Lawyers Are from Mars, but Tax Lawyers Are from Venus

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Abstract
In this article, the author reflects on the complementarity between taxation statutes and other legislative frameworks. She provides three non-exhaustive examples of situations where other laws may have an impact on taxation or where tax has affected the evolution of other legislative frameworks. She also notes that the interrelationship between taxation and commercial law is made even more complicated in Canada, where two legal systems of private law coexist. The author concludes that commercial lawyers and tax practitioners must work closely together when planning and implementing transactions, even if they practise in different areas of the law and may not always speak the same language.

Keywords: Dispositions ■ Restrictive Covenant ■ Bijuralism ■ Tax Practice ■ Commercial Law

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Introduction
I started the practice of law at approximately the same time as the Canadian Tax Foundation (CTF) opened its Quebec office. In 1987, the Income Tax Act1 (Canada) was a lot more “concise” than it is today. Over the years, as the Act has become much thicker (while the page size has increased and the font size continues to shrink), I have wondered what possessed me to become a tax practitioner. Each time...

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1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this article are to the Act.
I ask myself that question, the answer remains the same: Even as the practice of tax becomes more complex, it remains just as interesting as it was 25 years ago. There are many reasons for this. Certainly there is the constant challenge of interpreting the Act and its intricate and sometimes convoluted provisions (what other legislation contains so many double negatives?). But that is not the only difficulty confronting tax practitioners on a daily basis.

The Act contains the rules necessary to establish the tax consequences relating to the various transactions entered into by taxpayers. However, those transactions are generally subject to other legislative frameworks. For example, in Quebec, the Quebec Civil Code\(^2\) includes many provisions that govern commercial activities. Furthermore, in the case of a transaction that involves a corporation, it is essential to refer to the relevant incorporating statute. The rules found in those statutes will often determine whether the parties will be able to achieve the goals of their tax planning. Accordingly, tax lawyers must not only master the provisions of the Act; they must also be familiar with all of the other legislative frameworks that may apply to a particular transaction, in order to be able to fully comprehend the tax implications thereof and advise their clients properly.

Of course, this is not a new reality. The same situation existed 25 years ago,\(^3\) and even long before that. The decision of the House of Lords in *Inland Revenue Commissioners v. Westminster (Duke)* is generally known for the statement that a taxpayer has the right to arrange its affairs in order to minimize tax, but it also established that “the legal rights and obligations of the parties [must be] ascertained upon ordinary legal principles.”\(^4\) As far back as 1936, the courts had made it clear that there is a true complementarity between taxation statutes and other legislative frameworks.

The purpose of this article is not to provide an exhaustive list of all situations where other legislation, whether federal or provincial, may affect the tax liability of a taxpayer. Rather, its main purpose is to show how important it has always been (and remains) for tax practitioners to consider all applicable laws in their tax planning, and to provide particular examples where the rules set out in the Act are not sufficient, in and of themselves, to determine the tax consequences applicable to a transaction.

**MEANING OF THE WORD “DISPOSITION”**

Many provisions of the Act apply only if a taxpayer has made a disposition; for example, section 86 specifically applies in the context of a corporate reorganization “[w]here . . . a taxpayer has disposed of capital property that was all the shares of any

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2 Civil Code of Québec, LRQ, c. C-1991 (herin referred to as “the Civil Code” or “CCQ”).


particular class of the capital stock of the corporation.”5 The Act provides very little information as to what constitutes a “disposition” of shares or any other type of assets, although subsection 248(1) does contain a broad definition of the term. In particular, that definition provides that a disposition of property “includes” certain transactions or events—for example, those that entitle a taxpayer to proceeds of disposition of the property—and it sets out a list of situations that do not give rise to a disposition for the purposes of the Act. As a result of this broad and non-exhaustive definition, Canadian courts have had to refer to the general statutory scheme in order to determine whether or not a “disposition” has taken place in a particular situation.

The meaning of the word “disposition” is not a new issue for tax practitioners. Many of them are familiar with the excellent article written by Brian Arnold and David Ward in 1980.6 The topic was revisited in the special issue of the Canadian Tax Journal published in 1995 to commemorate the CTF’s 50th anniversary.7 Since then, the concept of disposition has continued to evolve, particularly in view of its importance under the Act.

In fact, even when applying a provision of the Act that does not refer to this concept, it may nevertheless be necessary to establish whether or not a disposition has taken place in order to determine the tax liability of a taxpayer. In General Electric Capital Equipment Finance Inc. v. Canada,8 the Federal Court of Appeal had to decide whether interest paid pursuant to promissory notes was exempt from withholding tax under the provisions of subparagraph 212(1)(b)(vii). One of the conditions for the exemption to apply was that the debtor may not be obliged to pay more than 25 percent of the principal amount of the obligation within five years from the date of issuance. Since the promissory notes had been amended following the initial date of their issuance but less than five years prior to the maturity date, the court had to determine whether a new debt obligation had been created by the amendments, in which case the interest would have become subject to withholding. Admittedly, subparagraph 212(1)(b)(vii) does not refer to a “disposition,” “novation,” or any other similar concept of private law. Nevertheless, the tax liability of the taxpayer (or lack thereof) depended just as much on whether or not there had been a disposition of the notes as on the specific words used in subparagraph 212(1)(b)(vii). In the end, the court held that a new obligation had been created by reason of the amendments, in view of the fact that the fundamental terms of the promissory notes (being the identity of the debtor, the principal amount of the note, the amount of the interest, and the maturity date of the note) had been so materially altered as to give rise

5 Subsection 86(1).
8 2001 FCA 392.
to a new debt. As a result of the amendment of the notes, the interest payable thereon became subject to tax. This decision serves as a cautionary tale for corporate lawyers and taxpayers who proceed with commercial transactions without consulting a tax practitioner. It also illustrates how important it is for tax lawyers to properly understand the commercial ramifications of a transaction in order to properly advise their clients.

**RECTIFICATION IN QUEBEC**

While the meaning of the term “disposition” has been the subject of scholarly papers and court decisions for more than 50 years, the possibility to rectify a transaction that would otherwise create unintended tax consequences for taxpayers became a hot topic little more than a decade ago, following the decision of the Ontario Court of Appeal in *Juliar*. Since then, many courts have agreed to rectify a transaction governed by the common law.

Whether a similar result can be achieved in Quebec remains to be seen at the time of writing. This is because the Civil Code contains specific provisions dealing with the consequences of a defect of consent. In particular, CCQ articles 1400 and 1407 provide as follows:

1400. Error vitiates consent of the parties or of one of them where it relates to the nature of the contract, the object of the prestation or anything that was essential in determining that consent.

An inexcusable error does not constitute a defect of consent.

1407. A person whose consent is vitiated has the right to apply for annulment of the contract; in the case of error occasioned by fraud, of fear or of lesion, he may, in addition to annulment, also claim damages or, where he prefers that the contract be maintained, apply for a reduction of his obligation equivalent to the damages he would be justified in claiming.

On the basis of these provisions, it has long been thought that under Quebec civil law, the only remedy in the case of a material error that prevents a true meeting of the minds is a cancellation of the transaction. In other words, it would not be possible to simply correct an agreement governed by the laws of Quebec in order to reflect the true intention of the parties.

This particular question was recently reviewed by the Quebec Court of Appeal in *Québec (Sous-ministre du Revenu) c. Services environnementaux*. The facts of this case are fairly straightforward. In the course of a corporate reorganization, the appellant...

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11 2011 QCCA 394.
had exchanged shares that it owned in the capital stock of a corporation for (1) other shares of its capital stock having an aggregate paid-up capital of $1 and (2) a promissory note in the amount of $1,217,028. The amount of the note had been established as a result of the appellant’s belief that the exchanged shares had an adjusted cost base of $1,217,029. When it was subsequently determined that the adjusted cost base was only $96,001, the “extra boot” received by the appellant created unintended tax consequences. As a result, the appellant filed a motion with the Quebec Superior Court seeking to reduce the principal amount of the note to $95,000 and issue additional shares of the corporation having an aggregate redemption price of $1,122,029.

The Quebec deputy minister of revenue objected to the rectification on the basis that the theory of “equitable rectification” was imported from the common law and did not exist in Quebec as a result of CCQ articles 1400 and 1407. However, both the Quebec Superior Court and the Quebec Court of Appeal disagreed with this contention and allowed the rectification.

According to the Quebec Court of Appeal, CCQ article 1425 is sufficient to allow the type of rectification requested by the appellant. That provision reads:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

In the court’s view, the correction to the agreement requested by the appellant simply allowed it to reflect the true intent of the parties. The Quebec Court of Appeal was also satisfied that the rectification did not lead to any retroactive tax planning since it simply allowed the parties to put themselves in the same situation as if they had known the true adjusted cost base of the exchanged shares at the time they entered into the agreement.

The appeal in Services environnementaux was heard by the Supreme Court of Canada in November 2012. Readers of this article will undoubtedly know the results of the appeal by the time they read these words. Whichever way the court elects to go, its decision should become one of the landmarks of the interaction between the practice of tax law and other legislative frameworks. If the Supreme Court sides with the Quebec deputy minister of revenue, taxpayers in Quebec will be significantly disadvantaged, compared to their counterparts in the common-law provinces, when a material mistake is discovered after a transaction. On the other hand, if the court upholds the ratio of the lower Quebec courts, then tax law will have led to the evolution of the civil law in that province by overturning a long-held belief of Quebec civilists and litigators.

**INTEREST IN A CORPORATION**

Many factors have contributed to the significant increase in the length of the Act in the last 25 years; to enumerate them all is beyond the scope of this article. However, there is no doubt that the higher level of sophistication of tax practitioners and their tax schemes has pushed the Department of Finance to replace broadly worded provisions meant to state a general principle with long and complex technical provisions
that aim to cover every imaginable situation and potential abuse (how else can one explain section 80?). The Department of Finance has also dealt with unsatisfactory court decisions (at least from its point of view) by introducing far-reaching and complicated provisions that go well beyond the perceived mischief that they were intended to resolve.

A case in point is proposed section 56.4, which deals with the tax consequences relating to the grant of a restrictive covenant. Under proposed subsection 56.4(2), all amounts in respect of a restrictive covenant of a taxpayer must be included in computing the taxpayer’s income unless one of the narrow exceptions listed in proposed subsection 56.4(3) is available. Furthermore, proposed paragraph 68(c) will give the Canada Revenue Agency the ability to revise the allocation of proceeds between assets, services, and restrictive covenants when the allocation is regarded as unreasonable, although section 68 cannot apply to the extent that proposed subsection 56.4(5) is applicable. However, because the Department of Finance wanted to prevent abuse of the proposed rules, none of the situations initially set out in subsection 56.4(5) included transactions between non-arm’s-length parties.

The department addressed this issue in revised draft legislation introduced in July 2010, which will allow a taxpayer to ensure that section 68 will not be applicable to reallocate a portion of the proceeds to a restrictive covenant granted to a related person, but only in limited circumstances. For example, where shares of the capital stock of a corporation (“the family corporation”) are sold to a corporation in which the related purchaser holds, directly or indirectly, shares of its capital stock (“the eligible corporation”), this new exception will apply only if the grantor “does not, at any time after the grant of the restrictive covenant and whether directly or indirectly in any manner whatever, have an interest, or for civil law . . . a right, in the [family] corporation or in the eligible corporation.”

What is “an interest” in a corporation? The Act does not define the words “interest” (in common law) and “right” (in civil law). This proposed exception is thus a perfect example of a provision that forces tax practitioners to refer to other legislative frameworks in order to determine whether their clients can avail themselves of that provision. It also illustrates some of the difficulties in applying the Act that result from the coexistence in Canada of two distinct legal systems.

Even before the introduction of subsection 56.4(8.1) in the draft legislation, proposed section 56.4 included many references to the concept of an “interest” in a corporation. Prior to July 16, 2010, the word “interest” was translated in French.

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12 Canada, Department of Finance, Legislative Proposals To Amend the Income Tax Act and Related Legislation To Effect Technical Changes and To Provide for Bilingual Expression in That Act (Ottawa: Department of Finance, July 16, 2010) (herein referred to as “the draft legislation”).


14 See, for example, proposed paragraph 56.4(6)(b).
as “participation.” In the draft legislation, both the English and the French versions of proposed section 56.4 were amended to refer to the common-law term “interest” (intérêt) and the civil-law term “right” (droit). Part 2 of the explanatory notes to the draft legislation (“Amendments Related to Bijuralism”) indicates that this change had been made in order to reflect appropriately the common law and the civil law in both official languages. In doing so, the Department of Finance set out its understanding of these terms as follows:

Generally, in the current tax legislation, the common law term “interest” and the civil law term “droit” are used to refer to the relationship that exists between a person and property. At common law, it is possible to have a right or an interest in property; an interest in property necessarily involves rights in property while the reverse is not always true.15

As this extract suggests, proposed section 56.4 is not the only provision of the Act in which the concept of an interest appears. In fact, Canadian courts have had to interpret the concept in the past with respect to other provisions of the Act. This exercise required a proper understanding of the commercial relationship that had been created by the parties, as well as references to the relevant provincial legislation.

For example, paragraph 12(1)(x) requires a taxpayer to include in computing income certain amounts received as an inducement or a contribution in respect of the cost of property or as an allowance in respect of an outlay or expense. However, subparagraph 12(1)(x)(viii) provides that a particular amount will not be included in computing income to the extent that it may reasonably be considered to be a payment made in respect of the acquisition of an interest in the taxpayer or the taxpayer’s business or property. In Supermarché Dubuc & Frère Inc. v. Canada,16 the Tax Court of Canada had to determine whether the exclusion set out in subparagraph 12(1)(x)(viii) applied to an inducement payment that had been received by the appellant pursuant to a loyalty agreement entered into with Métro-Richelieu Inc. (“Métro”). The appellant, which operated a grocery business, entered into a loyalty agreement with Métro pursuant to which it was obligated to purchase from Métro a certain percentage of its supplies. Métro was also given a right of first refusal to purchase the business, and in the event that Métro declined to exercise its right, the appellant had to ensure that the purchaser of the business would become subject to the provisions of the loyalty agreement. The appellant argued that the rights granted to Métro under the loyalty agreement were sufficient to be considered to give rise to the acquisition by Métro of an interest in the appellant or in its business or property, such that the inducement payment received by the appellant under the loyalty agreement did not have to be included in computing its income under paragraph 12(1)(x). Garon J allowed the appeal and held that the “rights” granted to Métro under the loyalty agreement...
agreement did not give rise to an acquisition of an interest in the appellant, but were sufficient to constitute an acquisition of an interest in the appellant’s business.

I am inclined to believe that the acquisition of a right “in [its] property” mentioned in subparagraph 12(1)(x)(viii) implies the acquisition of real rights over the property of a taxpayer. First, the use of the preposition “in” seems to me unsuited to describing personal rights or the rights of a creditor in legal terminology. Second, in the context of a right pertaining to property the preposition “in” designates a close relationship to that property, a jus in rea. I consider that when associated with the word “property” the preposition “in” is equivalent to the preposition “on.”

In the case of an artificial person the subparagraph can be applied to a person owning shares in a joint stock company. If in the instant case Métro had by this agreement acquired the appellant’s shares it could be said that Métro had acquired rights in the artificial person represented by the appellant. However, that is not the situation in the facts at issue here.

In view of the nature of the concept of a business, I think it is beyond question that Métro acquired rights relating to the activities of the appellant connected with the operation of its business. The appellant’s hands were tied in several respects. Métro thus held rights regarding how the appellant would cease operating its business in the circumstances I have just indicated.

The taxation of an inducement payment received pursuant to a loyalty agreement entered into with Métro was again reviewed by the Tax Court of Canada two years later in *Supermarché Ste-Croix Inc. v. The Queen*. In *Ste-Croix*, Lamarre Proulx J indicated that she agreed with Garon J’s interpretation of the expression “acquisition of an interest in the taxpayer or in the taxpayer’s property,” which should generally be understood as including the acquisition of (1) shares or a right relating to shares of a corporation, (2) a partnership interest in a partnership, and (3) a real right in a property. However, compared to Garon J, she adopted a much more restrictive interpretation of the expression “acquisition of an interest in the taxpayer’s business”:

Where my opinion differs is with respect to the meaning to be given to the words “acquisition of an interest in his business.” Like the judge in *Canada Trust Co. (Shaw Estate)* cited above, I do not believe that the appellant’s contractual obligations granted in consideration of the inducement payment can, in current legal language, be understood as interests acquired in a business. An interest in a business might possibly be a sharing in the business’s profits or possibly a management interest. I will not attempt

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17 Ibid., at 2224-25. In the same year, Bowman J considered the situation where a supplier had made a payment to the appellant in return for a commitment by the latter to buy the supplier’s products at enhanced prices: *Everett’s Truck Stop Ltd. v. The Queen*, 93 DTC 965 (TCC). In that case, Bowman J summarily concluded that subparagraph 12(1)(x)(viii) was not applicable in the circumstances.

18 95 DTC 871 (TCC).
to give a descriptive and exhaustive definition of what an interest in a business would be, but I can say with certainty what it is not. It cannot be contractual obligations to which the recipient of the inducement payment has agreed. Here I wish to restate the court’s words in Supermarché Dubuc, supra, with respect to the use of the preposition “in” with respect to the word “property”:

... the use of the preposition “in” seems to me unsuited to describing personal rights or the rights of a creditor in legal terminology.

If the terms “interest in a property” or “interest in the taxpayer” could not refer to personal interests or rights of claim, the same is true with respect to the term “interest in the business.”

The decision of Lamarre Proulx J in Ste-Croix was upheld by the Federal Court of Appeal, where the court held as follows:

We believe, like her, that the expression “acquisition ... of an interest in [the taxpayer’s] ... business” (in the French version, “acquisition ... d’un droit ... sur son entreprise”) must be understood as a direct interest in the actual activities of the business and not only what may still be described as an interest, but a personal one resulting from a promise by the business to act in a particular way in its future business relations. Here, the interest or “droit” the payor has acquired in the business is the worth to him of the obligation assumed by the appellant, which operates a grocery store, first, to draw its supplies from him, a wholesaler, in the future, to the amount of certain quotas, and second, to give him a first option to purchase shares issued from its capital stock if any transaction in relation to those shares was planned.

No right or direct interest in the business is involved, no property right or pecuniary interest whatsoever in its profits is transferred, no participation in its management, operations or administration is assigned. To give the word “interest” or “droit” in the business, as used in the provision, the broad meaning more or less suggested by the appellant, i.e. that of an advantage to be derived from the business’s activities, would be inconsistent with the current meaning attributed in legal language to the words “interest” and “droit” when used in regard to a property, as is indicated in the definitions provided by the legal dictionaries. And it would also mean depriving the provision of any possibility of actually playing the role assigned to it, namely, that of distinguishing between two types of inducement payments, since such a payment can hardly help but have in return some interest connected with the business’s activities.

On the basis of the reasoning in Ste-Croix, the expression “interest in a corporation” should be interpreted in a more restrictive manner than the words “interest in a business.” More specifically, it should not include an interest or right with respect to the day-to-day activities or financial matters of a business, such as “contractual
rights,” since an interest in a corporation refers to an interest in the vehicle that is the corporation (such as its shares) and not what is within that vehicle (its business). Consequently, debts and liabilities of a business should not be included in the meaning of an “interest in a corporation.” It therefore seems reasonable to restrict the meaning of the phrase “interest in a corporation” to shares and other financial instruments providing to its holder a right to participate in the corporation’s earnings. It is also possible that a real right, such as a hypothec, on such shares or financial instruments would be considered to give rise to an interest in a corporation. In Caisse populaire Desjardins de l’Est de Drummond v. Canada, the Supreme Court of Canada had to consider whether a deposit given to secure a line of credit (where compensation could be operated between the two in the event of a default) constituted a “security interest” for the purposes of subsection 224(1.3). Pursuant to that provision, a “security interest” means “any interest in, or for civil law any right in, property that secures payment or performance of an obligation.” While the dissenting judges disagreed with the majority of the court, which held that the above-described arrangement gave rise to a “security interest,” their analysis of the meaning of the expression “interest in property” remains relevant for our purposes. Deschamps stated:

In “The Income Tax Act, the Excise Tax Act and the Term Interest: An Interesting Case for Harmonization,” in The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism (2002), published in the Collection of Studies in Tax Law 2001, Martin Lamoureux points out that a term like “interest” may be impossible to define without considering the context. In his view, “depending on the context, the expression ‘interest in property’ appears to be the converse of the notion of absolute ownership” (p. 7:9). According to this interpretation, therefore, the security interest—the right in question in s. 224(1.3) ITA—is distinct from a right of absolute ownership.

After analysing how the “interest” concept is used in the ITA and in the Excise Tax Act, R.S.C. 1985, c. E-15 (“ETA”), Lamoureux proposes the concept of “real right” as a basis for harmonizing those of “interest” and “droit.” He explains this as follows:

As we stated in part three, we propose to harmonize the notion of “interest” (intérêt) with its Quebec equivalent which is “real right” (droit réel). This conclusion is based on a comparative analysis which shows a great similarity between the two concepts. In fact, a comparison of the two concepts shows a similarity between several of their general attributes, for example, the right to follow, the right to assert adversus omnes, a direct right to the thing and the dismemberment of property over time [p. 7:22]. . . .

The common law concept of security interest therefore corresponds, in civil law terms, not to a personal right, but to a real right. In short, although no single expression is used at common law, what can be seen is that the right holder has a right in the property itself, as opposed to a right to compel a person to perform an obligation,
which is the essence of a personal right. Thus, the “real right” concept is common to
the two legal traditions. This concept is also inherent, and literally so, in the English
expression “interest in property” and the French expression “droit sur un bien” used in
s. 224(1.3).22

In light of the foregoing, if a grantor of a restrictive covenant retains a personal
right in the family corporation, this should not create any problem under proposed
subparagraph 56.4(7)(c)(iii). As for a real right, such as a hypothec on shares to
guarantee a balance of price, it may prevent the application of subsection 56.4(7) on
the basis of the reasoning of the dissenting judges in *Caisse populaire*. Nevertheless,
since subsection 224(1.3) does refer to a “security interest” and not simply to an
“interest,” and in view of the fact that the majority did not expressly accept that a
security interest entails a real right,23 it might be possible for a grantor to obtain such
a hypothec and be protected with respect to a restrictive covenant.

Because this issue has yet to be reviewed by a court within the context of pro-
posed section 56.4, obviously a taxpayer should be careful when selling shares to a
related party where a relationship remains with the family corporation or with the
eligible corporation that has acquired its shares if the taxpayer wishes to use the
excepting provisions of proposed subsection 56.4(7). Furthermore, as shown by the
decisions in *Dubuc*, *Ste-Croix*, and *Caisse populaire*, the nature of any commercial re-
lationship between the grantor and the family corporation or the eligible corporation
should be reviewed in each case in order to determine whether such relationship
gives rise to “an interest” in the corporation.

**CONCLUSION**

This article has provided only a brief review of certain situations where other fed-
eral or provincial laws may have an impact on taxation (and/or where tax may just
as significantly affect the evolution of other legislative frameworks, as, for example,
in the case of a rectification). Furthermore, as shown by the *General Electric*
case, even where a transaction takes place for purposes other than tax, its terms and con-
ditions may nevertheless have a significant impact on the income tax payable by the
taxpayer involved in the transaction. It is thus essential that commercial lawyers work
closely with tax practitioners when they implement transactions that affect the rights
of their clients, even when taxation does not appear to be relevant at first glance. Tax
lawyers must also consult their colleagues in order to better understand the nature
of the commercial relations (contractual or otherwise) in order to establish the tax
consequences of a transaction. While it is easy to conclude that a taxpayer who holds
shares in a corporation has an interest therein, it is much more difficult to deter-
mine whether such an interest exists when dealing with a contractual relationship,

22 Ibid., at paragraphs 87-88 and 92.
23 Ibid., at paragraph 111.
as shown by the Dubuc and Ste-Croix cases. This is made even more complicated in Canada, where two legal systems of private law coexist, being civil law in Quebec and the common law in other provinces.

When planning the affairs of a client, it is thus important to carefully consider not only the provisions of the Act but also all other legislative frameworks that may be relevant in the circumstances. Since tax practitioners must also stay abreast of any legislative or judicial developments, I hereby predict that the practice of tax should still be a challenge when the Quebec office of the CTF celebrates its 50th anniversary (for which celebration I will be happy to forgo my post-retirement daily golf game in order to revisit this topic one last time).