. 6 *Canadian Tax Journal* 1726-1839.

224 This provision defines "depreciable property" of a taxpayer as "property acquired by the taxpayer in respect of which the taxpayer has been allowed, or would, if the taxpayer owned the property at the end of the year . . . be entitled to, a deduction under paragraph 20(1)(a) in computing income for that year or a preceding taxation year [emphasis added]."

of gains and losses on the property disposed of.<sup>225</sup> Although the ITA does not define the words “acquire” or “acquisition,” it contains a lengthy definition of the word “disposition” to include, among other things, “any transaction or event entitling a taxpayer to proceeds of disposition of the property” and to exclude various kinds of transfers “as a consequence of which there is no change in the beneficial ownership of the property.”<sup>226</sup> In addition to this definition, the ITA defines the expression “proceeds of disposition” to include “the sale price of property that has been sold” and various kinds of compensation for property unlawfully taken, destroyed, taken under statutory authority, injuriously affected, or damaged.<sup>227</sup> In applying statutory provisions governing the timing of inclusions and deductions, Canadian courts have often considered when or whether taxpayers have acquired or disposed of property.

In common law provinces, the leading case on the concept of an acquisition of property is *Wardean Drilling*,<sup>228</sup> which was reviewed earlier as an example of complementarity between the ITA and the private law of provinces other than Quebec.<sup>229</sup> Referring to provisions of the Alberta Sale of Goods Act,<sup>230</sup> the court held that the taxpayer had not acquired a drilling rig in the taxation year before the year in which it was delivered on the basis that the contract stipulated that title was not to pass until shipment. More generally, Cattanach J concluded, property could be acquired for tax purposes either “when title has passed, assuming that the assets exist at that time” or “when the purchaser has all the incidents of title, such as possession, use and risk, although legal title may remain in the vendor as security for the purchase price as is the commercial practice under conditional sales agreements.”<sup>231</sup> Subsequent cases in common law provinces have consistently followed this interpretation of an acquisition of property,<sup>232</sup> considering not only the legal ownership of property

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225 For example, ITA subsection 39(1) defines capital gain and capital loss as the gain/loss from the disposition of capital property. In subsection 13(21), the description of F in the definition of “undepreciated capital cost” requires proceeds from the disposition of depreciable property of a particular class (not exceeding the original capital cost of the property) to be subtracted in computing the undepreciated capital cost of the class, which may trigger an income inclusion for recaptured depreciation under subsection 13(1) or a terminal loss under subsection 20(16). In subsection 14(5), the description of E in the definition of “cumulative eligible capital” provides for a similar tax result on the disposition of eligible capital property.

226 See the definition of “disposition” in ITA subsection 248(1).

227 See the definition of “proceeds of disposition” in ITA subsection 13(21) and section 54.

228 *Supra* note 58.

229 See the discussion at the text accompanying notes 58 to 61, *supra*.

230 *Supra* note 59.

231 *Wardean Drilling*, *supra* note 58, at 5198; 271.

232 See, for example, *The Queen v. Henuset Brothers Ltd.* (No. 2), 77 DTC 5171; [1977] CTC 228 (FCTD); *Kamsel Leasing Inc. v. MNR*, 93 DTC 250; [1993] 1 CTC 2279 (TCC); and *Gartry v. The Queen*, 94 DTC 1947; [1994] 2 CTC 2021 (TCC).

represented by the transfer of title but also the beneficial ownership of property represented by “the incidents of title, such as possession, use and risk.”<sup>233</sup>

Consistent with this approach to the acquisition of property, cases in common law provinces have also looked to the beneficial ownership of property in order to characterize a disposition of property. In *Victory Hotels Ltd. v. MNR*,<sup>234</sup> for example, the court suggested that the words “disposed of” should be given “their widest meaning which would be ‘to part with,’ ‘to pass over the control of the thing to someone else’ so that the person disposing no longer has the use of the property.”<sup>235</sup> On this basis, it concluded that the taxpayer, who sold a hotel in December 1954 with occupancy on January 3, 1955, had not disposed of the property until 1955. Similarly, in *Kozan v. MNR*,<sup>236</sup> where the taxpayer entered into an agreement to sell an apartment building in 1979 but was unable to close until 1980, the court relied on the fact that the purchaser assumed “[f]ull possession and use” of the property in 1979 to conclude that the property was disposed of in that year.<sup>237</sup> In other cases, courts have held that taxpayers who have leased property under a lease-purchase agreement have retained sufficient “incidents of ownership” to preclude a disposition of the property until the end of the lease.<sup>238</sup>

Unlike the common law, Quebec’s civil law system does not distinguish between legal and beneficial ownership but generally regards ownership as absolute. To the extent that courts rely on provincial private law to interpret the ITA, therefore, tax cases in Quebec might be expected to require a transfer of title to trigger an acquisition or disposition of property. Indeed, in a number of cases involving transactions in Quebec, courts disallowed the deduction of capital cost allowance claimed by purchasers under conditional sales agreements on the basis that title to the property was not acquired by the purchaser but remained with the vendor.<sup>239</sup> In contrast, in *Olympia & York Developments*,<sup>240</sup> the court effectively dissociated the

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233 See, for example, *Kinguk Trawl Inc. et al. v. The Queen*, 2002 DTC 1399; [2002] 2 CTC 2229, at paragraph 123 (TCC), citing *Wardean Drilling* for the proposition that “[t]he concept of beneficial ownership, which might differ from strict legal ownership, is well recognized in the case law.”

234 62 DTC 1378; [1962] CTC 614 (Ex. Ct.).

235 *Ibid.*, at 1385; 626. Given the statutory definitions of disposition and proceeds of disposition, however, the court concluded that this meaning had been modified to include any sale “as soon as a taxpayer is entitled to the sale price of the property sold.” *Ibid.*, at 1386; 628.

236 87 DTC 148; [1987] 1 CTC 2258 (TCC).

237 *Ibid.*, at 152; 2264.

238 See, for example, *The Queen v. Browning Harvey Ltd.*, 90 DTC 6105; [1990] 1 CTC 161 (FCTD); and *Borstad Welding Supplies (1972) Limited v. The Queen*, 93 DTC 5457; [1993] 2 CTC 266 (FCTD).

239 See, for example, *Fortin & Moreau Inc. v. MNR*, 90 DTC 1436; [1990] 1 CTC 2583 (TCC); rev’d. on appeal in *Construction Bérou Inc. v. The Queen*, 99 DTC 5868; [2000] 2 CTC 174 (FCA); *D. Dumais et Fils Inc. v. MNR*, 92 DTC 1107; [1991] 1 CTC 2650 (TCC); *Location Gaëtan Lévesque Inc. v. MNR*, 91 DTC 1380; [1991] 2 CTC 2795 (TCC); and *Laurent Goulet & Fils Inc. v. MNR*, 92 DTC 1605; [1992] 1 CTC 2419 (TCC).

240 *Supra* note 32.

meaning of a disposition from the private law of Quebec by interpreting the concept in accordance with the concept of an acquisition set out in *Wardean Drilling*,<sup>241</sup> on the basis that the concept of a disposition is “obviously the direct opposite” of an acquisition.<sup>242</sup> As a result, it concluded, the taxpayer, which had conveyed property to a purchaser in 1969 pursuant to a sales agreement delaying transfer of title until 1974, had disposed of the property in 1969 when it “completely divested itself of all of the duties, responsibilities and charges of ownership and also all of the profits, benefits and incidents of ownership, except legal title.”<sup>243</sup> Other cases in Quebec have generally followed this approach, concluding that taxpayers have disposed of property under conditional sales agreements when they relinquish “the normal incidents of title . . . such as possession, use and risk” while nonetheless retaining legal ownership until the purchase price is fully paid.<sup>244</sup>

In *Construction Bérou Inc. v. The Queen*,<sup>245</sup> moreover, a majority of the Federal Court of Appeal reconsidered the concept of an acquisition in Quebec, affirming the meaning adopted in *Wardean Drilling* on the grounds that Parliament intended the concepts of an acquisition and a disposition of property to apply uniformly throughout Canada by incorporating the common law distinction between legal and beneficial ownership both in the statutory definition of a disposition<sup>246</sup> and in ITA subsection 248(3), which deems the civil law concepts of usufruct, right of use or habitation, and substitution to be a trust, and all rights under these arrangements to be beneficial interests. Desjardins JA stated:

The federal Parliament . . . devised, for tax purposes and for all of Canada, a common concept covering their ideas of “disposition” (“disposition de biens”) and “beneficial ownership” (“propriété effective”), both in civil and common law: the corollary of these provisions being that when there was a “disposition” for a party to a contract the other party made an “acquisition” or obtained the “beneficial ownership” of it.<sup>247</sup>

Consequently, Létourneau JA concluded, “disposition or acquisition of property for purposes of the capital cost allowance exists under the Act when the normal

241 Supra note 58. See the discussion at the text accompanying note 231, supra.

242 *Olympia & York Developments*, supra note 32, at 6193; 277.

243 Ibid., at 6193; 278.

244 *Robert Bédard Auto Ltée v. MNR*, 85 DTC 643, at 651; [1985] 2 CTC 2354, at 2366 (TCC). See also *Larose v. MNR*, 92 DTC 2055; [1992] 2 CTC 2339 (TCC).

245 Supra note 239.

246 See paragraphs (e) and (f) of the definition of “disposition” in subsection 248(1), which excludes various kinds of transfers “as a consequence of which there is no change in the beneficial ownership of the property.”

247 *Construction Bérou*, supra note 239, at paragraph 6 of Desjardins JA’s judgment. See also *ibid.*, at paragraph 2 of Létourneau JA’s judgment, emphasizing that “the attempt by Parliament to harmonize the two systems with a view to providing fair and equal treatment to all Canadian taxpayers cannot be doubted” and concluding on this basis that the court must adopt “a judicial interpretation which allows for the implementation of this legislative intent.”



incidents of title such as possession, use and risk are transferred.”<sup>248</sup> As a result, it follows, the concept of an acquisition, like that of a disposition, has been dissociated from the civil law of Quebec.

### Other Cases

In addition to cases interpreting the concepts of charity, gift, employment, residence, and the acquisition and disposition of property, other cases have dissociated the interpretation of the ITA from provincial private law in various other contexts. In *Jacoby v. MNR*,<sup>249</sup> for example, in which the taxpayer made payments to his wife pursuant to a written separation agreement that she had neither signed nor initialled, the Tax Review Board disallowed the deduction of these payments under ITA paragraph 60(b) on the basis that they were not payable pursuant to a “written agreement” within the meaning of the provision,<sup>250</sup> notwithstanding the board’s conclusion that the document was a “valid written agreement” under both the civil law and the common law, according to which consent to an agreement may be express or implied.<sup>251</sup> Observing that, under the ITA, deductible payments must be made either under the order of a competent tribunal or under a written agreement, the board reasoned that “it is rather difficult to conclude that the legislature did not mean that the contract should not be signed.”<sup>252</sup> As a result, it concluded, “the consent which is the specific element of the contract must also be in writing.”<sup>253</sup> Although other cases have held that both parties need not sign the same document for it to constitute a “written agreement” within the meaning of the ITA,<sup>254</sup> the requirement in *Jacoby* that consent must be in writing has been consistently affirmed.<sup>255</sup> As a result, it follows, these decisions have dissociated the concept of a “written agreement” under the ITA from that in provincial private law.

Similarly, in *Démolition A.M. de l’Est du Québec Inc. v. MNR*,<sup>256</sup> where the minister disallowed the taxpayer’s deduction for manufacturing or processing profits under ITA

248 Ibid., at paragraph 14 of Létourneau JA’s judgment.

249 81 DTC 824; [1981] CTC 2935 (TRB).

250 Although the deduction for spousal support payments is still found in ITA paragraph 60(b), the requirement that these payments must be “payable . . . under an order of a competent tribunal or under a written agreement” now appears in subsection 60.1(2).

251 *Jacoby*, supra note 249, at 831; 2944-45.

252 Ibid., at 842; 2964.

253 Ibid., at 842; 2963.

254 See, for example, *Simpson v. R.*, [1996] 2 CTC 2687 (TCC); and *Foley v. R.*, [2000] 4 CTC 2016 (TCC).

255 See, for example, *Hodson v. The Queen*, 88 DTC 6001; [1988] 1 CTC 2 (FCA); *MacLachlan v. The Queen*, 92 DTC 1024; [1992] 1 CTC 2089 (TCC); *Jaskot v. MNR*, 92 DTC 1102; [1992] 1 CTC 2145 (TCC); *McMillan, D.R., v. Canada*, [1995] 1 CTC 2678 (TCC); *Risula v. R.*, [1996] 3 CTC 2125 (TCC); *Von Neudegg v. R.*, [1999] 2 CTC 2525 (TCC); *Friesen v. R.*, [2001] 1 CTC 2208 (TCC); and *McIntosh v. R.*, [2000] 2 CTC 2423 (TCC).

256 [1993] 2 CTC 2447 (TCC).

section 125.1, the court rejected the minister's argument that the taxpayer's demolition business should, under Quebec law, be characterized as construction, which is not eligible for the deduction,<sup>257</sup> on the basis that the word "construction" should be interpreted according to its "ordinary meaning."<sup>258</sup> According to Garon TCCJ,

provisions of the *Civil Code*, assuming that they operate to treat demolition work on the same basis as construction activity, can be of no assistance when it comes to interpreting a federal tax statute dealing with the scope of the manufacturing and processing profits tax credit. It is of no relevance that the demolition industry in Quebec is governed by the Office de la construction du Québec, which was established under a provincial statute. It follows that this exception [for construction], which appears in subparagraph 125.1(3)(b)(iii) of the *Income Tax Act* [now paragraph (c) of the definition of "manufacturing or processing" in subsection 125.1(3)], must be interpreted solely in the context of that Act. The interpretation cannot be determined by provincial statutes which may vary from one province to another in respect of the same subject and thus treat demolition businesses and related activities differently.<sup>259</sup>

For the purpose of the manufacturing and processing deduction, therefore, this decision dissociated the meaning of the word "construction" from its meaning under provincial law.

A final example of dissociation between the ITA and provincial private law is the Federal Court of Appeal decision in *Marcoux v. AG of Canada*,<sup>260</sup> in which a tax debtor relied on article 553(7) of Quebec's Code of Civil Procedure, c. C-25, which exempts from garnishment proceedings "[b]enefits payable under a supplemental pension plan to which an employer contributes on behalf of his employees," to challenge the minister's garnishment of pension income under ITA subsection 224(1).<sup>261</sup> Since this provision does not exclude provincial law, the taxpayer maintained, the Code of Civil Procedure should be applied as a supplement to the federal law. At

257 See paragraph (c) of the definition of "manufacturing or processing" in ITA subsection 125.1(3), which specifically excludes "construction" from manufacturing or processing activities, the profits from which are eligible for the deduction.

258 *Démolition A.M. de l'Est du Québec*, supra note 256, at 2457. For a similar conclusion, see *The Queen v. Nova Construction Co. Ltd.*, 85 DTC 5594, at 5597; [1986] 1 CTC 68, at 72 (FCA), endorsing the view of the trial judge that the word "construction" is "not a term of art."

259 *Démolition A.M. de l'Est du Québec*, supra note 256, at 2457.

260 2001 DTC 5233; [2001] 4 CTC 174 (FCA).

261 ITA subsection 224(1) provides, "Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection . . . referred to as the 'tax debtor'), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act."

trial,<sup>262</sup> the court dismissed the taxpayer's appeal on the basis that subsection 224(1) was a "complete code."<sup>263</sup> Denault J stated:

In the interests of the uniform application of this federal statute and the equality of taxpayers before the taxation authorities, I am of the opinion that Parliament, under subsection 224(1) of the *Income Tax Act*, has created a unique mechanism that gives its provision a genuine self-sufficiency in relation to private law.<sup>264</sup>

On appeal, the Federal Court of Appeal characterized the issue as one of "statutory construction."<sup>265</sup> It cited ITA subsection 225(5), which exempts from seizure under subsection 225(1) "[s]uch goods and chattels of any person in default as would be exempt from seizure under a writ of execution issued out of a superior court of the province in which the seizure is made," to conclude that Parliament did not intend to permit any provincial exemption to the garnishment rule in subsection 224(1). Noël JA held:

Section 224, when read with s. 225, shows that in creating the methods of seizure mentioned in those sections Parliament had in mind the exemptions from seizure enacted in private law, and chose to take them into account in s. 225 and not take them into account in s. 224.<sup>266</sup>

In contrast to the decision in *Markevich*,<sup>267</sup> where the Federal Court of Appeal interpreted legislative silence regarding limitations for tax debts to require reference to provincial private law,<sup>268</sup> the court in *Marcoux* concluded that "Parliament has spoken on the point at issue."<sup>269</sup>

## CANADIAN BIJURALISM AND THE FEDERAL INCOME TAX ACT

As explained in the introduction to this article, "bijuralism" may be defined narrowly as the coexistence of two legal systems within a single state, and more broadly as "the sharing of values and traditions" associated with each of the two

262 *Marcoux v. AG of Canada*, 2000 DTC 6010; [2000] 4 CTC 143 (FCTD).

263 *Ibid.*, at paragraph 16.

264 *Ibid.*

265 *Marcoux*, supra note 260, at paragraph 10.

266 *Ibid.*, at paragraph 13.

267 *Supra* note 111.

268 On appeal, a majority of the Supreme Court of Canada held that reference to provincial law was unnecessary on the basis that collection of the taxpayer's federal tax debt was subject to the six-year limitation period in section 32 of the Crown Liability and Proceedings Act in respect of a cause of action arising "otherwise than in a province." See the discussion at note 117, *supra*, and accompanying text.

269 *Marcoux*, supra note 260, at paragraph 13.

legal systems.<sup>270</sup> In Canada, bijuralism of the first kind may be traced to the Quebec Act of 1774,<sup>271</sup> which provided that French law would apply to matters of property and civil rights in Quebec, and was secured by section 92(13) of the Constitution Act, 1867, which granted exclusive authority to provincial governments to make laws in relation to “Property and Civil Rights.” Bijuralism of the second kind is more elusive and aspirational, but finds expression both in federal policies and enactments and in the evolving jurisprudence of Canadian courts.<sup>272</sup>

This part of the article examines the aims of Canadian bijuralism and its implications for the interpretation and amendment of the ITA. First, the aims of Canadian bijuralism are reviewed, as expressed in the policy on legislative bijuralism adopted by the federal Department of Justice in June 1995, the preamble to the Federal Law-Civil Law Harmonization Act, No. 1, and recent amendments to the federal Interpretation Act. Then the discussion turns to the implications of these developments for the interpretation and amendment of the ITA.

### Canadian Bijuralism

Although, as noted above, bijuralism narrowly defined has existed in Canada since the Quebec Act of 1774, recognition of the civil law tradition at the federal level is a relatively recent development. Until the 1970s, for example, federal legislation was typically drafted by English-speaking lawyers trained in the common law and translated into French by translators with little or no legal training, who incorporated makeshift adjustments to accommodate the interaction of this legislation and the civil law of Quebec.<sup>273</sup> Correspondingly, Supreme Court of Canada decisions routinely ignored the distinctive character of the civil law of Quebec, interpreting provisions of the CCLC in light of English authorities and common law concepts.<sup>274</sup>

With the development of official bilingualism and biculturalism at the federal level in the 1960s and 1970s, these unijural approaches to legislative drafting and judicial decision making became increasingly anachronistic and unacceptable. In 1975, the Supreme Court of Canada explicitly recognized the CCLC as “radically different” from the common law, the provisions of which “must be interpreted in

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270 See notes 9 and 10, *supra*, and accompanying text.

271 An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America (UK) 14 Geo. III, c. 83.

272 On the expression of bijuralism in decisions of the Supreme Court of Canada, see Allard, *supra* note 10; and Louise Lavallée, “Bijuralism in Supreme Court of Canada Judgments Since the Enactment of the Civil Code of Quebec,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, *supra* note 7, booklet 3, 1-29. For a recent judicial expression of bijuralism, see Décarý JA’s judgment in *St-Hilaire v. Canada (Attorney General)* (2001), 204 DLR (4th) 103 (FCA).

273 Lionel A. Levert, “The Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, *supra* note 7, booklet 1, 5-9, at 6.

274 See Allard, *supra* note 10, at 3-12.

keeping with the whole of which it is a part.”<sup>275</sup> Over the next few years, the court established the basis for a complementary relationship between federal legislation and provincial private law through a series of decisions interpreting the words “Laws of Canada” for the purpose of section 101 of the Constitution Act, 1867 to require a federal statutory text.<sup>276</sup> Most important, perhaps, in 1978 the federal Department of Justice introduced a new method of drafting federal legislation called “co-drafting,” whereby all bills drafted by the Legislative Services Branch are prepared by two drafters—a francophone, who is typically trained in civil law, and an anglophone, who is usually trained in the common law.<sup>277</sup>

Although bijural, this method of co-drafting did not directly speak to francophone common law lawyers or anglophone civil law lawyers. Nor did the new approach make bijuralism an explicit objective of the co-drafting process. In June 1995, therefore, the Department of Justice adopted an explicit policy on legislative bijuralism, intended to provide Canadians with “federal legislative texts that will reflect, in each linguistic version, the legal system in use in their province.”<sup>278</sup> According to this policy, the Department of Justice

a) formally recognizes that it is imperative that the four Canadian legal audiences (Francophone civil law lawyers, Francophone common law lawyers, Anglophone civil law lawyers and Anglophone common law lawyers) may, on the one hand, read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory;

b) will undertake, in drafting both versions of every bill and proposed regulation that touches on provincial or territorial private law, to take care to reflect the terminology, concepts, notions and institutions of both of Canada’s private law systems; [and]

c) charges the Legislative Services Branch with the mandate of seeing to the respect and the implementation of legislative bijuralism, in bills as well as in proposed regulations.<sup>279</sup>

In general, therefore, this policy is designed to promote equal access to justice by different legal and linguistic communities in Canada, equal recognition of the civil and common law traditions in federal legislation, and a harmonious relationship between federal legislative objectives and these legal traditions.<sup>280</sup> Given the historical

275 *Pantel v. Air Canada*, [1975] 1 SCR 472, at 478.

276 See *Quebec North Shore Paper v. CP Ltd.*, [1977] 2 SCR 1054; *McNamara Construction et al. v. The Queen*, [1977] 2 SCR 654; and *R v. Thomas Fuller Const. et al.*, [1980] 1 SCR 695. For a useful discussion of these cases, see Allard, *supra* note 10, at 22-25.

277 Levert, *supra* note 273, at 6.

278 “Policy on Legislative Bijuralism,” appendix III to Maguire Wellington, *supra* note 15, at 22.

279 *Ibid.*, at 23.

280 See Marie-Claude Gervais, “Harmonization and Dissonance: Language and Law in Canada and Europe—Program To Harmonize Federal Legislation with the Civil Law of the Province

dominance of common law concepts and principles in federal legislation, moreover, an important objective of this policy was also to ensure that federal legislation not “treat Quebec civil law as an inferior or subsidiary component of the Canadian legal tradition.”<sup>281</sup>

Three years after the adoption of this policy on legislative bijuralism, the federal government introduced Bill C-50,<sup>282</sup> containing amendments to various federal statutes relating to provincial private law,<sup>283</sup> as well as the federal Interpretation Act.<sup>284</sup> Although Bill C-50 died on the order paper when the House was prorogued, and a subsequent version, Bill S-22,<sup>285</sup> died when Parliament dissolved in the autumn of 2000, the bill was retabled at the opening of the subsequent parliamentary session as Bill S-4,<sup>286</sup> enacted into law as the Federal Law-Civil Law Harmonization Act, No. 1,<sup>287</sup> and proclaimed in force on June 1, 2001.<sup>288</sup> According to the preamble to this legislation,

all Canadians are entitled to access to federal legislation in keeping with the common law and civil law traditions; . . .

the civil law tradition of the Province of Quebec, which finds its principal expression in the *Civil Code of Québec*, reflects the unique character of Quebec society; . . .

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of Quebec, Assumption of Complementarity and Methodological Issues,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 7, booklet 1, 10-18, at 11-12.

281 Roderick A. Macdonald, “Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law,” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism. Collection of Studies*, supra note 11, 27-69, at 69. See also Levert, supra note 273, at 5, emphasizing the “moral duty” of Parliament “to take the two systems of law into account in its legislation . . . when it sets out standards the application of which intersects with provincial private law.”

282 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, first reading June 12, 1998.

283 The main statutes are the Federal Real Property and Federal Immovables Act, SC 1991, c. 50, as amended; the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as amended; and the Crown Liability and Proceedings Act, RSC 1985, c. C-50, as amended.

284 Supra note 24.

285 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, first reading May 11, 2000.

286 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, first reading January 31, 2001.

287 Supra note 23.

288 For a detailed review of the origins and content of Bill S-4, see Marie-Noëlle Pourbaix, “S-4: A First Harmonization Bill,” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Second Publication*, supra note 7, booklet 6, 1-12.

the harmonious interaction of federal and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be; . . .

the full development of our two major legal traditions gives Canadians enhanced opportunities worldwide and facilitates exchanges with the vast majority of other countries; . . .

the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law; [and] . . .

the objective of the Government of Canada is to facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions.

In addition to restating the basic goals underlying the Department of Justice policy on legislative bijuralism, this preamble affirms a principle of complementarity between federal legislation and provincial private law.

For the purpose of this discussion, there is no need to consider in detail the Federal Law-Civil Law Harmonization Act, No. 1, most of which addresses the law of property, security interests, and civil liability. Although the statute does not address the ITA directly, it does so indirectly through amendments to the federal Interpretation Act, which merit specific examination.<sup>289</sup> New section 8.1 of this statute provides:

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.

New section 8.2 provides:

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.

In general, section 8.1 recognizes the equal status of common law and civil law as “sources of the law of property and civil rights in Canada,” affirms complementarity as the appropriate approach to the interpretation of federal legislation relating to provincial private law, and establishes an ambulatory principle according to which the relevant provincial private law is stipulated to be that “in force in

289 For a useful explanation of the rationale for and intended effect of these amendments, see Henry L. Molot, “Clause 8 of Bill S-4: Amending the Interpretation Act,” *ibid.*, booklet 6, 1-19.

the province at the time the enactment is being applied.” Significantly, however, the complementarity principle applies only “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 [emphasis added],” and it does not apply where “otherwise provided by law.” In practice, of course, each of these conditions is itself a matter of statutory interpretation. For this purpose, however, courts should presumably refer to the aims and principles underlying Canadian bijuralism, particularly those expressed in the preamble to the Federal Law-Civil Law Harmonization Act, No. 1.<sup>290</sup>

Beginning with the first condition, that it must be “necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights” to interpret the enactment, this would seem to be satisfied where the enactment relies on or employs a concept with an established private law meaning that is not defined in federal legislation, relies on private law rules or principles to define the legal relationships to which it applies, or is silent on a matter that is governed by a specific provincial rule forming part of the law of property and civil rights. Since the enactment cannot be applied without relying on the private law rules, principles, or concepts, it follows that it is “necessary to refer to . . . rules, principles or concepts forming part of the law of property and civil rights” to interpret the enactment.<sup>291</sup> Moreover, since the Constitution Act, 1867 grants provincial governments exclusive authority to make laws in relation to property and civil rights, the interpretation of the enactment must, unless otherwise provided by law, refer to “*a province’s* rules, principles or concepts forming part of the law of property or civil rights [emphasis added].” Conversely, it is not necessary to refer to provincial private law to interpret concepts that are fully defined in federal legislation; statutory provisions that do not depend on “rules, principles or concepts forming part of the law of property and civil rights”; and legislation that explicitly precludes reliance on provincial private law.<sup>292</sup>

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290 Supra note 23. Of the various statements in the preamble to this statute, the following are the most relevant for the interpretation of new section 8.1 of the federal Interpretation Act: “the harmonious interaction of federal and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be”; and “the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law.”

291 See, for example, Molot, supra note 289, at 14: “In the context of ‘interpreting an enactment,’ it is implicit that recourse to provincial rules, principles or concepts is ‘necessary’ for the purpose of interpreting and applying the federal enactment. If a federal enactment, expressly or impliedly, relies on a provincial rule, concept or principle that relates to ‘property and civil rights,’ it may not be possible to fully understand and apply the federal enactment without recourse to that provincial rule, concept or principle. Reference to the latter is therefore ‘necessary’ in order to accurately interpret and apply the federal enactment.”

292 See, for example, *ibid.*, at 18: “Federal legislation may make it ‘unnecessary to refer’ to provincial private law principles, or may express an intention that reference not be made to rules, etc. of the province concerned. For example, such legislation could so comprehensively define its terms as to implicitly exclude any reference to provincial private law as the external source of



As for the second condition, which precludes a necessary reference to provincial private law to interpret a federal enactment where “otherwise provided by law,” this exclusion is clearly satisfied where the federal enactment explicitly dissociates the interpretation of a concept or provision from provincial private law.<sup>293</sup> More difficult, however, are circumstances in which dissociation from provincial private law is implicit in the language or purposes of the statutory text. Where federal legislation relies on common law terms, for example, a necessary implication may be raised that its interpretation must be based on common law principles and dissociated from the civil law of Quebec.<sup>294</sup> In the context of much federal legislation, moreover, it is often a reasonable presumption that Parliament intends that its laws should apply uniformly throughout Canada,<sup>295</sup> particularly in the area of taxation, where equity and anti-avoidance considerations can weigh so heavily.<sup>296</sup> As a result, some might argue, undefined private law concepts in federal legislation should be given their common law meanings in order to ensure conceptual coherence and uniformity throughout Canada.

Although the principle of parliamentary sovereignty requires the courts to dissociate the interpretation of federal legislation from the private law of one or more provinces where Parliament’s intention is clear, the goals of Canadian bijuralism suggest that this should be done only when this intention is stated explicitly or necessarily implied by the language of the statutory text.<sup>297</sup> As Roderick Macdonald explains, “forcing Parliament itself to make its choices explicitly is the best guarantee that the distinctive civil law and common law traditions in Canada will be respected in any legislative reordering.”<sup>298</sup> Moreover, judicial precedents should not be regarded as “law” within the meaning of the exclusion in new section 8.1 of

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interpretation and application. Federal legislation could also expressly refer to some other external source of interpretation thereby demonstrating a contrary intent as regards it being ‘necessary to refer to a province’s rules.’”

- 293 See *ibid.*, at 19, suggesting that the expression “unless otherwise provided by law” is triggered by “a legislative provision to the contrary.”
- 294 See, for example, Brisson and Morel, *supra* note 11, at 237. See also André Morel, “Harmonizing Federal Legislation with the Civil Code of Québec: Why and Wherefore?” *ibid.*, 1-25, at 6, explaining that this “helps create the impression that there is a sort of organic bond, an association inherent in the nature of things, between federal law and common law—and the language used in those statutes tends to reinforce that impression.”
- 295 See, for example, Brisson and Morel, *supra* note 11, at 235; and Bastarache, *supra* note 10, at 21.
- 296 See, for example, Brisson and Morel, *supra* note 11, at 237; and Morel, *supra* note 294, at 7.
- 297 See, for example, Roderick A. Macdonald, “Provincial Law and Federal Commercial Law: Is Atomic Slipper a New Beginning?” (1992) 7 *Banking & Finance Law Review* 437-51, at 447, suggesting that provincial law in respect of property and civil rights should be subject to displacement by federal law only “explicitly” or “by *absolutely necessary implication* [emphasis in original].” See also *Markevich*, *supra* note 111, at paragraph 25, suggesting that while the ITA “may exclude application of general legal principles, rules and remedies,” this can be accomplished only by “express language or a necessary implication to that effect.”
- 298 Macdonald, *supra* note 297, at 450.

the federal Interpretation Act, since this would render the provision largely meaningless. For this reason, it might be clearer to amend the provision to read “unless otherwise provided in federal legislation.”

In contrast to new section 8.1 of the Interpretation Act, new section 8.2 is relatively straightforward, stipulating that federal legislation using civil law and common law terminology “must be interpreted in a way that is consistent with the legal system of the province in which the provision is being applied.”<sup>299</sup> As a guide to the interpretation of bijural legislation, this provision is intended to preclude the application of common law concepts in Quebec and civil law concepts in the common law provinces.

### **Implications for the Income Tax Act**

Although most of the amendments introduced by the Federal Law-Civil Law Harmonization Act, No. 1 involve federal statutes relating to the law of property, security interests, and civil liability, the preamble to this legislation and new section 8.1 of the Interpretation Act have important implications for the interpretation of the ITA, calling into question a number of the cases examined earlier in which courts have dissociated the interpretation of specific concepts or provisions from their interpretation under provincial private law. These statutory developments and the Department of Justice policy on legislative bijuralism also have important implications for the amendment of the ITA in order to ensure that federal objectives are achieved in a manner that is consistent with equal recognition of the civil law and common law traditions and complementarity between federal legislation and provincial private law. The discussion that follows considers both sets of implications, examining the impact of Canadian bijuralism on the interpretation of the ITA and the amendment of specific concepts and provisions.

### ***Interpretation***

In order to interpret the ITA, Canadian courts have tended to refer to provincial private law in three circumstances.

First, where the ITA employs a concept with an established private law meaning without specifically defining the concept for the purposes of the ITA, courts have generally turned to provincial private law in order to define its meaning. In *Continental Bank*,<sup>300</sup> for example, the Supreme Court of Canada looked to the common law and the Ontario Partnerships Act to determine whether the taxpayer had entered into a valid partnership for the purpose of the rollover rule in ITA subsection 97(2). In Quebec, on the other hand, courts have looked to the civil law to determine the meaning of a partnership for the purpose of the ITA.<sup>301</sup> In other cases, courts have referred to provincial private law to determine the meaning of a

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299 Levert, *supra* note 273, at 8.

300 *Supra* note 53.

301 See the cases listed in note 48, *supra*.

director for the purpose of the liability rule in ITA section 227.1,<sup>302</sup> and the meaning of the expression “goods for sale” for the purpose of ITA rules governing accelerated capital cost allowance and investment tax credits.<sup>303</sup> In each of these cases, courts have relied on provincial private law as a kind of “legislative dictionary” to supply the meaning of an otherwise undefined term for the purpose of the ITA.<sup>304</sup>

Second, where the application of a specific provision depends on legal rights and obligations that are not defined in federal legislation, courts have relied on the private law rules and principles by which these rights and obligations are established in order to apply the provision. In *Drescher*,<sup>305</sup> for example, the court looked to the law of property in Manitoba to determine whether interest income from term deposits purchased with the proceeds of a jointly acquired lottery ticket should be allocated equally among the taxpayer, his spouse, and his daughter, or be taxable in the hands of the taxpayer alone. Likewise, in other common law provinces, as well as Quebec, courts have looked to provincial rules and principles governing the law of property to determine the attribution of income and losses under the ITA,<sup>306</sup> the application of the joint and several liability rule in ITA section 160,<sup>307</sup> and eligibility for the rollover rules in ITA subsections 70(6) and (9).<sup>308</sup> In these and other cases examined earlier,<sup>309</sup> provincial private law provides the general legal framework or “suppletive law”<sup>310</sup> to which the ITA applies.

Finally, where the ITA is silent on a matter that is governed by a specific provincial rule forming part of the law of property and civil rights, courts have generally applied the provincial rule in order to interpret the ITA. In *Markevich*,<sup>311</sup> for example, the Federal Court of Appeal concluded that the power to collect tax debts under ITA section 222 was subject to a six-year limitation period under the British Columbia Limitation Act,<sup>312</sup> on the basis that the ITA did not explicitly preclude the application of this private law rule. Absent “express language or a necessary implication” to the

302 See, for example, *Kalef*, supra note 98, and *Wheeliker*, supra note 101.

303 See, for example, *Will-Kare*, supra note 65.

304 On the use of provincial private law for this purpose, see Roderick A. Macdonald, “Encoding Canadian Civil Law,” in *Mélanges Paul-André Crépeau*, supra note 154, 579–640, at 592. See also Macdonald, supra note 281, at 43.

305 Supra note 72.

306 See, for example, *Garant v. The Queen*, supra note 44; *Feder v. MNR*, supra note 75; *Stockman v. R*, supra note 77; and *Holizki*, supra note 79.

307 See, for example, *Furfaro-Siconolfi v. The Queen*, supra note 45; *Gardner v. MNR*, supra note 82; *Savoie v. The Queen*, supra note 84; and *Biderman*, supra note 85.

308 See, for example, *Hillis*, supra note 91, and *Boger Estate v. The Queen*, supra note 89.

309 See, for example, *Perron v. MNR*, supra note 26; *The Queen v. Lagueux & Frères Inc.*, supra note 29; *Wardean Drilling*, supra note 58; *West Kootenay*, supra note 62; and *Dale*, supra note 107.

310 See, for example, *Morel*, supra note 294, at 7; and *Gervais*, supra note 280, at 15.

311 Supra note 111.

312 Supra note 112.

contrary, the court emphasized, the application of the ITA is subject to the “general legal principles, rules and remedies” established by provincial private law.<sup>313</sup>

In contrast to these cases, others have dissociated the interpretation of the ITA from provincial private law, interpreting certain concepts and provisions without reference to the private law of all provinces and others without regard to the civil law of Quebec.<sup>314</sup> In the *Vancouver Society* case,<sup>315</sup> for example, the Supreme Court of Canada dissociated the concept of a “charitable purpose” from the private law of the common law provinces, as well as that of Quebec.<sup>316</sup> Likewise, the concept of “residence” affirmed for the purpose of the ITA in *Thomson*<sup>317</sup> is dissociated from the private law of all provinces,<sup>318</sup> as are the concept of a “written agreement” for the purpose of the deduction for support payments,<sup>319</sup> the meaning of the word “construction” in the context of the deduction for manufacturing and processing profits,<sup>320</sup> and the garnishment rule in ITA section 224.<sup>321</sup> In *Littleler*<sup>322</sup> and *Gervais*,<sup>323</sup> on the other hand, the concept of a gift was interpreted according to its common law meaning, thereby maintaining complementarity with the private law of the common law provinces but dissociating its interpretation from the private law of Quebec.<sup>324</sup> Similarly, in *Olympia & York Developments*<sup>325</sup> and *Construction Bérou*,<sup>326</sup> the concepts of a disposition and an acquisition of property were interpreted in accordance with the common law distinction between legal and beneficial ownership, ensuring complementarity with the private law of the common law provinces but dissociating the meaning of these concepts from the private law of Quebec.<sup>327</sup> Judicial decisions distinguishing between employees and independent contractors have also relied on tests derived from the common law, making the interpretation of these concepts

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313 *Markevich*, supra note 111, at paragraph 25. The Supreme Court of Canada decision dismissing the taxpayer's appeal does not challenge this conclusion but adopts a different interpretation of the location of a cause of action for the purpose of section 32 of the Crown Liability and Proceedings Act.

314 See the discussion above under the heading “Dissociation.”

315 Supra note 137.

316 See the discussion above under the heading “Charity.”

317 Supra note 198.

318 See the discussion above under the heading “Residence.”

319 See notes 249 to 255, supra, and accompanying text.

320 See notes 256 to 259, supra, and accompanying text.

321 See notes 260 to 269, supra, and accompanying text.

322 Supra note 127.

323 Supra note 132.

324 See the discussion above under the heading “Gift.”

325 Supra note 32.

326 Supra note 239.

327 See the discussion above under the heading “Acquisition and Disposition of Property.”

for the purposes of the ITA broadly consistent with the private law of the common law provinces but noticeably different from the private law of Quebec.<sup>328</sup>

With the sole exception of *Wolf*,<sup>329</sup> in which the Federal Court of Appeal addressed the distinction between an employee and an independent contractor, each of the cases reviewed in this article was decided before the enactment of the Federal Law-Civil Law Harmonization Act, No. 1. As the interpretation of the ITA is now subject to the statutory complementarity rule in new section 8.1 of the federal Interpretation Act, it is necessary to determine which, if any, of these decisions must be reconsidered. According to the text of section 8.1, this inquiry turns on whether “it is necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights” to interpret the relevant concept or provision, and, if so, whether such reference is excluded on the basis that it is “otherwise provided by law.”

Beginning with the many cases in which courts have already affirmed or applied a principle of complementarity between the ITA and provincial private law,<sup>330</sup> it seems clear that these decisions are unaffected or reaffirmed by the enactment of section 8.1 of the Interpretation Act. Indeed, since these cases involve the interpretation of concepts with established private law meanings that are not defined in federal legislation, the application of statutory provisions that depend on private law relationships that are not defined in federal legislation, and the interpretation of other provisions that are silent on matters governed by a specific provincial rule forming part of the law of property and civil rights, references to provincial private law are not only consistent with the goals and principles underlying Canadian bijuralism but arguably “necessary” to interpret the ITA. Further, such references are not excluded by any law that provides “otherwise.”

Nonetheless, it is always a matter of interpretation whether a provision uses a concept with an established private law meaning that is not defined in federal legislation, relies on private law relationships that are not defined in federal legislation, or is silent on a matter governed by a specific provincial rule forming part of the law of property and civil rights.<sup>331</sup> In *Will-Kare*,<sup>332</sup> for example, Binnie J’s dissenting judgment made a persuasive argument that Parliament intended the words “goods for sale” in ITA rules governing accelerated capital cost allowance and investment tax credits to be understood according to their ordinary or plain meaning, and not by reference to “the distinction between a contract for the sale of goods and a contract for work and materials . . . developed in a non-tax context

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328 See the discussion above under the heading “Employee/Independent Contractor.”

329 *Supra* note 51.

330 See the discussion above under the heading “Complementarity.”

331 See, for example, Durnford, *supra* note 154, at 282, observing that courts should not “jump too quickly to the conclusion that the mere fact that the same word appears both in the [Income Tax] Act and in the Civil Code necessarily results in the private law’s definition being applied.”

332 *Supra* note 65.

aimed at the totally different (and irrelevant) law governing the rights and obligations of buyers and sellers.”<sup>333</sup> Similarly, in *Thomson*,<sup>334</sup> the Supreme Court of Canada decided that the concept of “residence” in the ITA should be understood according to its ordinary meaning without reference to private law,<sup>335</sup> while the decisions in *Jacoby*<sup>336</sup> and *Démolition A.M. de l’Est du Québec*<sup>337</sup> interpreted the terms “written agreement” and “construction,” respectively, in the context of the applicable provisions of the ITA in which they appeared without relying on provincial law.<sup>338</sup> In *Marcoux*,<sup>339</sup> moreover, the court relied on the explicit incorporation of provincial exemptions from the seizure of chattels in ITA subsection 225(5) to conclude that the absence of any such reference in section 224 implied a specific intent to disallow provincial exemptions from the garnishment rule in subsection 224(1).<sup>340</sup> In each of these cases, therefore, it is arguable that it was not “necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights” in order to interpret the relevant concept or provision. As a result, it follows, notwithstanding that these judgments may have dissociated the interpretation of the ITA from provincial private law, they need not be reversed under new section 8.1 of the federal Interpretation Act.

In contrast, where provisions in the ITA employ the words “gift” or “charitable” purpose or activity, rely on the distinction between an employee and an independent contractor, or speak of an “acquisition” or “disposition” of property, it is arguable that cases that have dissociated these concepts from provincial private law should be reconsidered on account of new section 8.1. To begin with, in contrast to the concept of residence, which is understood in its ordinary meaning, each of these provisions refers to an established private law concept or relies on private law relationships that are not completely defined in the ITA.<sup>341</sup> In practice, moreover, the leading judicial decisions in which these provisions have been interpreted refer not to the ordinary meaning of the words, but to common law concepts and principles.<sup>342</sup>

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333 Ibid., at paragraph 68.

334 Supra note 198.

335 See the discussion above under the heading “Residence.”

336 Supra note 249.

337 Supra note 256.

338 See the discussion at the text accompanying notes 249 to 259, supra.

339 Supra note 260.

340 Ibid., at paragraph 13.

341 See the discussion above under the headings “Gift,” “Charity,” “Employee/Independent Contractor,” and “Acquisition and Disposition of Property.” Although some cases have described the definition of a “gift” that courts have generally adopted for tax purposes as its “ordinary” meaning, the authorities cited for this concept and the distinction between it and the definition in the CCQ confirm its common law origins. See notes 121 to 122, supra, and accompanying text.

342 See the discussion above under the headings “Gift,” “Charity,” “Employee/Independent Contractor,” and “Acquisition and Disposition of Property.”

Consequently, it is necessary to refer to “a province’s rules, principles or concepts forming part of the law of property and civil rights” in order to interpret these provisions. Moreover, as discussed earlier, since the Constitution Act, 1867 grants exclusive authority to make laws in relation to property and civil rights to provincial governments, the interpretation of these provisions must refer to “a province’s rules, principles or concepts forming part of the law of property and civil rights.” As a result, it follows, the complementarity principle in new section 8.1 of the Interpretation Act should apply in each of these cases, unless “otherwise provided by law.”

In interpreting new section 8.1, this article has argued that the exclusion should apply only where federal legislation explicitly dissociates the interpretation of a concept or provision from that in provincial private law or where such dissociation is necessarily implied by the language of the statutory text.<sup>343</sup> Is such explicit or implicit dissociation apparent in statutory provisions that employ the words “gift” or “charitable” purpose or activity, rely on the distinction between an employee and an independent contractor, or refer to an “acquisition” or “disposition” of property?

Beginning with the concept of a “gift,” neither the ITA nor any other federal legislation explicitly dissociates the meaning of this word from the meaning it has under civil law of Quebec. Nor does the text of the ITA necessarily imply that the meaning of the word for tax purposes should be interpreted according to its common law definition. On the contrary, in the cases in which courts have dissociated the tax concept of a gift from the concept in the civil law of Quebec, this result has been justified solely on the basis that the ITA should apply uniformly throughout Canada.<sup>344</sup> Although this might be a reasonable presumption of Parliament’s intentions, it cannot outweigh the clear expressions of parliamentary intent in new section 8.1 of the federal Interpretation Act and the preamble to the Federal Law-Civil Law Harmonization Act, No. 1, that concepts with established private law meanings that are not defined in the ITA should be interpreted in accordance with provincial private law. As a result, it follows, in cases where courts have dissociated the meaning of “gift” in the ITA from the meaning under the civil law of Quebec, those decisions should not be followed.

Unlike the concept of a “gift,” the concept of a “charitable” purpose or activity for the purpose of the ITA has no equivalent in the CCQ, which, as explained earlier, recognizes the concepts of a “social trust” and a “socially beneficial purpose,” but does not employ the words “charity” or “charitable.”<sup>345</sup> In Quebec, therefore, the interpretation of this concept necessarily must be dissociated from the application of provincial private law. In common law provinces, on the other hand, the concepts of a “charitable purpose” or “charity” are often defined in provincial legislation and subject to judicial interpretation.<sup>346</sup> In these provinces, therefore, it is possible to

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343 See notes 293 to 298, *supra*, and accompanying text.

344 See *Littler*, *supra* note 127, and *Gervais*, *supra* note 132.

345 See notes 143 to 144, *supra*, and accompanying text.

346 See note 145, *supra*, and accompanying text.

interpret the tax concepts of a “charitable” purpose or activity in accordance with provincial private law. In the *Vancouver Society* case,<sup>347</sup> however, Gonthier J concluded that the tax concept of a “charitable” purpose or activity should also be dissociated from the concept in the private law of the common law provinces on the basis that Parliament intended it to be “uniform federal law across the country.”<sup>348</sup> As with the concept of a gift, this may be a reasonable presumption of Parliament’s intentions, but it cannot outweigh the clear expression of a contrary intent in new section 8.1 of the federal Interpretation Act and the preamble to the Federal Law-Civil Law Harmonization Act, No. 1. As a result, it follows, where the concepts of a “charitable purpose” or a “charity” have been defined in provincial legislation forming part of the law of property and civil rights, the tax concepts of a “charitable” purpose or activity should be interpreted in accordance with these definitions.

As discussed earlier, in contrast to the words “gift” and “charitable,” the ITA defines the words “employment” and “business,” but does so in such general language that Canadian courts have looked to private law principles to distinguish between employees and independent contractors.<sup>349</sup> In most tax cases, these judicial decisions rely on the general test adopted in *Wiebe Door*,<sup>350</sup> which corresponds to the test used in private law of the common law provinces but differs from the control or subordination test contained in the CCQ.<sup>351</sup> Neither the ITA nor other federal legislation explicitly dissociates the meaning of “employment” from the meaning it has in the civil law of Quebec, nor does the text of the ITA necessarily imply that the word should be interpreted for tax purposes according to its common law definition. Here too, a general presumption that Parliament might have intended the distinction between employees and independent contractors to apply uniformly throughout Canada should not outweigh the explicit affirmation of Canadian bijuralism in new section 8.1 of the federal Interpretation Act and the preamble to the Federal Law-Civil Law Harmonization Act, No. 1. Consequently, to the extent that tax cases in Quebec rely on *Wiebe Door* rather than the CCQ,<sup>352</sup> or on a separate test in addition to that in the CCQ,<sup>353</sup> they are incompatible with new section 8.1 of the federal Interpretation Act. Where a court refers to the general test in *Wiebe Door* in order to apply the control or subordination test, on the other hand, complementarity is maintained and section 8.1 need not apply.<sup>354</sup> In practice,

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347 Supra note 137.

348 Ibid., at paragraph 28.

349 See notes 152 to 154, supra, and accompanying text.

350 Supra note 155.

351 See text under the heading “Employee/Independent Contractor.”

352 See, for example, *Tedco Apparel Management Services*, supra note 52; *Beaulieu*, supra note 166; and *Placements Marcel Lapointe*, supra note 166.

353 See, for example, Desjardins JA’s judgment in *Wolf*, supra note 52, discussed in the text accompanying notes 185 to 189, supra.

354 See, for example, Décary JA’s judgment, *ibid.*, discussed in the text accompanying notes 187 to 189, which emphasized (at paragraph 117) that “[t]he test . . . is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other.”



however, the expansive *Wiebe Door* test may be incompatible with the singular emphasis on subordination in the CCQ.

Although the ITA does not define the word “acquisition,” it defines the concept of a “disposition” to include transactions or events entitling taxpayers to “proceeds of disposition” and exclude transfers “as a consequence of which there is no change in the beneficial ownership of the property.”<sup>355</sup> “Proceeds of disposition” is defined to include “the sale price of property that has been sold” as well as various kinds of compensation.<sup>356</sup> While the concept of beneficial ownership in the definition of a disposition is necessarily dissociated from the meaning of disposition in the private law of Quebec, which does not distinguish between legal and beneficial ownership, the reference to this common law concept in the statutory definition of a disposition does not specifically define the meaning of the term, but instead excludes certain categories of transactions from the meaning otherwise determined.<sup>357</sup> For the latter purpose, the statutory definition generally depends on the private law concept of a “sale.” In *Olympia & York Developments*,<sup>358</sup> however, the court dissociated the meaning of disposition from that in the private law of Quebec on the basis that the concept of a disposition is “obviously the direct opposite”<sup>359</sup> of the common law concept of an acquisition adopted in *Wardean Drilling*.<sup>360</sup> Moreover, in *Construction Bérou*,<sup>361</sup> a majority of the Federal Court of Appeal relied on the statutory definition of a disposition and statutory references to beneficial ownership in subsection 248(3) to conclude that the concept of an acquisition also should be dissociated from that in the private law of Quebec, on the basis that Parliament intended the concepts of an acquisition and a disposition of property to apply uniformly throughout Canada by incorporating the general common law distinction between legal and beneficial ownership.

Parliament’s intention to dissociate the interpretation of the ITA from the application of the civil law of Quebec is implicit in the exclusion from the definition of a disposition of transfers “as a consequence of which there is no change in the beneficial ownership of the property.” However, this intention does not clearly extend to the full meaning of disposition, or to the concept of an acquisition, which is not defined in the ITA. Again, a general legislative intention that the concepts of an

355 See the definition of “disposition” in ITA subsection 248(1).

356 See the definition of “proceeds of disposition” in ITA subsection 13(21) and section 54.

357 For a similar point, see Allard, *supra* note 223, at 1796, observing that although the definition of “disposition” in ITA subsection 248(1) excludes transfers of legal ownership without beneficial ownership, it does not specifically provide for the “opposite result—that is, that a transfer of beneficial ownership without legal ownership would constitute a disposition.”

358 *Supra* note 32.

359 *Ibid.*, at 6193; 277.

360 *Supra* note 58, at 5198; 271, concluding that property is acquired for tax purposes “when title has passed, assuming that the assets exist at that time, or when the purchaser has all the incidents of title, such as possession, use and risk, although legal title may remain in the vendor as security for the purchase price as is the commercial practice under conditional sales agreements.”

361 *Supra* note 239.

acquisition and a disposition of property should apply uniformly throughout Canada cannot outweigh the specific legislative intention in new section 8.1 of the federal Interpretation Act and the preamble to the Federal Law-Civil Law Harmonization Act, No. 1, that provisions that rely on private law relationships that are not fully defined in the ITA should be interpreted in accordance with provincial private law. As a result, therefore, in cases where courts have dissociated the tax concepts of an acquisition and a disposition from those in the private law of Quebec, those decisions should be reconsidered under new section 8.1 of the federal Interpretation Act.

### *Amendment*

In addition to its implications for statutory interpretation, Canadian bijuralism has important implications for the amendment of the ITA, since it is necessary to ensure that federal objectives are pursued in a manner that is consistent with complementarity between federal legislation and provincial private law and equal recognition of the civil law and common law traditions in Canada. Where complementarity produces unacceptable differences in tax consequences in different provinces, for example, legislative amendments may be necessary to ensure that the applicable provision applies uniformly throughout the country. Where the ITA currently achieves such uniformity through the use of unijural principles and concepts, on the other hand, Canadian bijuralism suggests that provisions should be redrafted in a manner that does not privilege one legal tradition over the other. As discussed below, there are a number of concepts and provisions in respect of which legislative amendment may be advisable. Specific amendments are suggested in some circumstances and further investigation in others.

With respect to cases in which complementarity may produce unacceptable differences in different provinces, one can begin with the concept of a gift. The common law interpretation allows for no consideration, but the CCQ permits consideration that is less than the value of the gifted property. As a result, taxpayers in Quebec might obtain a deduction or credit for contributions to charitable organizations for which they receive consideration of a lesser value, while taxpayers in the rest of the country would be denied this benefit. Although the Canada Customs and Revenue Agency has effectively harmonized the tax consequences in different provinces in certain circumstances, by permitting a deduction or credit for the difference between the purchase price of a ticket to attend “a dinner, ball, concert, or show” and its fair market value,<sup>362</sup> there is no legal basis for this administrative practice in the common law provinces.<sup>363</sup> Nor does this limited “exception” to the general common law concept of a gift reflect the actual legal position in Quebec. Moreover, for the purpose of the deduction and credit in ITA sections 110.1 and 118.1, the civil law concept of a gift is better suited to the tax policy underlying these

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362 See *Interpretation Bulletin* IT-110R3, “Gifts and Official Donation Receipts,” June 20, 1997, paragraphs 4 to 8.

363 See, for example, Bromley, *supra* note 119, at 184.

provisions, which is designed to subsidize qualifying donees by encouraging donations.<sup>364</sup> For these reasons, it would be advisable to define the word “gift” for the purpose of these provisions, or to replace this word with a separate term unrelated to civil law or common law, such as “qualifying contribution.” In either case, the statutory definition of this concept should serve the policy of the provision by looking to the economic substance of a contribution, rather than the legal form of a gift.

Another case in which complementarity may produce unacceptable differences in tax consequences in different provinces involves the concept of a charitable purpose or activity, which is not recognized in the CCQ<sup>365</sup> but is subject to different definitions in a number of statutes in common law provinces.<sup>366</sup> To the extent that these statutory definitions differ from each other and from the common law test affirmed in the *Vancouver Society* case,<sup>367</sup> the kinds of organizations that qualify for the tax advantages associated with this status could differ from one province to another. For this reason, one might consider codifying the legal definition of charity in *Pemsel*,<sup>368</sup> in order to ensure uniformity throughout Canada. However, since this definition is itself based on the common law, and since the traditional definition of charity has been subject to considerable criticism as being restrictive and anachronistic,<sup>369</sup> the broader objectives of Canadian bijuralism suggest that it might be better to rely on a term or concept that either recognizes or transcends both legal traditions. Instead of “charity,” for example, the ITA might refer to a specifically defined concept, such as “public benefit organization.”

As with the concept of a gift, the distinction between an employee and an independent contractor is also defined differently in the CCQ and the common law, with the former making control or subordination the primary test and the latter emphasizing the “total relationship of the parties” by “weighing all the relevant factors” including control, ownership of tools, chance of profit and risk of loss, and integration.<sup>370</sup> Here too, complementarity could lead to unacceptable differences in tax consequences among provinces, with identical relationships characterized one way in Quebec and another way in the rest of the country.<sup>371</sup> Moreover, to the

364 See Duff, *supra* note 134, at 425-37.

365 See notes 143 to 144, *supra*, and accompanying text.

366 See *supra* note 145.

367 *Supra* note 137.

368 *Supra* note 138.

369 See, for example, Moran and Phillips, *supra* note 137; and Deborah S. Lewis, “A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education” (2000) vol. 25, no. 2 *Queen’s Law Journal* 679-712. See also David G. Duff, “Tax Treatment of Charitable Contributions in Canada: Theory, Practice and Reform,” in *Proceedings of Annual Conference of the National Center on Philanthropy and the Law: Reformation of the Charitable Contribution Deduction* (New York: New York University School of Law, forthcoming).

370 See the discussion above under the heading “Employee/Independent Contractor.”

371 For a similar conclusion, see Auger, *supra* note 154, at 3:67. Although Durnford concludes that “[t]he number of situations where the judgments in income tax cases rendered in Quebec

extent that civil law and common law tests are designed for purposes other than tax, such as the imposition of vicarious liability, these tests may be inappropriate for the income tax, for which the main implications of the distinction between employees and independent contractors are the availability of deductions and withholding of tax at source by employers.<sup>372</sup> For both of these reasons, therefore, it might be advisable to enact a more detailed statutory definition of the word “employment,” which would emphasize the economic substance of the relationship rather than its legal form. In this way, the tax concept of employment would be explicitly dissociated both from the definition in the CCQ and from common law tests developed for different purposes.

Yet another circumstance in which complementarity can produce unacceptable differences in tax consequences among provinces involves the concepts of an acquisition and a disposition of property, which have been interpreted to depend on the beneficial ownership of property in all provinces,<sup>373</sup> but should not be so interpreted in Quebec after the enactment of new section 8.1 of the federal Interpretation Act.<sup>374</sup> As the tax implications of transactions should, as a matter of tax policy, generally follow their economic substance rather than their legal form, the emphasis on beneficial ownership under the common law has distinct advantages over reliance on legal ownership under the civil law. Nonetheless, the codification of common law concepts such as “beneficial ownership” contradicts the Department of Justice policy on legislative bijuralism by privileging one legal tradition over the other. As a result, while it would be advisable to amend the statutory definition of a “disposition” and introduce a statutory definition of the word “acquisition” to, in effect, codify the decisions in *Olympia & York Developments*<sup>375</sup> and *Construction Bérou*,<sup>376</sup> this should be done through the use of terms and concepts that recognize both legal traditions.

In addition to these cases, amendments might also be considered to ensure that other terms that ought not to be interpreted in accordance with private law meanings are not so interpreted under new section 8.1 of the federal Interpretation Act. Although the concept of “residence” in the ITA is properly dissociated from that in provincial private law,<sup>377</sup> for example, courts might inappropriately rely on new section 8.1 to refer to the concept of residence in the CCQ, the common law, or provincial statutes. For this reason, caution favours the enactment of a provision like

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would vary from those rendered in other provinces would probably be quite limited,” the very development of the economic reality and integration tests to address limitations of the traditional control test suggests that this may not be true. See Durnford, *supra* note 154, at 308.

372 For a similar argument, see Auger, *supra* note 154, at 3:66-75.

373 See the discussion above under the heading “Acquisition and Disposition of Property.”

374 See the argument to this effect under the heading “Interpretation.”

375 *Supra* note 32.

376 *Supra* note 239.

377 See the argument to this effect under the heading “Interpretation.”

section 7.14 of the Quebec Taxation Act,<sup>378</sup> which explicitly dissociates the interpretation of the concept of residence for tax purposes from its meaning in the CCQ.<sup>379</sup> A similar concern might suggest that ITA provisions governing the deduction and inclusion of support payments be amended by either defining the term “written agreement” for the purpose of these provisions or specifying in the relevant provisions that the support must be “payable under a written agreement that is signed by both parties.” For the same reason, the garnishment rule in ITA section 224 might be amended to specifically exclude the application of provincial exemptions.

With respect to other concepts and provisions considered in this article, further investigation is required to determine whether complementarity produces unacceptable differences in tax consequences in different provinces such that legislative amendments are required. Since the definition of a “partnership” in the CCQ differs from the common law definition,<sup>380</sup> for example, complementarity may produce unacceptable differences in tax consequences between Quebec and the rest of the country.<sup>381</sup> In practice, however, Canadian courts have concluded that differences between the civil law and common law concepts of a partnership are substantively immaterial.<sup>382</sup> Whether provincial differences in the definition of a “director” produce unacceptable variations in the application of the joint and several liability rule in ITA section 227.1 should also be examined, as should the more general challenge to uniformity resulting from different concepts of property ownership in the civil law and the common law.

A final agenda for legislative amendments involves the use of unijural principles and concepts, such as the rules in ITA subsection 248(3), which deem the civil law concepts of usufruct, right of use or habitation, and substitution to be a trust, and all rights under these arrangements to be beneficial interests. Without examining this or other unijural provisions in detail, one can clearly see that they contradict the Department of Justice policy on legislative bijuralism and, more generally, the

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378 *Supra* note 222.

379 For a similar recommendation, see Auger, *supra* note 220, at 5:31.

380 In CCQ section 2186, a partnership is defined as “a contract 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.” In contrast, partnership statutes in common law provinces have codified the common law definition of a partnership as “the relation that subsists between persons carrying on a business in common with a view to profit.”

381 For a preliminary discussion of this issue, see Cuerrier, *supra* note 21, at 14-16. See also Charlaine Bouchard, “Report on the Legal Nature of Partnerships: A Comparative Law Study,” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism. Collection of Studies in Canadian Tax Law*, *supra* note 4, 6:1-63.

382 See, for example, *Derby Development Corporation v. MNR*, 62 DTC 18, at 19; (1962), 28 Tax ABC 221, at 224; *Hollinger*, *supra* note 48, at 5008-9; 600; *Cornforth*, *supra* note 48, at 6062; 50-51; *R. Berg v. MNR*, [1982] CTC 2558 (TRB); *Waxman*, *supra* note 48, at 718; 2747; *Spire Freezers Limited et al. v. The Queen*, 98 DTC 1287; [1998] 2 CTC 2764, at paragraph 66 (TCC); and *Backman v. The Queen*, 97 DTC 1468, at 1480 (TCC).

broader goals of Canadian bijuralism, by subsuming the concepts of one legal tradition within those of another or by disregarding the concepts of one legal tradition altogether. Moreover, in practice, such unijuralism tends to subordinate the civil law to the common law, reflecting the historical dominance of common law concepts and principles in federal legislation. Although this article does not recommend legislative solutions for these instances of unijuralism, let alone catalogue their occurrence in the ITA, it endorses the efforts of the federal Department of Justice to ensure that these “colonial anachronisms” are identified and addressed.<sup>383</sup>

## CONCLUSION

Canadian bijuralism, at its core, is about recognition and respect—recognition of different cultures and legal traditions, and respect for these cultures and legal traditions as enduring and worthy expressions of social organization. While these ideals may seem far removed from the ITA, the pursuit of Canadian bijuralism has important implications for the interpretation and amendment of this statute. This article has argued that, where the ITA employs concepts with established private law meanings that are not defined in federal legislation, relies on private law rules or principles to define the legal relationships to which specific provisions apply, or is silent on a matter that is governed by a specific provincial rule forming part of the law of property and civil rights, Canadian bijuralism requires that courts refer to the private law of the applicable province in order to interpret the relevant concepts or provisions. However, where this complementary approach to the interpretation of the ITA produces unacceptable differences in tax consequences in different provinces, uniformity should be restored through legislative amendments that explicitly dissociate the ITA from provincial private law, but do so in a way that respects the equal status of the civil law and the common law in federal legislation. Moreover, where the ITA currently achieves such uniformity through the use of unijural concepts or principles, these provisions should also be amended to ensure equal recognition of both legal traditions.

In practice, Canadian courts routinely refer to provincial private law to interpret the ITA, relying on private law meanings to interpret undefined terms in the ITA, private law rules and principles to determine the legal relationships to which ITA provisions apply, and provincial rules to address issues that are not addressed in the ITA. In several cases, however, Canadian courts have interpreted concepts or provisions of the ITA without regard to the private law of the applicable province, dissociating the interpretation of the ITA from the private law of all provinces or in the civil law of Quebec. Although the dissociation of some concepts may be justified on the basis that they are properly understood according to their ordinary meanings, other provisions clearly refer to concepts and relationships defined by private law and therefore should, under new section 8.1 of the federal Interpretation Act, be interpreted in accordance with provincial private law. Where the application

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383 Macdonald, *supra* note 281, at 66.

of this statutory complementarity rule produces unacceptable differences in tax consequences among different provinces, however, specific legislative amendments are advisable.

While the aims of Canadian bijuralism are broad and aspirational, their realization in the ITA can be detailed and technical. This inevitable detail should not obscure the underlying values of recognition and respect that motivate the endeavour.