The Retroactive Effect of Conditional Obligations in Tax Law

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PRÉCIS

Le bijuridisme canadien, c'est-à-dire la coexistence du droit civil et de la common law, pose de nombreux problèmes d'interprétation et d'application de la Loi de l'impôt sur le revenu. Cet article fait état du problème d'application en droit fiscal de la rétroactivité des conditions suspensives ou résolutoires prévue par le Code civil du Québec.

En droit civil, la réalisation de la condition a un effet rétroactif : l'annulation du contrat ou sa confirmation, selon le cas, est réputée avoir eu lieu le jour de la conclusion du contrat. La question est donc de savoir si cette rétroactivité devrait avoir son plein effet au niveau des conséquences fiscales d'une transaction. Vu les dispositions actuelles de la Loi de l'impôt sur le revenu et l'état de la jurisprudence, l'auteure est d'avis qu'il faut répondre affirmativement à cette question.

Cet article analyse d'abord les effets des conditions suspensives et résolutoires en droit civil, ainsi que l'effet rétroactif d'autres institutions de droit civil telles que la résolution du contrat pour inexécution, la nullité du contrat, la vente à tempérament, la vente à l'essai, la vente avec faculté de rachat et la promesse de vente. Par la suite, l'article fait état des institutions similaires en common law, telles que la condition precedent et la condition subsequent, pour conclure que, contrairement aux obligations conditionnelles du droit civil, ces conditions n'ont pas d'effet rétroactif.

L'auteure se penche ensuite sur les dispositions pertinentes de la Loi de l'impôt sur le revenu, en particulier sur la définition de « disposition », et conclut que la Loi n'impose pas une définition exclusive et dissociée du droit privé des provinces. Il faut donc consulter le droit privé pour circonscrire la notion de disposition, et s'en remettre au droit civil pour son application au Québec. Une analyse de la jurisprudence fiscale fait ressortir certaines contradictions et deux grandes tendances : l'une penche vers l'application uniforme de la Loi de l'impôt sur le

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revenu partout au Canada, alors que l'autre favorise le respect des différences entre les deux systèmes de droit privé. Selon l'auteure, ce second courant jurisprudentiel est le mieux fondé en droit.

Vient ensuite une analyse de la position de l'Agence des douanes et du revenu du Canada. Essentiellement, elle ne tient pas compte de l'effet rétroactif des obligations conditionnelles en droit civil et applique la Loi de la même façon dans toutes les provinces. L'auteure critique cette position, étant plutôt d'avis que si la politique fiscale exige une application uniforme, la législation devrait définir clairement une notion de disposition dissociée du droit privé des provinces.

ABSTRACT

Canadian law is bijural; that is, it comprises two distinct private law systems—civil law and common law. Civil law is the law of Quebec, embodied in the Civil Code of Quebec. Common law is rooted in English law and underlies the legal framework of the other provincial jurisdictions.

The interaction of these two systems can lead to complications, particularly with respect to the interpretation and application of federal law. The relationship of provincial law and federal law is generally governed by the principle of complementarity in that, in matters of interpretation of federal law, provincial private law concepts are frequently relied upon. However, Parliament may choose to dissociate federal law from provincial private law, within its jurisdictional authority, by enacting legislation that intentionally departs from provincial private law. A further difficulty can arise when a concept exists in civil law that has no counterpart in, and is incompatible with, common law. In this situation, administrators of a federal statute may face a conflict between respect for the rules of both legal systems and the desire for uniform application of the statute throughout Canada. When the latter prevails, a unique and important element of civil law may be effectively displaced, overridden, or ignored.

This paper focuses on the conceptual differences that exist under civil law and common law with respect to conditional obligations in contractual relationships, and it examines the significance of those differences in the context of the application of Canada's Income Tax Act. Of particular concern is the civil law concept that conditional obligations have a retroactive effect: when a condition is fulfilled, the cancellation or confirmation of the contract is deemed to have occurred on the date on which the contract was concluded. This treatment can—and, in the author's view, should—directly affect the tax consequences of a transaction carried out under the contract.

The author examines the common law framework for conditional obligations and finds no counterpart to the civil law concept of retroactivity. Moreover, neither the Income Tax Act nor the administrative practice of the Canada Customs and Revenue Agency recognizes this concept in determining the tax consequences of conditional arrangements. At the same time, the Act does not contain an explicit rule that displaces provincial law for these purposes. The author concludes that

in the absence of such a rule, for taxpayers in Quebec, civil law should prevail. If, on the other hand, uniform treatment is considered necessary from a tax policy perspective, the Act should be amended to make it clear that, in this respect, federal law is dissociated from provincial law. **Keywords:** Contracts; federal-provincial; Quebec; sales; ownership; property.

INTRODUCTION

A distinctive feature of Canadian law is its bijural structure, which provides for the coexistence of two systems of private law: civil law and common law. This juxtaposition of two distinct legal systems, and their constant interaction, is without a doubt a source of extraordinary richness for both systems—although, as one of our greatest jurists has warned, there is a risk of hybridization through judicial interpretation.[1]

Bijuralism is deeply and inextricably rooted in the history and legal tradition of the Canadian federation. In 1774, the Quebec Act[2] reintroduced civil law in Quebec,[3] reversing a ban imposed by the Royal Proclamation of 1763, which had ordered the use of English law in both criminal and civil matters. Subsequently, the Constitution Act, 1867,[4] which confers upon the provinces the exclusive authority to pass laws in relation to property and civil rights, confirmed the coexistence of two systems of private law.[5]

The courts have always held that tax law is accessory to private law; it merely specifies the tax consequences of contractual relationships between parties, which are governed by private law:

> 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.[6]

Thus, when a federal statute uses a word or phrase from private law without defining it or giving it a specific meaning, one must refer to provincial private law in order to interpret it. In such a case, we say that provincial private law stands in a relationship of complementarity with federal law. However, the Parliament of Canada may also choose to exercise its ancillary or incidental powers under section 91 of the Constitution Act, 1867 and establish its own independent private law rules, for purposes of federal law. In this event, federal law is dissociated from provincial private law.[7]

Since Canada is officially bilingual,[8] bijuralism requires that Parliament speak to four distinct legal audiences, namely, the francophones and anglophones of both systems of private law. For this reason, for the past several years, Parliament

has been engaged in an extensive review of federal legislation that aims to achieve harmonization with private law and, in particular, to ensure that "[TRANSLATION] the civil law and common law are adequately reflected in both language versions."[9] The Income Tax Act[10] is one of the statutes reviewed in this process.

This paper comes within the scope of the harmonization process and proposes some solutions to one of the problems that arise in tax law—the retroactive effect of conditional obligations under civil law. In civil law, suspensive and resolutory conditions have an effect that is retroactive to the date on which the contract was concluded; by contrast, in common law, conditions precedent and conditions subsequent have no retroactive effect. For tax law purposes, the time at which a disposition of property takes place is pivotal in determining, inter alia, the timing of taxation of a capital gain, recapture of depreciation, or a change of control of a corporation. The following question thus arises: where the issue is to determine the moment in time when a disposition has occurred, does federal tax law recognize the retroactive effect of conditional obligations?

In this paper, I will consider whether the Act and the administrative policy of the Canada Customs and Revenue Agency ("the CCRA") adequately recognize the unique features of civil law with respect to the effect of conditional obligations. In the event that they do not, I will assess how and to what extent it might be possible to harmonize the Income Tax Act with Quebec civil law in this area, while also respecting Parliament's intent. In this regard, I will be mindful of the need to strive for a balance between two objectives that are often in conflict: the uniform application of the Act across Canada, and respect for the rules of private law under both legal systems, even though they are occasionally incompatible.

The paper is divided into four main sections. The first section presents a review of the civil law rules regarding conditional obligations and their effects, as well as other civil law concepts that could involve issues of retroactivity. The second section examines the common law concepts that correspond to civil law conditional obligations, and identifies similarities and differences between the two legal systems in this regard. The third section focuses on the legislation, the case law, and scholarly writing on the retroactive effect of conditional obligations in tax law, and also reviews the CCRA's administrative position. Finally, the fourth section offers a critical analysis of the current situation, with the particular intent of identifying trends in the evolution of the law and offering specific proposals for reform.

CONDITIONAL OBLIGATIONS UNDER CIVIL LAW

Suspensive Conditions

Conditional obligations are governed by articles 1497 to 1507 of the Civil Code of Quebec.[11] Under the Civil Code, a conditional obligation is defined as follows:

> 1497. An obligation is conditional where it is made to depend upon a future and uncertain event, either by suspending it until the event occurs or is certain not to occur, or by making its extinction dependent on whether or not the event occurs.[12]

A condition must thus be future and uncertain. As well, it cannot be purely potestative—that is, it cannot depend solely upon the will of the debtor.[13] A condition must also be an extrinsic event, and not an essential element in the formation of the contract. For example, a buyer who agrees to pay the price if the seller agrees to deliver the item contracts a pure and simple obligation.[14]

When a condition is suspensive, the obligation arises only on the occurrence of an event or on the certainty that the event will not occur; thus, the condition delays the creation of an obligation between the parties.[15] As long as the condition has not been fulfilled, the very existence of the obligation is in abeyance.[16] The obligation is not only inexigible, as in the case of a term. Rather, it does not exist; it has not yet come into being. If the obligation in question is payment, the debt has not legally arisen, and a person who has paid in error can even claim the money back.[17] Thus, the seller has no right to the price until the condition is fulfilled.

Ownership of property sold subject to a suspensive condition is not transferred immediately. The seller retains the right of ownership and all the incidents thereof.[18] Occasionally, possession of the property may be transferred when the contract is concluded—for example, in a trial sale,[19] which is presumed to be subject to a suspensive condition—but this does not have the effect of transferring ownership.

When the condition is fulfilled, it has a retroactive effect to the date of conclusion of the contract, both between the parties and with respect to third parties:

> 1506. The fulfillment of a condition has a retroactive effect, between the parties and with respect to third persons, to the day on which the debtor obligated himself conditionally.

This provision reiterates the principle that a condition that has been fulfilled has a retroactive effect, as stated in the first sentence of articles 1085 and 1088 of the Civil Code of Lower Canada (hereinafter "the CCLC").[20] Thus, it is not a departure from the previous law. In this regard, the CCLC was almost identical to article 1179 of the Code Napoléon.

With a suspensive condition, the fulfillment of the condition causes the obligation to have become pure and simple from the beginning:

> [TRANSLATION] *From what point does the obligation exist as a pure and simple obligation, however?* The answer might seem clear: until such time as the suspensive condition is fulfilled, the obligation is a conditional one; but from the moment the suspensive condition is fulfilled, a pure and simple obligation is substituted therefor. And yet, the result is different under French law: art. 1179 C. civ. states that *the condition is retroactive: "a condition fulfilled takes effect retroactively to the date the obligation was contracted"* [italics in original text]. *Everything happens as though the obligation had been pure and simple from the date the contract was formed; it is deemed never to have been merely a potential obligation* (emphasis added).[21]

When a contract provides for the transfer of ownership, the right of ownership is deemed to have passed to the buyer on the date the contract was signed.[22] The

effects and consequences of such retroactivity will be analyzed below under the heading "The Effects of Retroactivity."

Where the condition is not fulfilled within the allotted time, or when it becomes certain that it will not be fulfilled, the contract is, for all intents and purposes, considered never to have been concluded.[23] Pineau, Burman, and Gaudet have written, "[TRANSLATION] the slate is wiped clean: the potential buyer never was a buyer and the potential seller is considered never to have been a seller."[24]

Resolutory Conditions

A resolutory condition suspends not the existence of the obligation, but its extinction.[25] An obligation subject to a resolutory condition comes into existence immediately, as soon as the contract is concluded.[26] This means that as long as a resolutory condition remains unfulfilled, the obligation is treated exactly like a pure and simple obligation. It takes full effect, so that in a sale, ownership is transferred immediately and the buyer is obligated to pay the price.

Mignault has summarized the immediate effect of an obligation subject to a resolutory condition:

> [TRANSLATION] The moment the contract of sale is formed it comes into full effect, just like a pure and simple sale. Both parties are bound to perform their obligations: the vendor must deliver the thing sold, and the purchaser must pay the price; ownership is transferred from the outset.[27]

When the condition is fulfilled, the contract is cancelled retroactively in accordance with CCQ article 1506. Mignault goes on to write:

> [TRANSLATION] However, if the condition is fulfilled, all the effects of the sale are revoked *retroactively*: they are terminated not only as to the future, but also as to the past; they are considered never to have arisen.[28]

Several scholars have written that everything thereafter occurs as though the obligation had never existed: "[TRANSLATION] the buyer never became the owner of the building (not even conditionally) and the seller has never ceased to be the full owner of the building."[29]

The outcome of the converse situation is obvious: if it becomes certain that the condition will not be fulfilled, the sale is pure and simple from the outset and the contract is retroactively confirmed.[30] Thus, the buyer is deemed to have been the owner from the date the contract was signed.[31]

One should note the "mirror" effect of suspensive and resolutory conditions: all conditional obligations are suspensive for one party and resolutory for the other. Mignault illustrates this reciprocity by using a concrete example:

> [TRANSLATION] I have sold you my house under this condition: *that a certain ship arrives*. If the condition is realized, it has a double effect: you will be deemed to

> have been, and I will be deemed to have ceased being, owner, from the date of the contract (art. 1085). Thus, we were both owners: you were an owner under a *suspensive* condition, and I was an owner under a *resolutory* condition.
>
> I sell you my house, but on the condition that the sale will be resolved *if a certain ship arrives*. The sale, like a pure and simple sale, produces all of its effects *hic et nunc*: you are the owner from this very moment onward; but if the condition is fulfilled, you are deemed never to have been the owner, and I am deemed never to have ceased being the owner (art. 1088): the very same event that deprives you of a right has the effect of granting me that right. We were therefore both owners: you were an owner subject to a *resolutory* condition and I was an owner subject to a *suspensive* condition.[32]

Essentially then, before the condition is fulfilled in a sale subject to a resolutory condition, the seller is the owner under a suspensive condition and the buyer is the owner under a resolutory condition. In the reverse situation—that is, where a sale is subject to a suspensive condition—before the fulfillment of the condition, the seller is the owner under a resolutory condition and the buyer is the owner under a suspensive condition.[33]

The Effects of Retroactivity

General Effects of Retroactivity

The main effect of the fulfillment of a suspensive condition is that the parties must perform their obligations as though the obligations had existed from the date the contract was signed. Conversely, the main effect of the fulfillment of a resolutory condition is to oblige each party to return to the other the prestations he has received under the contract, as though the contract had never existed.[34]

What occurs when a suspensive condition is not fulfilled? If possession has not been transferred *pendente conditione*,[35] the contract has simply never existed and the parties owe nothing to each other.[36] If, however, possession has been transferred, the buyer subject to a suspensive condition must return the property to the seller; in this regard, a sale under a suspensive condition is subject to the same restitutionary process as a sale under a resolutory condition.

CCQ articles 1699 to 1707 now govern the restitution of prestations, whether such restitution is needed because a resolutory condition has been fulfilled, a suspensive condition has failed, a creditor has demanded resolution,[37] or the contract has become null[38] because of a failure to meet one of the necessary conditions of its formation.[39]

CCQ article 1700 specifies that the restitution of prestations is made in kind. The general rule is that the buyer must give the property back to the seller, and the seller must refund such part of the purchase price as was received. As we shall soon see, this requirement will be problematic only if the thing is lost.

Retroactivity also affects third parties, given that the fulfillment of the condition has the effect of annulling the rights granted by the seller under a suspensive condition or by the buyer under a resolutory condition. Since their right

of ownership is extinguished retroactively, those rights would have been granted in the "property of another." On the other hand, all rights granted by the buyer under a suspensive condition or by the seller under a resolutory condition during the period of uncertainty are confirmed by the fulfillment of the condition.[40]

This rule was applicable both under French law and under the CCLC. However, new CCQ article 1707 seems to call this principle into question:

> 1707. Acts of alienation by onerous title performed by a person who is bound to make restitution, if made in favour of a third person in good faith, may be set up against the person to whom restitution is owed. Acts of alienation by gratuitous title may not be set up, subject to the rules on prescription.
>
> Any other acts performed in favour of a third person in good faith may be set up against the person to whom restitution is owed.

Does this article make a fundamental break with prior law, and are conditional obligations thus no longer retroactive as against third parties? In my view, the answer is no.

One should begin by noting that the acts of alienation contemplated in the first paragraph of article 1707 include only acts that transfer ownership. All other acts, including grants of real rights in the thing (such as a hypothec or servitude), are covered by the second paragraph of article 1707.[41]

It must be understood that CCQ article 1707, found in chapter IX of the Civil Code entitled "Restitution of Prestations," applies to all contracts retroactively annulled, including situations where annulment results from the failure of a condition of formation of the contract, as well as those involving conditional obligations. It is very difficult, if not impossible, for a third party to have knowledge of the flaws of a contract that make it potentially null. However, under the former Code, it was considered that land registration requirements were sufficient to protect third parties in cases where conditional obligations affected immovables, since those third parties could thereby have knowledge of the precarious nature of their debtor's right.[42]

The same principle remains applicable under the new Civil Code. In fact, where immovables are involved, the creditor's right of restitution is published in the land register. Since all purchasers are deemed to know of the registered rights,[43] a third party could not invoke CCQ article 1707 because he could not claim to be acting in good faith.[44] Moreover, with respect to rights published in the register of personal and movable real rights, the same presumption of knowledge applies to third parties, even though it is rebuttable in the latter case.[45] Thus, in most cases where the debtor of the obligation of restitution grants real rights to third parties, the rights will be retroactively annulled, having been granted by a person who never was the owner: *nemo dat quod non habet*.[46]

In addition, CCQ article 1506, which specifically provides that a condition fulfilled has a retroactive effect in respect of third parties, articulates a specific rule on conditional obligations, as opposed to CCQ article 1707, which contains a

general rule. Thus, article 1506 should normally take precedence. This opinion is shared by certain scholars who believe that CCQ article 1707 does not apply to conditional obligations.[47] Baudouin and Jobin still write, despite CCQ article 1707, that the fulfillment of a suspensive condition retroactively annuls the rights granted by the seller *pendente conditione*:

> [TRANSLATION] In contracts that transfer ownership, the right of ownership is deemed to have passed to the creditor on the date the contract was signed. Consequently, any act of the debtor regarding the thing prior to the fulfillment of the condition is annihilated. Thus, the disposition of the material thing that is the object of the contract, or hypothecs or other securities, or servitudes granted by the debtor, would in principle have no effect in relation to the creditor. On the contrary, all acts entered into by the creditor during the same period are retroactively validated, since they were performed while the creditor was deemed to be the owner of the thing.[48]

Baudouin and Jobin express the same view regarding resolutory conditions:

> [TRANSLATION] In the case of a contract that transfers ownership, the buyer is deemed never to have been the owner and thus, in principle, all rights that he has granted to third parties lapse retroactively.[49]

In fact, CCQ article 2682 appears to confirm that article 1707 does not apply to conditional obligations, at least in relation to hypothecs:

> 2682. A person whose right in a property is conditional or open to an attack in nullity may only grant a hypothec subject to the same condition or nullity.

As for acts of administration performed *pendente conditione*, CCQ article 1707 merely codifies the old doctrine, which considered them to be binding on the person to whom restitution is owed.[50]

Essentially then, it is reasonable to conclude that CCQ article 1707 does not negate or undermine the principle that the retroactivity of a condition can be set up against third parties—a principle that is expressly articulated in CCQ article 1506. It would make no sense for the legislator to have stated the principle and then deprived it of any effect.

Finally, one of the predominant effects of retroactivity is the crystallization of a legal situation despite any subsequent amendments to a statute:

> [TRANSLATION] If a new law comes into effect between the date of the agreement and the date on which the condition is fulfilled, the obligation will remain subject to the old law, as though it had been pure and simple from the outset.[51]

As will be discussed later (under the heading "Conflicts Between Federal Law and Civil Law—Suspensive Conditions—Without Transfer of Possession"), this principle is particularly important in tax law. The retroactive effect of conditions

allows the parties to anticipate, with a reasonable degree of certainty, the tax consequences of the transaction they have in mind, since they will be protected from the application of any amendments to the Income Tax Act that may be enacted after the signing of the contract.

Limitations to the Retroactive Effect of Conditions

Risks

Under the CCLC, for contracts transferring ownership, the doctrine of risk applied the maxim *res perit domino*[52] and imposed the burden of risk on the owner of the thing.[53] However, CCLC articles 1087 and 1088 established an exception to this rule in relation to conditional obligations. Article 1087 read as follows:

> 1087. When the obligation has been contracted under a suspensive condition, the debtor is bound to deliver the thing which is the object of it, upon the fulfilment of the condition.
>
> *If without the fault of the debtor, the thing have altogether perished or can no longer be delivered, no obligation exists.*
>
> If the thing be deteriorated without the fault of the debtor, the creditor must receive it, in the state in which it is, without diminution of price.
>
> If the thing be deteriorated by the fault of the debtor, the creditor may either exact the thing in the state in which it is, or demand the dissolution of the contract, with damages in either case [emphasis added].

The second paragraph of this provision reversed the general principle of the doctrine of risk and ran counter to the principle that conditions are retroactive. Indeed, it placed the burden of the risk of loss on the debtor of the obligation to deliver: if the thing perishes completely, the seller is no longer required to deliver, but the buyer is no longer required to pay;[54] thus, it is the seller who bears the loss. The normal rules of retroactivity would logically have led to the opposite result. Faribault noted this contradiction of principles:

> [TRANSLATION] This provision in our article 1087 evidently allows for an exception to the rule stated in article 1085 to the effect that conditions are retroactive.
>
> Pursuant to this rule, the creditor should bear the risks, since after the condition has been fulfilled the sale is deemed to have been pure and simple from the moment the contract was formed, and the buyer owned the thing from that point onward. By applying the maxim *res perit domino*, the buyer, that is, the creditor of the obligation to deliver, would logically have to bear the loss. That is not the result provided for by article 1087, which is quite similar to article 1182 of the Code Napoléon.[55]

When the Civil Code was reformed, in 1994, the special regime for the attribution of risk applicable to conditional obligations was purposely set aside. From then on, the general rules pertaining to contracts transferring ownership would apply to conditional obligations.[56] Those rules are found in CCQ articles 1456, 1693, and 1694:

> 1456. The allocation of fruits and revenues and the assumption of risks incident to property forming the object of a real right transferred by contract are principally governed by the Book on Property.
>
> The debtor of the obligation to deliver the property continues, however, to bear the risks attached to the property until it is delivered.

> 1693. A debtor is released where he cannot perform an obligation by reason of a superior force and before he is in default, or where, although he was in default, the creditor could not, in any case, benefit by the performance of the obligation by reason of that superior force, unless, in either case, the debtor has expressly assumed the risk of superior force.
>
> The burden of proof of superior force is on the debtor.

> 1694. A debtor released by impossibility of performance may not exact performance of the correlative obligation of the creditor; if the performance has already been rendered, restitution is owed.
>
> Where the debtor has performed part of his obligation, the creditor remains bound to perform his own obligation to the extent of his enrichment.

Although *res perit domino* continues to be the general rule for risks,[57] it has been set aside in favour of *res perit debitori*[58] where the contract transfers ownership. Pineau explains the new provisions as follows:

> In the new Code article 950 states, certainly, that the owner of the thing bears the risk of loss; however the second paragraph of article 1456 specifies that "the debtor of the obligation to deliver the property [which is the object of a real right conferred by contract] continues, however, to bear the risks attached to the property, until it is delivered:" *this means that the risks here are not assumed by the purchaser become owner, but rather by the vendor, debtor of the obligation of delivery*. This is the rule *res perit debitori*.
>
> The change is noteworthy: this rule, which is new law, "was partly based on article 69 of the United Nations Convention on international contracts of sale of merchandise (Vienna, 1980), introduced into Quebec law by chapter 68 of the Statutes of 1991. This rule takes into account that the person in possession of the property is in the best position to take the appropriate measures to ensure its protection;" *it is therefore possession which determines the risk, rather than ownership* [emphasis added].[59]

Thus, the exceptional regime that applied to risks in respect of conditional obligations became the general rule for contracts transferring ownership. Risks are no longer tied to the right of ownership, but rather to the obligation to deliver the property—that is, to the possession of the property. Accordingly, in the case of a conditional sale, the attribution of risks to the debtor of the obligation to deliver is no longer an exception to the retroactivity rule; it merely follows the general rule for contracts transferring ownership.

Pineau, Burman, and Gaudet provide the following general explanation of the burden of risk associated with conditional obligations:

> [TRANSLATION] In such contracts, the risks are borne by the debtor of the obligation to deliver, *who had possession of the property when it was lost due to a superior force*. Thus, if the thing perishes *pendente conditione* and if the condition is subsequently fulfilled, the debtor of the obligation to deliver assumes the risks. That person is normally the seller in a sale subject to a suspensive condition and the buyer in a sale subject to a resolutory condition since normally, *pendente conditione*, *the person in possession of the thing sold* conditionally and debtor of the obligation to deliver is the seller in the former case, and the buyer in the latter [emphasis added].[60]

Let us now consider how this rule applies to obligations involving a resolutory or a suspensive condition.

1) Resolutory Conditions

Where a resolutory condition is involved, in accordance with the general rule *res perit domino*, the risks are transferred to the buyer from the moment the contract is concluded,[61] since the buyer's right of ownership arises immediately at that time. Given that the buyer generally takes possession of the thing at the moment the contract is concluded, CCQ article 1456 will not counteract the effect of article 950.

If the resolutory condition is never fulfilled, the buyer will, of course, have to assume the loss of the thing. Conversely, if the resolutory condition is fulfilled before the thing is lost, everything follows as though there had never been a contract and the seller must bear the loss of his property.

The problem arises if the resolutory condition is fulfilled after the loss. As a result of retroactivity, the buyer is considered never to have been the owner. In addition, the fulfillment of the condition gives rise to an obligation of restitution under CCQ articles 1699 et seq.[62] Article 1701 provides as follows:

> 1701. In the case of total loss or alienation of property subject to restitution, the person liable to make the restitution is bound to return the value of the property, considered when it was received, or at the time of its loss or alienation, or at the time of its restitution, whichever value is the lowest, or, if the person is in bad faith or if the restitution is due to his fault, whichever value is the highest.
>
> If the property has perished by superior force, however, the debtor is exempt from making restitution, but he shall then assign to the creditor, as the case may be, the indemnity he has received for the loss of the property, or, if he has not already received it, the right to the indemnity. If the debtor is in bad faith or if the restitution is due to his fault, he is not exempt from making restitution unless the property would also have perished if it had been in the hands of the creditor.

The first paragraph does not raise the question of risks, since the debtor of the obligation of restitution—that is, the buyer subject to a resolutory condition—is not released from the obligation, but rather is required to make restitution by giving equivalent property. The seller is therefore also required to make restitution of the prestations received.[63]

The second paragraph, however, releases the buyer from the obligation of restitution if the loss is due to a superior force. It must therefore be determined whether the seller is also released from the obligation to refund the purchase price. Since CCQ article 1701 does not speak to this point, one must refer to the general rules of the doctrine of risk. The buyer under a resolutory condition, being the debtor of the obligation of restitution, might be considered in this case as the debtor of the obligation "to deliver" within the meaning of CCQ article 1456.[64] Consequently, *res perit debitori* would apply, and the debtor of the obligation to deliver (or to make restitution) would have to bear the loss. Thus, the buyer who cannot return property that is lost by reason of a superior force could not recover the purchase price, and he would have to pay it if he had not already done so.

2) Suspensive Conditions

Let us begin with the case in which the seller retains possession of the thing *pendente conditione*. When the suspensive condition is fulfilled after the fortuitous loss of the thing, the seller, being the debtor of the obligation to deliver, will be released from that obligation, but the buyer will not have to pay the price, as stated in CCQ article 1456. Thus, it is the seller who bears the risks of loss.

This result is logical since, as we have seen, the buyer subject to a resolutory condition is also the debtor of the property under a suspensive condition,[65] by reason of the reciprocal nature of suspensive and resolutory conditions (discussed above).[66] It is therefore normal for the seller under a suspensive condition to bear the risks, in the same manner as a buyer under a resolutory condition, since they are both in the same legal position.

If the condition fails, however, the problem of risks does not arise since the seller has remained at all times the owner and possessor of the property.

A different problem arises where the buyer has taken possession of the thing *pendente conditione*. If the thing is lost before the condition is fulfilled, CCQ article 1456, paragraph 2 cannot apply since the property has already been delivered. Instead, the general rule in CCQ article 950 will apply, and the owner will assume the risks. In this case, the question is whether one must take into account the retroactive effect of the condition. If so, the buyer should bear the loss, being the one deemed to have been the owner since the contract was concluded. If not, the logical conclusion is that the buyer does not have to pay the price and the seller bears the loss.

Applying Mignault's argument, the seller bears the loss. According to Mignault, when the condition is fulfilled, the contract cannot be formed unless all the elements necessary to its formation are present at that time. Since one cannot deliver something that no longer exists, the seller's obligation no longer has an object. In addition, the buyer's obligation to pay the price no longer has a cause, since the cause was the seller's obligation to deliver, which has disappeared. Consequently, the contract cannot come into existence since there is no cause or object.[67]

Nonetheless, in my view, the buyer should assume the risks of loss if he is in possession of the property. This position recognizes the modern principle that possession is the decisive factor with regard to risks.[68] In addition, this result is more compatible with the treatment of resolutory conditions, since a buyer under a suspensive condition who has taken possession of the property is the potential debtor of an obligation of restitution, just like the buyer under a resolutory condition. CCQ article 1456 should therefore apply to impose the burden of risk on the buyer.

It can therefore be concluded that, under the Civil Code of Quebec, in the case of a conditional sale, the transfer of risks is no longer tied to ownership of the property but depends on possession. In all cases, subject to the uncertainty mentioned above with regard to suspensive conditions where possession is transferred *pendente conditione*, the risk of loss is transferred to the buyer from the time he takes possession of the thing, whether or not the condition is later fulfilled.

Since risks are now tied to possession, the retroactive nature of the condition no longer has an impact on risks, because the retroactivity does not affect the possession of the thing *pendente conditione*. As for cases involving a suspensive condition and a transfer of possession, even if the position I have taken is not accepted, retroactivity does not apply because the contract simply could never have come into existence.

Fruits

The general rule is that fruits and revenues (comprehensively referred to as "fruits") belong to the owner.[69] Given the retroactive nature of conditions, whoever is deemed to be the owner from the date the contract was signed should be entitled to the fruits. That would be the seller where the suspensive condition fails or the resolutory condition is fulfilled, and the buyer in the reverse situation. Consider, for example, a contract of sale subject to a resolutory condition. If the condition is fulfilled, the seller is deemed to have always been the owner, and the buyer who had possession of the thing *pendente conditione* and collected the fruits is not entitled to them because he was never the owner.

This was not the result under the old law. On the contrary, on the basis of both the CCLC[70] and French law,[71] the doctrine was well established that the person who had collected the fruits could keep them, and did not owe anything to the true owner. A number of justifications for this position were offered. For Baudry-Lacantinerie, the question was essentially one of equity:

> [TRANSLATION] If the thing that is the object of the contract does not bear fruit, it is incontestable that the seller under a suspensive condition or the buyer under a resolutory condition is entitled to use it during the interim period, and that after the condition is fulfilled, he is not required to pay rent to the other party for any benefit derived from the thing. Why, if the thing is fruit-bearing, would he have to restore the fruit? What would be the reason for the difference? . . . Shouldn't one conclude

> that there is no distinction between fruit-bearing and non-fruit-bearing things? Some object, citing article 547 [of the Code Napoléon]. This provision states that the fruits "belong to the owner by right of accession." Thus, the fruits must return to the contracting party who, by operation of retroactivity, was the owner at the time they were collected. *But doesn't the shocking result to which the application of the principle contained in article 547 leads, in this case, prove that this application must be set aside?* Should we not take into consideration the very important fact that the seller under a suspensive condition, or the buyer under a resolutory condition, was given possession by the very same person to whom he should restore the fruits? Could we not invoke in support of our position the likely intent of the contracting parties? [emphasis added].[72]

Faribault appears to affirm the following reason for the exemption of fruits from restitution:

> [TRANSLATION] For his part, Demolombe believes that the true reason underlying this doctrine is that retroactivity operates *in jure* and not *in facto*. This was the reason accepted by Mignault.
>
> Demolombe says: "[TRANSLATION] Since it is an ineffaceable fact that the debtor had both the possession and the enjoyment of the property, the consequences of this fact must also be ineffaceable. Now, the collection and the acquisition of fruits seems to me to be one of the most reasonable of these consequences."
>
> To my mind, this reasoning reflects the true state of the law.[73]

Faribault, however, adds a further argument, which is the one advanced by Baudry-Lacantinerie, quoted above, and also supported by Demolombe.

Mignault, for his part, explains his reasoning as follows:

> [TRANSLATION] The conditional seller who has collected the fruits *pendente conditione* . . . does not have to restore them: retroactivity attached to the fulfilled condition concerns only matters *of law*. It was conceived both in the interest of the purchaser, who, without it, would have been required to be subject to the alienations, servitudes or hypothecs granted *pendente conditione* by the alienator, and in the interest of his heirs. It does not apply to matters *of fact*; the acquisition of fruits by collection is a fait accompli that the fulfillment of the condition cannot erase.[74]

Retroactivity would not affect events, or "ineffaceable facts," that actually happened, *pendente conditione*, since retroactivity cannot retroactively change reality. This point will be discussed further below.

As we have seen, under the old law, the possessor of the thing *pendente conditione* was entitled to keep the fruits he collected. This result is codified in CCQ article 1704, which states that the "fruits and revenues of the property being restored belong to the person who is bound to make restitution," unless he is in bad faith or unless the restitution is due to his fault. Thus, if the condition is fulfilled, a buyer subject to a resolutory condition who must restore the property to the seller is nonetheless entitled to keep the fruits produced by the property

and collected *pendente conditione*. Similarly, a buyer under a suspensive condition can keep the fruits even if he must restore the property following the failure of the condition.

In the case of fruits collected by the seller under a suspensive condition, can he keep them even though the fulfillment of the condition retroactively extinguishes his ownership of the property? Although this situation is not, strictly speaking, one of restitution and therefore is not directly addressed in CCQ article 1704, in my view the same result applies. Clearly, the legislator wanted to retain the old rule, according to which the person who collected the fruits is entitled to keep them, independent of the retroactive effect of the condition.

Acts of Administration

As noted above, under the old law, acts of administration that the possessor of the thing performed *pendente conditione* could be set up against a party who became the owner retroactively after the fulfillment or failure of the condition.[75] This position appears to have been adopted for practical reasons:

> [TRANSLATION] It would be very difficult, if not impossible, to administer the thing that is the object of the contract if the solution were otherwise. No one would want to deal with the interim possessor if leases he signed failed due to the occurrence of the condition. Would the legislator have accepted such an economically poor solution?[76]

The law would presume that the intention of the parties was to give the debtor a "mandate" to administer the property on behalf of the true owner:

> [TRANSLATION] [T]he cases have long admitted that acts of administration, such as leases, performed by the owner subject to a resolutory condition remain valid despite retroactivity. It is not denied that after the resolution, that owner is deemed never to have had any right in the thing. But he would in some way have acted as mandatary for the owner subject to a suspensive condition for the purpose of administering the thing until the fulfillment of the condition.[77]

Faribault appears to support this concept of a tacit mandate:

> [TRANSLATION] The law is presumed to have excluded acts of administration from the rule of retroactivity on the basis that it was the parties' intent to do so. The creditor, by leaving the thing in the hands of his debtor until the occurrence of the condition, necessarily expected him to administer it and collect its fruits.
>
> Moreover, it is in the interests of the parties, and of society in general, that the object of the contract be administered *pendente conditione*.
>
> It follows that acts of administration performed by the debtor while he was in possession are not covered by the rule that conditions are retroactive.
>
> The creditor is presumed to have given the debtor a tacit mandate to administer the thing since the debtor is the only one able to do so while he has it in his possession.[78]

However, Faribault, in support of his position, also makes the same argument that he made regarding fruits:

> [TRANSLATION] It seems to me that, under our law, the fulfillment of the condition cannot prevent the acts of administration that the debtor may have performed while he had possession, from having been actually performed and having produced their effect, but that this effect ceases with the fulfillment of the condition. There can be no question of retroactivity of the condition in this context.[79]

As discussed above, new CCQ article 1707 states that "[a]ny other acts performed in favour of a third person in good faith may be set up against the person to whom restitution is owed." To the extent that this article may apply, it merely codifies the former law on acts of administration. Here I am referring only to true acts of administration, such as the signing of a lease, and not to "other acts" that may fall within article 1707, paragraph 2, which, according to some writers,[80] would include consent to real rights such as a hypothec.

Interpreting Retroactivity Restrictively

The origins of retroactive conditions can be traced back to Roman law. However, according to modern authors, classical Roman law did not admit the principle of retroactivity; rather, this principle results from a historical error of interpretation by old French authors, particularly Pothier, who apparently believed that retroactivity was the general rule that explained the transfer of conditional obligations to heirs. This principle was subsequently codified in article 1179 of the Code Napoléon,[81] upon which CCLC article 1085, and now CCQ article 1506, are based.

Several authors have thus criticized the very existence of the principle of retroactivity.[82] They maintain that the wording of the law itself contradicts many consequences that logically stem from retroactivity, such as the attribution of risk. Moreover, they note that consequences usually attributed to retroactivity can very well be explained by reference to other principles. For example, the creditor's right to undertake certain measures of conservation can be explained by the existence of a "contingent" right *pendente conditione*.[83] Similarly, the cancellation of real rights granted to third parties by the seller subject to a suspensive condition or the buyer subject to a resolutory condition may follow from the rule *nemo plus juris ad alium transferre potest quam ipse habet*,[84] without recourse to retroactivity.[85] Furthermore, a number of civil law countries—notably Germany, Switzerland, and Japan—have not codified the retroactivity of conditions in their civil codes.[86]

For these reasons, Baudry-Lacantinerie concluded that retroactivity is a "fiction":

> [TRANSLATION] The retroactive effect of the condition is therefore not a juridical necessity.
>
> Furthermore, from the preceding we can see that from a practical standpoint, this fiction unnecessarily complicates the application of the condition. . . .
>
> Since the retroactivity of the fulfilled condition is expressly recognized in the Civil Code, commentators on our law cannot disregard it. However, because this

> retroactivity is a fiction, it would be wise, at the very least, to apply a narrow interpretation in those cases where its application is questionable.[87]

Faribault accepts this idea and extends it a little further:

> [TRANSLATION] Since the retroactivity of the fulfilled condition is a legal fiction, it must be given a narrow interpretation. If there is a doubt, the decision must be that it does not exist because its fictitious nature cannot prevent a fact from having occurred in the past.
>
> Where the object of the obligation is a specific thing, this fiction cannot erase the fact that the conditional debtor had possession of it *pendente conditione*. If this possession escapes the retroactivity of the condition, all that naturally and rationally derives therefrom must also escape it, such as, for example, acts of administration performed by the debtor, and the fruits he collected during that possession.[88]

Mignault does not refer to retroactivity as a "fiction." Nonetheless, he appears to accept the argument that retroactivity does not apply to matters of fact but only to matters of law. For convenience, an excerpt quoted earlier in this paper is again reproduced here:

> [TRANSLATION] The conditional seller who has collected the fruits *pendente conditione* . . . does not have to restore them: retroactivity attached to the fulfilled condition concerns only matters *of law*. It was conceived both in the interest of the purchaser, who, without it, would have been required to be subject to the alienations, servitudes or hypothecs granted *pendente conditione* by the alienator, and in the interest of his heirs. It does not apply to matters *of fact*; the acquisition of fruits by collection is a fait accompli that the fulfillment of the condition cannot erase.[89]

Although these assertions by Faribault and Mignault may appear to be very broad in scope, in my view they may be much narrower than they seem at first glance. In fact, the contention that retroactivity does not apply to matters of fact originates with Demolombe, but most French scholars declined to follow him on that point.[90] Moreover, even Baudry-Lacantinerie, who maintained that retroactivity is a legal fiction, did not adopt the idea that it would apply only to matters of law. As we have seen, he relied on other grounds (fairness, practical considerations) to support his contention that fruits and administrative acts are not affected by retroactivity, and the "legal fiction" argument was raised only as a subsidiary point in both instances.[91]

Leloutre criticized this position in the following terms:

> [TRANSLATION] It is said that the owner subject to a resolutory condition should keep the fruits because retroactivity operates *in jure*, not *in facto*. Retroactivity, without a doubt, can cause the owner to be considered, some day, as never having been the owner. But it cannot erase the fact that he collected the fruits of the thing or that he enjoyed it. It cannot prevent the acquisition of fruits from being permanent.
>
> It is surprising that such reasoning was accepted. It is true that the retroactive nature of the condition cannot prevent the owner subject to a resolutory condition

> from having enjoyed the thing, but this does not mean that he did not enjoy it without being entitled to do so, because he was not the owner. Thus, retroactivity does not prevent him from having to make restitution.[92]

In addition, as pointed out earlier, Faribault himself relied on other reasons (fairness and tacit mandate) for his position regarding fruits and administrative acts. As for Mignault, his discussion applies only in the context of the restitution of fruits.

The scholarly writing does not lead us to a clear conclusion on this question. However, in my opinion, there does not appear to be a *general principle* to the effect that the retroactive nature of a condition applies only to matters of law and not to matters of fact. Rather, it appears that some authors supported this idea in an attempt to justify a policy not to apply retroactivity in certain very specific situations, such as the collection of fruits and acts of administration.

In any event, in my view, even if such a principle does exist, its application should be limited to what might be described as "real and incontestable facts," or facts that, to quote Demolombe, are "ineffaceable"—that is, tangible, irreversible events that have actually occurred: possession and enjoyment of the thing, collection of the fruits, and performance of acts of administration. Moreover, I have already suggested that neither possession of the thing *pendente conditione*, nor any of its direct consequences (that is, the burden of risk) can be affected by retroactivity.

The question of the application of retroactivity to matters of law and of fact will be re-examined later in the context of the concept of disposition under tax law.[93]

Despite the lack of theoretical clarity, and certain limitations on the application of retroactivity, the Quebec legislature deliberately chose to preserve the general rule regarding the retroactive nature of conditions, as set out in CCQ article 1506. The legislator's intent seems clear: the principle should apply to conditional obligations in Quebec civil law, subject to specific exceptions provided for in the Civil Code regarding fruits, risks, and acts of administration.

Other Civil Law Concepts That Raise Questions of Retroactivity

The discussion above has focused on the rules of civil law governing conditional obligations. Other civil law concepts also may have retroactive consequences. Although this paper will not undertake a detailed analysis of these concepts, it will provide an overview, so that the tax treatment that applies can be considered in parallel with that accorded to conditional obligations.

Resolution of Contract for Non-Performance of an Obligation

Where a debtor defaults on the performance of an obligation, the creditor may choose to force specific performance or ask that the contract be resolved.[94] Since resolution has a retroactive effect, the contract is deemed never to have existed.[95]

In situations involving sales, CCQ article 1740 specifically provides that the seller of movable property has a right of resolution if the buyer fails to pay the sale price. CCQ article 1742 allows the seller of immovable property to do the same, provided, however, that the contract contains a resolutory clause. If it does contain such a clause, the seller must also abide by the formal requirements set out in the Civil Code, including the sending of a 60-day notice[96] and compliance with notice requirements contained in the Book "Prior Claims and Hypothecs."

Resolution for non-performance has the same effect as the fulfillment of a resolutory condition:

> [TRANSLATION] Resolution annihilates the contract retroactively: the situation is in all respects as though the contract had never been formed, or as though it were subject to a resolutory condition and the conditional event had occurred. This retroactive elimination places the parties back where they would have been if they had never contracted. Thus, if certain obligations have already been performed, there must be restitution of prestations in accordance with arts. 1699-1706 C.C.Q. (art. 1606 C.C.Q.).[97]

The previous discussion concerning restitution thus applies here. However, CCQ article 1743 states that the seller of immovable property takes it back free of any charges that the buyer may have placed on it after the seller registered his rights. This rule is logical, since the seller must publish his right of resolution in order for it to be set up against third parties.[98] As we have seen, third parties cannot be considered in good faith in such a case, since they are deemed to have had notice of the resolutory clause.[99]

It is important not to confuse "resolution for non-performance" and "resolutory condition." The condition must be a future and uncertain event that is extrinsic to the legal relationship between the parties. Resolution, on the other hand, is a sanction for default in respect of a principal obligation of the contract. Pineau, Burman, and Gaudet explain the distinction as follows:

> [TRANSLATION] One must, however, make sure to distinguish between an express resolutory clause and the resolutory condition considered earlier in association with conditional obligations. Clauses are designed to punish wrongful non-performance of an obligation, not to submit the contract to the occurrence of a future and uncertain event. Admittedly, voluntary performance may be uncertain, but one must recall that payment itself is legally certain since its performance can be enforced in court and is therefore not up to the debtor's whim.[100]

In addition, a clause that provides for the resolution of the contract if the debtor fails to perform cannot be considered a resolutory condition in civil law because the condition cannot be an essential element in the formation of the contract:

> [TRANSLATION] *The event must be external to the legal relationship*. The legal relationship must be able to exist independently of the condition, and the condition is merely a *modality of it: thus, an essential element of the contract can never be a*

> *condition*. A sale subject to the condition that the price will be paid is not a conditional sale. It is a pure and simple sale. Payment of the price is an element of the sale—an intrinsic condition. By contrast, the sale of an immovable subject to the condition that the buyer marries is a conditional sale: the contract is conceivable without the condition, and the condition is merely a modality of it. Unfortunately, the cases still do not use rigorous terminology in this field.[101]

The distinction between resolutory conditions and resolution for non-performance may appear to be of little interest in this discussion, since the same retroactive effects are produced in both cases. Its importance will become clear later when I deal with ITA sections 79 and 79.1.

Finally, one should also take care not to confuse a resolutory clause for non-performance with a clause that reserves ownership until full payment has been made. A sale subject to such a clause is actually an instalment sale, discussed immediately below.

Instalment Sales

An instalment sale is defined in the Civil Code as "a term sale by which the seller reserves ownership of the property until full payment of the sale price."[102] The Quebec minister of justice wrote the following commentary on this provision:

> [TRANSLATION] The first paragraph states the universally accepted definition of "instalment sale": a sale in which the seller reserves ownership of the property until the price is paid in full. The provision also states that an instalment sale is a term sale—*the term relates to the transfer of ownership and the payment of the price—to ensure that this type of sale would not be confused with a conditional sale* [emphasis added].[103]

This provision codifies the principles articulated by the Supreme Court in *Venne v. Quebec (CPTA)*.[104] In that case, the court addressed the question whether a sale in which ownership was reserved until full payment of the price was subject to a suspensive condition. If it were, the transfer of ownership would be retroactive to the date of the contract. The court held that the sale was not a conditional sale but rather a term sale, and the transfer of ownership was therefore not retroactive to the date on which the obligation was incurred. The court cited with approval the judgment of McCarthy JA of the lower court:

> In my view, and with respect for the contrary opinion, there is no question of a conditional obligation here; accordingly, the retroactivity mentioned in art. 1085 C.C. does not apply. The "condition" referred to in arts. 1079 *et seq.* of the *Civil Code* is "an event future and uncertain" on which the existence of an obligation depends. The payment of the price by Venne does not fall in this category: Venne was *obligated* to pay the price, just as the Winzen company was obligated to convey the immoveable property, within a certain time. The obligations on either side were obligations with a term (arts. 1089 *et seq.* C.C.), not conditional obligations. They

> existed once the "Contract for Deed" had been signed, even though their performance was in abeyance. The same is true for the rights corresponding to the obligations.
>
> In any synallagmatic contract performance of its obligations by one of the parties depends on performance by the other, but that does not make the obligations conditional within the meaning of the *Civil Code*.[105]

Thus, instalment sales create obligations with a term, which exist from the signing of the contract, but the performance of which is delayed until the occurrence of the future and certain event that constitutes the term.[106] The term involves both the payment of the price and the transfer of ownership. Thus, from the very beginning, the parties make irrevocable commitments. One party agrees to pay the price, and the other agrees to transfer ownership of the property. However, the transfer of ownership will take place only when the term is complete—that is, at the time the buyer has paid the full purchase price. In contrast to a sale subject to a suspensive condition, in this case the transfer has no retroactive effect: the seller continues to own the property until the price is paid, and the transfer of ownership occurs at that time.

Obviously, if the buyer fails to pay, the seller is entitled to take back the property.[107] The situation will then be similar to one in which a suspensive condition has not been fulfilled, and there is no retroactivity involved, since ownership was never legally transferred to the buyer.

Suspensive conditions and instalment sales both suspend the transfer of ownership until the occurrence of a particular event. What sets them apart is that only suspensive conditions have a retroactive effect. As noted earlier, a distinction should also be drawn between an instalment sale and the resolution of a sale for non-payment of the purchase price: in the former case, the sale is pure and simple, ownership is transferred immediately, and the resolution of the contract annuls it retroactively, just as the fulfillment of a resolutory condition would do.

Finally, it should be emphasized that CCQ article 1746 transfers the risks of loss to the buyer, even if he does not obtain any ownership right. The provision is consistent with the principle, discussed earlier, that links the risk to possession rather than to ownership:

> [TRANSLATION] It should be recalled that reservation of ownership is designed strictly as a mechanism to guarantee that the price is paid. In all other respects, the buyer is allowed to enjoy the property as would an owner. Thus, it would seem fair that he should assume any loss. It should, however, be noted that there has been a change in the basis for the rule: in instalment sales under the Civil Code of Quebec, the risks are no longer tied to ownership; rather, they are tied to possession (in a broad sense).[108]

The Quebec minister of justice explained the provision in similar terms:

> [TRANSLATION] The provision places the risks of loss on the buyer except where the agreement states otherwise or where it is a consumer contract. This rule runs

> counter to the general principle to the effect that the owner bears the risks, which principle is expressed in arts. 950 and 1456, and restated as regards instalment sales in section 133 of the *Consumer Protection Act* (R.S.Q., c. P-40.1). Since *the buyer is in possession of the property* and the need for protection is different from situations governed by the *Consumer Protection Act, this special rule seemed better suited to the context and is in fact in keeping with the underlying principle of article 1456, para. 2, which, in another context, makes risks dependent on possession* [emphasis added].[109]

Nullity as a Sanction of Conditions of Formation of Contracts

CCQ articles 1416 et seq. provide that a contract is annulled if it does not meet the conditions of formation required by law, such as consent, cause, and object. The nullity is absolute where the condition of formation sanctioned by it is necessary for the protection of the general interest, in which case any interested person may request it and the courts must raise it on their own motion. On the other hand, if the condition protects individual interests, the nullity is relative: only the party in whose interest it has been established may request that the agreement be annulled.

Whether the nullity be relative or absolute, its effects are the same:[110] CCQ article 1422 provides that the contract is deemed never to have existed and that the parties have an obligation of restitution, which is subject to the general rules of CCQ articles 1699 to 1707 analyzed above.

Thus, the new Civil Code abolished the old distinction between absolute and relative nullity. A contract that was absolutely null was void ab initio; that is, it had never existed, and the court simply recognized this fact. In contrast, relative nullity required a determination by the court that the contract was void, and nullity took effect at the time of that determination. Thus, the contract could remain in effect so long as the injured party did not seek a declaration that it was void.[111]

Today both kinds of nullity have the same effect as a resolutory condition.[112] They annihilate the contract retroactively, as though the contract had never existed. Thus, all of the comments made earlier regarding resolutory conditions apply here, except the specific reservations noted in respect of CCQ article 1707. In effect, this article applies fully, to protect third parties in good faith, who have no way of knowing that the potential for nullity exists.

Sales with a Right of Redemption

CCQ articles 1750 to 1756 govern sales with a right of redemption. Such sales are defined as sales "under a resolutory condition by which the seller transfers ownership of property to the buyer while reserving the right to redeem it."[113]

The French version of the Civil Code uses the term "rachat," which could be translated as "repurchase" or "buyback," instead of the term "réméré" previously used in the CCLC. Nevertheless, and although the condition is purely potestative

because it depends solely on the seller's will,[114] a sale with a right of redemption is essentially a sale under a resolutory condition:

> [TRANSLATION] Although the legislator has used the words "rachat" and "racheter," the arrangement does not constitute two contracts, the first being a purchase and the second a repurchase, but rather a single contract subject to a resolutory condition. This distinction has important implications for third parties.[115]

Here, the effects of resolutory conditions apply. Before the right of redemption is exercised, the buyer is the true owner of the thing. He may collect the fruits from it, and he bears the risks in respect of it.[116]

When the seller chooses to exercise his right of redemption, he must comply with the requirements prescribed by the Civil Code.[117] He can then take back the property. In this case, since the sale with a right of redemption is a true sale under a resolutory condition, retroactivity applies, and the seller is deemed never to have given up ownership.[118] Thus, he takes back the property free of any charges that the buyer may have laid upon it, provided that all the applicable publication requirements have been satisfied.[119]

In sum, sales with a right of redemption are sales under a resolutory condition and, aside from the special requirements with which they must comply, they have the same consequences, notably in terms of retroactivity.

Trial Sales

A trial sale is a sale subject to the condition that the buyer is satisfied with the property and decides to purchase it. Under CCQ article 1744, the sale is presumed to be made under a suspensive condition. Thus, a trial sale has the same effect as a sale under a suspensive condition, including retroactivity, and all the points raised above apply.

A trial sale is the most common example of a sale under a suspensive condition with immediate transfer of possession. In effect, the property must be delivered to the buyer to allow for trial of the object of the sale.[120] Are the risks of loss therefore transferred to the buyer *pendente conditione*? For the reasons discussed earlier,[121] in my view they are, since the risks are tied to possession of the property.

Promises of Sale

Promises of sale do not involve retroactivity issues but nonetheless raise questions regarding the time at which ownership is transferred.

A bilateral promise of sale is a pre-contract by which both promisors agree to enter into a definitive contract of sale at a later date.[122] The parties have an obligation to perform, which is to sign a contract that corresponds to the provisions of the promise. If one party refuses to perform, the other may institute an action in execution of title.[123] Thus, a promise of sale is not an actual sale:

> [TRANSLATION] The promise itself does not generate any of the effects of a sale. Among other things, this means that *it does not transfer ownership of the property*, and does not give the promisor-buyer any publishable real right [emphasis added].[124]

It should be emphasized, however, that this rule is merely supplementary. It applies only when it is impossible to determine whether the parties intended simply to enter into a pre-contract, or whether they intended to effect a sale and an immediate transfer of ownership. It is therefore necessary to interpret the contract in order to ascertain the true intent of the parties.[125]

By way of exception to this interpretation rule, CCQ article 1710 states that a promise of sale with delivery and actual possession is equivalent to a sale. Jobin explains this rule as follows:

> [TRANSLATION] Under the Civil Code, a promise constitutes a sale when it is completed by the delivery of the property to the promisor-buyer and the buyer has actual possession thereof. In such a case, the sale takes place immediately, notwithstanding the fact that the parties may sign the instrument of sale at a later date. . . .
>
> The law presumes, in these circumstances, that the parties are agreeing that the sale takes effect immediately, which implies that it is indeed a sale, not a promise. Thus, the promisor-vendor, in delivering the property, and the promisor-buyer, in taking possession, have actually started to perform their obligations pursuant to the sale itself.[126]

Thus, in promises of sale where the buyer takes possession of the property, the law presumes that the parties intended to transfer ownership immediately. This is, of course, a simple presumption, which will apply only if the parties to the contract have not stipulated otherwise.[127]

Essentially then, a promise of sale will not generally transfer ownership, unless otherwise provided in the contract. However, a presumption to the opposite effect applies where possession of the property is transferred to the buyer. In such cases, ownership is presumed to have passed unless the parties provide otherwise.

Retroactivity Provided For by Contract

May the parties stipulate, in their contract of sale, that ownership was transferred before the signing of the contract?

In both the CCLC and the CCQ, the Quebec legislature adopted the consensual principle, following the model of modern French law.[128] According to this principle, the contract is complete and the right of ownership passes to the buyer at the moment when the minds of the parties are in accord.[129] Baudouin and Jobin write:

> [TRANSLATION] *The meeting of two minds on the essential elements creates the contract*, unless, of course, the law makes its validity dependent on some additional act, such as the completion of certain formalities. The mere fact that the parties have agreed to subsequently record their agreement in writing *does not postpone the formation of the contract to the date of that writing*. The situation is different if

> the parties actually intended that the contract come into being only at the time of signing [emphasis added].[130]

A distinction must be made between the contract and the written agreement that records its terms. The contract is validly formed from the moment the parties have agreed on its essential elements, such as the object and the price. Later, when the contract is drafted, the parties are entitled to state that the contract is effective from the time of its true formation.[131] However, as Baudouin and Jobin point out, the parties may have intended their contract to come into being, and ownership to be transferred, only on the date the written agreement was signed. It will thus be necessary to determine the intention of the parties on this question.

In any event, it is doubtful that the parties could stipulate an effective date that is earlier than the date on which they arrived at a meeting of minds, since the agreement between them is the legal cause of the transfer of ownership, and an effect cannot precede a cause. The parties cannot make their contract retroactive to a date on which it did not exist; at least, this retroactivity would not be effective against third parties.

Retroactivity Under the Civil Code

There are a number of other instances of retroactivity under the Civil Code.[132] Without being exhaustive, this paper will review several examples, and later discuss their treatment in tax law, for the purpose of drawing a comparison with the tax treatment of conditional obligations.

Under the old matrimonial regime of community of property, spouses co-owned the community property.[133] The Supreme Court has held that where the community property passes to the surviving spouse under the marriage contract, ownership in all the community property devolves to the latter upon the death of the first spouse, retroactively to the date of marriage.[134] This result follows from the declaratory, rather than the translative, effect of the dissolution of the community property regime.[135]

The declaratory effect of the succession's partition is also provided for elsewhere in the Civil Code.[136] Although the liquidator has seisin until the partition of the succession, once partition has occurred, each heir is deemed to have been the owner of the property included in his share from the date of death of the deceased.

These examples demonstrate that it is not exceptional under the Civil Code for certain events to have a retroactive effect. Retroactivity is not reserved to the realm of contracts; rather, it can arise from the sole effect of the law. Later in this paper, I will discuss the application of retroactivity in the context of the ITA.

CONDITIONS UNDER COMMON LAW

Preliminary Concepts

Before we consider conditions under common law, it is essential to review certain fundamental common law concepts pertaining to ownership rights.

First, it must be understood that, in contrast to civil law, which considers ownership to be unitary and indivisible, ownership under common law is regarded as a "bundle of rights":

> [TRANSLATION] Not only is the common law definition of property different from the Civil Code definition, but the entire approach to developing rules governing ownership, and even the examination of those rules, is totally different. For example, the common law does not even speak of "ownership" when real property is involved. Because the feudal system never recognized that an individual could own land outright, and because many basic rules of the feudal system are still in force and pertinent today, there is no theory of real property "ownership." Rather, the common law has devoted its attention to considering *the rules that govern the range of rights, privileges and powers included within ownership. Thus, the common law conceives of ownership as a bundle of rights*. At least in theory, no one can own a parcel of land; rather, one "holds the land of the Crown"—that is, one owns an "interest" in the property, not the property itself [emphasis added].[137]

These rights, privileges, and powers that constitute ownership can be divided and attributed to several different people:

> Ownership consists of innumerable rights over property, for example the rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons. Those rights are conceived not as separately existing, but as merged in one general right of ownership. . . .
>
> Ownership is nevertheless divisible to some extent. For example, one or more of the collection of rights constituting ownership may be detached. Thus prima facie an owner is entitled to possession or to recover possession of his goods against all the world, a right which a dispossessed owner may exercise by peaceable retaking. He may, however, voluntarily or involuntarily part with possession, for example by the pledging, lending, hiring out, bailment, theft or loss of his goods, in any of which cases he is left with a right of ownership without possession, accompanied or not accompanied, as the case may be, by the right to possess.[138]

In addition, the rights that constitute ownership can be split between a legal owner and a beneficial, or equitable, owner. The legal owner holds title to the property "at law," whereas the beneficial owner has an equity interest in the same property:

> The separation of the enjoyment of property and its administration, though not unique to the common law, is solved by the fragmentation of title into a legal and equitable title. . . . *Both the holder of the legal title and that of the equitable title are regarded as owners of the land* [emphasis added].[139]

Black's Law Dictionary defines the term "beneficial owner" as follows:

> Beneficial owner. Term applied most commonly to cestui que trust who enjoys ownership of the trust or estate in equity, but not legal title which remains in trustee or personal representative. Equitable as contrasted with legal owner.
>
> *One who does not have title to property but has rights in the property which are the normal incident of owning the property.* The persons for whom a trustee holds title to property are beneficial owners of the property, and the trustee has a fiduciary responsibility to them [emphasis added].[140]

The concepts of beneficial and legal ownership are the foundation of the common law concept of trust. The trust provides the easiest context in which to understand the difference between the beneficial and the legal owner:

> The separation of ownership is critical to the concept of a trust. Once the settlor transfers the property to the trustees, the settlor has divested him- or herself of the ownership of the property. The trustees become the legal owners of the property while other persons, the beneficiaries, have the equitable or *beneficial ownership (that is, the right to use and enjoy the property)*. The trustees hold title and manage the property for the benefit of the beneficiaries and are not entitled to enjoy or use the property [emphasis added].[141]

Thus, the concept of ownership in common law is very different from that embodied in the Civil Code, which does not recognize a distinction between legal and beneficial ownership. As Rinfret J has noted, ownership in civil law is indivisible:

> [T]he legal system in the province of Quebec does not include the common law concept which recognizes beneficial ownership in one person and legal title in another. In Quebec both are invariably combined in the same person. Ownership is unitary. Usufruct, substitution, trust, pledge, hypothec and privilege confer more or less extensive rights over the thing . . . but never transfer ownership.[142]

It is for this reason that the trust, as understood in common law, does not exist in civil law. The concept of trust is based on the division of ownership between the trustee, who holds legal title, and the beneficiary, who holds equitable title:

> The division of legal and beneficial ownership is foreign to civil law and irreconcilable with the fundamental principle of unity of title. In civil law jurisdictions permitting the creation of trusts (such as Quebec), trusts often consist in the segregation of property into a separate patrimony for the carrying out of a particular purpose. In other civil law countries, trusts are either entirely ignored or assimilated to agency relationships and governed by the rules applicable to such relationships.[143]

Since common law and civil law concepts of ownership are so different, it is difficult to apply the ITA uniformly while taking the specificities of provincial law into account. As Addy J so wisely put it,

> [t]he law of real property is one of the areas where common law and civil law principles are most likely to be at variance or at least to flow from different fundamental premises. At common law, the nature of the relationship existing between a vendor and purchaser of real estate under given circumstances is governed to a large extent by the distinctions between legal and equitable ownerships, estates and remedies and by the principles applicable to various categories of trusts and trustees. None of these concepts even 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* [emphasis added].[144]

Conditions Precedent

A condition precedent is the common law equivalent of the suspensive condition in civil law. Rather than explore all the intricacies of this concept, the intention here is to discuss the ways in which the two conditions resemble each other and the ways in which they differ.

It is first necessary to define the term "condition." It appears to have the same meaning as it does in civil law:

> Condition. A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Provision making effect of legal instrument contingent upon an uncertain event.[145]

A "condition precedent" is defined as follows:

> A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties.[146]

Thus, the effect of a condition precedent is to delay the creation of an obligation until the condition is fulfilled. As long as the condition has not been fulfilled, the obligation has no legal existence: "a contract that is subject to the fulfillment of a condition precedent does not become a binding agreement until such time as the condition has been met or waived."[147]

One must, however, note the distinction between true conditions precedent, which suspend the *creation* of the obligation, and conditions that are inherent in the contract and merely suspend the *performance* of the obligation. As Fridman explains, this distinction was first drawn in *Turney v. Zhilka*:[148]

> A radical change in the approach to conditions precedent was effected by the Supreme Court of Canada in *Turney* v. *Zhilka*. The court differentiated what was called "a true condition precedent—an external condition upon which the existence of the obligation depends" from an ordinary or *internal* condition [italics in original

> text]. . . . *If a condition is a true condition precedent, there is no contract until it is satisfied* [emphasis added]. If a condition is the other sort of condition, then, in the event of its non-fulfilment, there may still be a binding contract between the parties, depending on the way in which the innocent party, guiltless of any breach, reacts to a breach of the condition. It follows from *Turney* v. *Zhilka*, therefore, that a distinction now exists between a condition relating to the *existence* of any contractual obligation and a condition that is precedent to *performance* of a contractual obligation by the other party, not the one subject to fulfilment of the condition precedent [italics in original text].[149]

It appears that "true" conditions precedent are similar to suspensive conditions in civil law, at least *pendente conditione*, since they suspend the creation of the obligation. Likewise, conditions that are not true conditions precedent are similar to obligations with a term, in that they merely suspend the performance of the obligation.

When a condition precedent is fulfilled, in contrast to a suspensive condition, the obligation arises immediately but without retroactive effect.[150] This is the fundamental difference between the condition precedent in common law and the suspensive condition in civil law. In the former case, the question of retroactivity in respect of the transfer of ownership does not arise: the buyer becomes the owner only when the conditional event occurs and is not deemed or presumed to have acquired ownership at any earlier moment.

What happens if the condition fails? In this case, the contract is considered never to have existed. Since a non-existent contract cannot give rise to any obligation, beneficial ownership was never transferred:

> In the event the condition is not met or waived, then the agreement is void *ab initio*; it has never come into existence. *Beneficial ownership of the subject matter of the contract cannot pass* until the condition precedent has been satisfied or waived [emphasis added].[151]

A contract that is void, in common law, can have no legal effect. In contrast, a voidable contract—that is, one that can be annulled at the request of the injured party—is valid until it is set aside, and it has certain effects, including the transfer of beneficial ownership.[152]

Thus, the effects of a condition precedent are similar to those of the suspensive condition in civil law, both *pendente conditione* and where the condition fails. However, when the condition is fulfilled, a condition precedent, unlike a suspensive condition, has no retroactive effect. I will discuss the tax impact of these differences in a later section.

Conditions Subsequent

A condition subsequent is very similar to a resolutory condition in civil law. It is defined as follows:

> A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.[153]

Just like a resolutory condition in civil law, a condition subsequent does not suspend the creation or coming into force of the obligation. In a contract of sale, ownership will pass immediately, despite the existence of a condition subsequent. The condition extinguishes the obligation when the uncertain event occurs:

> A condition subsequent is an agreement between the parties that the contract is immediately binding, but that if certain facts are ascertained to exist or upon the happening of a certain event, either the contract ceases to bind or one party is to have the option of cancelling the contract.[154]

Despite its resemblance to a resolutory condition, there is an important difference: the parties cannot waive a resolutory condition and treat the contract as valid notwithstanding that the conditional event occurred. They may enter into a new contract, but it will come into force only when that contract is signed. At common law, however, a condition subsequent may give one of the parties the option to rescind the contract.

In fact, the essential difference between a resolutory condition and a condition subsequent is that the latter has no retroactive effect: it sets aside the contract in terms of the future, but has no impact on the past effects of the contract. Thus, beneficial ownership is transferred twice—once when the contract is concluded, and again when the condition is fulfilled:

> In instances where a contract is subject to a condition subsequent, beneficial ownership passes from one contracting party to the other subject to the revesting of the property in the original owner upon the happening of certain prescribed events. If those events do not occur, the contract remains in force. If they do occur, there is a second transfer of beneficial ownership to the original owner.[155]

In short, before the fulfillment of the condition (or if it never is fulfilled), a condition subsequent essentially has the same effects as a resolutory condition. However, when a condition subsequent is fulfilled, unlike a resolutory condition, it has no retroactive effect.

Other Common Law Concepts That Raise Questions of Retroactivity

Retroactivity Provided For by Contract

In matters of contract, the question arises whether the parties to a contract can validly stipulate that their agreement came into effect at a date that precedes the actual signing date. The answer in common law is similar to that in civil law. The

earlier effective date will be acceptable if it reflects the time at which the parties came to a definitive agreement, whether oral or recorded in a written letter of intent, on all the essential elements of the contract.[156] The agreed-upon date cannot, however, be earlier than the moment at which the agreement between the parties became "binding and legally enforceable." If, on the effective date, the parties were continuing to negotiate any essential elements of the contract (such as the sale price), if they did not intend to be bound before the contract was duly signed, or if the initial agreement was subject to a condition precedent, the stipulated effective date will be binding as between the parties, but not on third parties.

The real question in this area is not so much whether the effective date is valid as between the parties, but more particularly whether it is considered the transaction date for tax purposes. I will consider this question in greater detail below in my analysis of the applicable tax law.

Retroactivity Under Provincial Law

Certain provincial statutes allow courts to make retroactive orders. For example, most common law jurisdictions in Canada have statutes that assure dependants of a deceased person of a fair share of the decedent's estate. These statutes, such as Saskatchewan's Dependant's Relief Act,[157] provide that a person who was a dependant of the deceased, notably the spouse, may apply to the court to obtain a greater share of the estate than the amount provided under the will or by the rules of intestacy. The judge's order on such an application is generally retroactive under the legislation. Thus, the property ordered to be granted to the applicant is deemed to have devolved by will or by law, on the date of death of the deceased.

This retroactivity may have significant tax consequences, especially in relation to the question of when property vests indefeasibly in the heirs or legatees. Later in this paper, I will consider whether federal tax law recognizes the retroactivity of such orders.

THE RETROACTIVE EFFECT OF CONDITIONAL OBLIGATIONS IN TAX LAW

The Provisions of the Income Tax Act

The foregoing discussion has established that, in civil law, conditional obligations have retroactive effects that influence the time at which ownership of a thing is transferred pursuant to a contract of sale. The ITA imposes certain tax consequences on such transactions; however, it does not make these consequences flow directly from the transfer of ownership, but rather ties them to the concept of "disposition." Accordingly, it is essential to analyze this concept.

The Act provides, inter alia, that "taxable capital gains for the year from dispositions of property"[158] must be included in the computation of income for tax purposes. Disposition is a central concept in this computation, because capital gains are taxable in the taxation year in which the disposition occurred.

The Act also provides that recaptured depreciation must be included in a taxpayer's income for the taxation year in which property of a prescribed class is disposed of.[159] Conversely, in order to claim capital cost allowance on property, the taxpayer must have "acquired" the property before the end of the year.[160] According to the case law,[161] the concept of acquisition is the inverse of the concept of disposition: when a taxpayer disposes of property, someone else acquires it at the same time. The concept of disposition is therefore very important, for the buyer as well as the seller, where capital cost allowance is being claimed.

The term "disposition" is defined in the Act. The new definition, enacted in 2001 and generally applicable after December 23, 1998, is contained in subsection 248(1) and states, in part:

> 248(1) "disposition"—"disposition" of any property, except as expressly otherwise provided, *includes*
>
> (a) any transaction or event entitling a taxpayer to proceeds of disposition of the property . . .
>
> but does not include
>
> (e) any transfer of the property as a consequence of which there is no change in the beneficial ownership of the property, except where the transfer is [emphasis added]. . . .[162]

This definition is almost identical to the definition in former section 54, which read as follows:

> 54 In this subdivision . . .
>
> "disposition" of any property, except as expressly otherwise provided, *includes*
>
> (a) any transaction or event entitling a taxpayer to proceeds of disposition of property . . .
>
> but, for greater certainty, does not include
>
> (e) any transfer of property by virtue of which there is a change in the *legal ownership* of the property without any change in the beneficial ownership thereof [emphasis added].

This definition formerly applied to subdivision c, "Taxable Capital Gains and Allowable Capital Losses," which contains sections 38 to 55. A different definition of the term "disposition" applied to capital cost allowance:

> 13(21) In this section . . .
>
> "disposition of property" includes any transaction or event entitling a taxpayer to proceeds of disposition of property.

This definition was identical to that in paragraph (a) of the definition of "disposition" in section 54, quoted above. Therefore, even before the amendments introduced in 2001, the concept of "disposition" was the same, whether it was applied in the context of taxable capital gains or of recaptured depreciation.

It should be noted that subsection 248(1), section 54, and subsection 13(21) all refer to "proceeds of disposition," which also is defined in section 54, as follows:

> 54 In this subdivision . . .
> "proceeds of disposition" of property includes,
> (a) the sale price of property that has been sold.

Subsection 13(21) contains an almost identical definition. The case law has always held that the definition applies in the same manner for capital cost allowance and for disposition of capital property purposes.[163]

Analysis of these definitions reveals that "disposition" includes any event entitling a person to the proceeds of disposition of property—that is, the sale price in the case of a thing that has been sold—unless "beneficial ownership" of the property was not transferred by that event. This exception will puzzle civil lawyers, particularly those who read the French version of the Act, where they will encounter the phrase "propriété effective." This expression is evidently a translation of the term "beneficial ownership," a concept in common law that has no equivalent in civil law.[164]

At first glance, this definition leads to a paradoxical conclusion. On the one hand, by enacting a specific definition of disposition for the purposes of the ITA, Parliament seems to have intended to dissociate the Act from provincial private law and to create a special tax rule. On the other hand, within that definition, Parliament uses a private law concept without defining it, thereby bringing us back to the principle that the relevant private law must be consulted—that is to say, the civil law in Quebec and the common law elsewhere in Canada. This process works very well for the common law provinces, since common law defines "beneficial ownership" and thereby completes the ITA definition. However, complications arise when the definition must be applied in Quebec. Must Quebec courts and lawyers actually apply the common law concept of "beneficial ownership"? Or should they try to define this term by analogy or equivalence with civil law concepts?

Moreover, although the new definition in subsection 248(1) (unlike former section 54) makes no mention of "legal ownership," this omission does not appear to have changed the substance of the provision, since the phrase "any transfer of the property as a consequence of which there is no change in the beneficial ownership" could only be a reference to a simple transfer of legal ownership. Besides, since the definition continues to refer to "beneficial ownership," the same problem of interpretation in civil law persists.

Parliament did try to define "beneficial ownership" for the purposes of applying this term in Quebec, in ITA subsection 248(3). The provision formerly read:

> 248(3) References to property beneficially owned and to beneficial owner of property. In its application in relation to the Province of Quebec, a reference in this Act *to any property that is or was beneficially owned by any person shall be read as*

> *including a reference to property in relation to which any person has or had the full ownership* whether or not the property is or was subject to a servitude, or has or had a right as a usufructuary, a lessee in an emphyteutic lease, an institute in a substitution or a beneficiary in a trust, and a reference in this Act to the beneficial owner of any property shall be read as including a reference to a person who has or had, accordingly as the context requires, such ownership as a right in relation to that property [emphasis added].

Since 1991, the above provision has been replaced by current paragraph 248(3)(f):

> 248(3) Rules applicable in relation to the Province of Quebec. For the purposes of the application of this Act in relation to the Province of Quebec, . . .
> (f) property in relation to which *any person has*, at any time,
> (i) the right of ownership,
> (ii) a right as a lessee in an emphyteutic lease, or
> (iii) a right as a beneficiary in a trust
> shall, notwithstanding that such property is subject to a servitude, *be deemed to be beneficially owned* by the person at that time [emphasis added].

This amendment does not appear to have made new law. New paragraph 248(3)(f) has the same effect as former subsection 248(3) (although it might be worded more clearly): beneficial ownership includes the right of ownership, the right of the lessee in an emphyteutic lease, and the right of the beneficiary in a trust. Usufructuaries and institutes of substitution are not included in the new definition, because they are now considered deemed trusts under paragraphs 248(3)(a) through (e). In any event, both the old definition and the new are equally clear—the *owner* of the thing in the civil law sense of the term is deemed to have beneficial ownership.

Let us now consider how these provisions of the Act have been interpreted and applied by the courts and by scholars, before moving on to examine the CCRA's administrative position.

The Case Law and Scholarly Writing

The Complementarity of Provincial Private Law

Before I review the case law on the definition of disposition and the retroactive nature of conditional obligations, it is important to set out the basic principles underlying the concept of complementarity of private law.

As discussed in the introduction to this paper, tax law is accessory to private law, and follows private law in establishing the tax consequences of certain transactions. Thus, tax law is dependent upon the legal contractual relationships established by the parties, which relationships are, of course, governed by provincial law.[165]

In this regard, apart from the now famous excerpt from *Lagueux & Frères*, cited in the introduction, one of the best-known quotes is from the judgment of Boisvert J in *Perron v. MNR*:

> 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.[166]

The Supreme Court confirmed this principle in *The King v. Dominion Engineering Co. Ltd.*[167] That case dealt with an instalment sale, and the Act, at the time, stated that where monthly payments were due on a sale price, the tax on each of these payments was due at the time when "each of such instalments falls due and becomes payable." The purchaser declared bankruptcy before paying the full price, but the Department of National Revenue[168] claimed that the vendor should pay taxes on the unpaid instalments, because they had become due and payable.

The court found for the taxpayer, and Rand J held as follows:

> Although the section declares the "transaction" to be a constructive sale and delivery, *the fundamental support of the tax is an executory contract leading to the transfer of title and possession*. That contract is conceived as a potential sale to which in turn is related a potential total tax: "the tax shall be payable." *Pro tanto* portions of the tax are related to instalments of price and, when the latter become payable as parts of a whole, the right to the tax takes on the same character: but throughout, *the tax depends for its efficacy upon the maturing contract*. For the total tax there is only an inchoate liability created by the making of the agreement: and *to sustain the right to the tax, the instalment become payable must remain an obligation of an executory contract*.
>
> The legal liability at any time for any portion of the tax in no degree restricts the parties in good faith from modifying the contract as they see fit, and *a fortiori* it does not prevent a modification by operation of law. *If, in the legal result, the actual transaction ceases to be one of sale, then the necessary support for the tax disappears* [emphasis added].[169]

Thus, the Supreme Court recognized that the "necessary support" for taxation is the existence of a valid contractual relationship under applicable private law. The court recently reiterated that tax law must be founded on the true legal relationships established by the taxpayers;[170] yet these legal relationships can only be established under private law.

Hence, when the Act uses a private law term without defining it, one must resort to the private law of the province involved in order to interpret it.[171] However, this principle of complementarity of provincial private law is sometimes cast aside on the basis of the principle that federal laws should be applied uniformly. As Brisson and Morel explain,

> [i]n opposition to the commonly held view that the complementarity of provincial private law with federal private law legislation is accepted failing any provision to the contrary, it is *sometimes suggested that federal legislation should be applied in the same way everywhere, in the interests of uniformity*. . . . For the same reason it has sometimes been considered appropriate to interpret the *Income Tax Act* as overrid-

> ing the civil law, using a common law rationale, to avoid giving the Act a broader scope within Quebec than it would have in some other province [emphasis added].[172]

However, they criticize this uniform approach in the following terms:

> According to this view, the usual logic applied to the distribution of powers in private law is to some degree reversed. The private law of the provinces is no longer regarded as the fundamental law of federal legislation, since the latter is self-sufficient, generating its own "common law." Whether in the name of the uniform application of federal statutes and their source of inspiration (often the common law) or because a particular statute constitutes a "complete code," *the result is always the same: the federal private law legislation need no longer be shaped to fit the particular features of the law of any particular province.* On the other hand, it has been rightly observed, with regard to the private law, *"if all aspects of the law should be exactly the same across the country, why have a federal system?"*
>
> However, the influence of this opinion, which advocates the autonomy of federal statutes, should not be exaggerated. For every decision that argues in favour of the dissociation of federal law and civil law, there are many others affirming their principled complementarity, excluding thereby the application of the common law [emphasis added].[173]

Brisson and Morel conclude that the complementarity principle should be applied despite the resulting disparities in applying federal legislation:

> If so, one can accept the direct and substantial complementarity of federal legislation with the civil law, since it is consistent with the general scheme of Canadian federalism in matters of private law. Although, it should be noted that a similar approach must, in the same spirit, be followed when a federal private law statute is applied in a common law province. *This means, of course, that incomplete federal legislation will not be applied uniformly throughout the country. If this is unsatisfactory, it is sufficient, albeit necessary, that the federal statute supply its own definition, as is so often done in the field of taxation.* Otherwise, the complementarity of legal systems, and the ensuing diversity, will continue to prevail [emphasis added].[174]

In a recent decision, *Canada (Attorney General) v. St-Hilaire*,[175] the Federal Court of Appeal clearly applied the principle of complementarity of civil law with federal legislation. The facts of the case are highly unusual. The respondent, after stabbing her husband to death, claimed surviving spouse benefits under the Public Service Pension Act.[176] Naturally, the attorney general opposed this claim. Since the statute in question had no provision on the subject, the attorney general relied on the common law principle that no one may profit from his or her crime. The respondent submitted that one had to turn to the Civil Code of Quebec in the case at bar in order to complete matters to which the federal statute did not speak. She claimed that she was not caught by CCQ article 620, which provides that "a person convicted of making an attempt on the life of the deceased" is unworthy of inheriting, since she had been convicted of manslaughter, and according to her,

article 620 applied only to persons convicted of murder or of attempt to commit murder.

Décary JA gave a comprehensive analysis of the complementarity of civil law in order to determine which rules should apply to the federal statute in question. Citing an article by Brisson,[177] he concluded that there is no federal ordinary law in the strict sense: unless the federal statute itself states otherwise, the private law of the provinces must be applied to complete it:

> [T]he federal private law in Quebec is composed of the private law defined in a statute of the Parliament of Canada *and the civil law if it is necessary to resort to an external source in order to apply a federal statute*. The Parliament of Canada may enact private law legislation that will form a complete code in which case there is no need to resort to an external source, the civil law, or it may enact private law legislation which, because it is incomplete, will refer either expressly or by implication to the civil law for its implementation [emphasis added].[178]

On the uniform application of federal laws, Décary JA commented:

> It is the Constitution of Canada itself which provides that some federal laws have differing effects according to whether they are applied in Quebec or in the other provinces. By guaranteeing the perpetuity of the civil law in Quebec and encouraging in section 94 the uniformization of the laws of provinces other than Quebec relative to property and civil rights, *the Constitution Act, 1867 enshrines in Canada the federal principle that a federal law that resorts to an external source of private law will not necessarily apply uniformly throughout the country*. To associate systematically all federal legislation with common law is to ignore the Constitution [emphasis added].[179]

In response to the attorney general's argument that the common law should complete the statute in issue because that statute was one of public law, Décary JA held:

> The Act, in the part that concerns us, simply designates the beneficiary of the plan in which a government employee was participating. The nature of the Act does not appear to me to differ from that in the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, and yet, in *Ménard v. Canada* (C.A.), [1992] 3 F.C. 521, this Court applied the civilian theory of unjust enrichment rather than the common law theory of estoppel to order Her Majesty the Queen to pay overtime to an employee of the Correctional Service of Canada. *And this Court routinely applies the civil law in Quebec cases pertaining to the Income Tax Act, a so-called public law enactment* [emphasis added].[180]

Décary JA then cited Morel in this regard:

> First, there are a number of situations in which the civil law is required to assume what might be called a passive role. Such situations include every instance where,

> in furtherance of its own purposes, a federal statute assigns certain effects to juridical acts or facts governed by the Civil Code. Examples abound. . . . The *Income Tax Act*, which determines the tax consequences of sales, assignments of claims, gifts, or legacies, illustrates how certain public law statutes also require *that recourse be had to the Civil Code to identify the precise nature of the juridical act in question*. This is an example of how *the Civil Code governs a private law relationship that comes into indirect contact with federal law, which in turn intervenes to determine the consequences of such relationship as far as the federal legal order is concerned* [emphasis added].[181]

Décary JA concluded as follows:

> What, in my view, should determine whether or not it is necessary to resort to the private law (in Quebec, the civil law) is not the public or private nature of the federal enactment at issue but the fact, quite simply, *that the federal enactment in a given case must be applied to situations or relationships that it has not defined and that cannot be defined other than in terms of the persons affected*. In some ways the circle is closed and we come back to the point of departure, in section VIII of the Quebec Act: when these affected persons are litigants and their civil rights are in dispute and have not been defined by Parliament, it is the private law of the province that fills the void. *In short, the civil law applies in Quebec to any federal legislation that does not exclude it* [emphasis added].[182]

Since the Public Service Pension Act refers to a private law concept ("succession") without defining it, Décary JA held that the statute must be interpreted in accordance with civil law. He then considered the civil law on point and found that the respondent could not be considered unworthy of inheriting under CCQ article 620. The other two justices concurred entirely in the opinion of Décary JA as to the application of civil law, but differed in their interpretation of the Civil Code and held that the respondent was unworthy of inheriting.

The complementarity principle is the premise of my legal reasoning. On the basis of the wording of the Act, I will attempt to determine whether the legislator has established a definition of the concept of "disposition" that is exclusive to tax law and dissociated from provincial private law. If this is not the case, in my view civil law rules must apply in accordance with the principle of complementarity. If the rules cause negative tax consequences, it is up to Parliament to amend the Act to remedy the problems.

As discussed above, although the legislator has defined the word "disposition," the definition itself contains a reference to "beneficial ownership," a term of private law that is recognized by only one of Canada's two private law systems. Moreover, as we shall see below, the definition of "disposition" is not exhaustive, and it is therefore necessary to refer to provincial private law to complete it.

The Concept of Disposition

In Common Law Provinces

The first judicial interpretation of the concept of disposition, in the context of the ITA, is found in the 1962 decision of the Exchequer Court in *Victory Hotels Ltd. v. MNR*.[183]

In December 1954, the parties signed an agreement of sale in respect of a hotel owned by the appellant. The agreement stipulated that the buyer would take possession on January 3, 1955 and that the sale would be cancelled if the buyer was unable obtain a liquor licence or if the hotel was destroyed by fire before the taking of possession. The buyer made a deposit of $25,000 on the purchase price, which was to be held in trust by the real estate agent until the conditions were satisfied. If the sale was cancelled because one or more of the conditions was not fulfilled, the deposit was to be returned to the buyer.

Noël J held that the "disposition" occurred on January 3, 1955. In his opinion, there was no doubt that the parties had intended the sale to take effect on that date. In addition, the seller retained possession, use, and control of the hotel up to January 3; the seller kept the revenues generated by the business up to that date; and the interest on the mortgage was calculated from that date.

Noël J first established that the term "disposed of" in ITA section 20 must be given a broad interpretation:

> Indeed, in the context of s. 20 of the *Income Tax Act* it is not unreasonable to give the words "disposed of" 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.[184]

However, Noël J noted that the legislator might have narrowed the broad interpretation of "disposition." In his opinion, this is the case where there is a sale of property:

> We have seen that s. 20(5)(b) of the *Income Tax Act* states that " 'disposition of property' includes any transaction or event entitling a taxpayer to proceeds of disposition of property" and 20(5)(a) states that " 'proceeds of disposition' of property include (i) the sale price of property that has been sold." These sections do not define but merely include as a disposition of property a transaction (a sale for instance) entitling a taxpayer to proceeds of disposition of property, i.e. to the sale price of the property sold. It would indeed appear that *the meaning of "disposition of property" has been somewhat restricted by the Act when a disposal of property takes place by means of a sale; in such a case there is a disposal of property as soon as a taxpayer is entitled to the sale price of the property sold* [emphasis added].[185]

Thus, Noël J held that the relevant sections[186] do not *define* the word "disposition" but merely *include* within the term such transactions as entitle a person to proceeds of disposition. Nonetheless, Noël J concluded that the meaning of "dis-

position" was *narrowed* where the disposition resulted from a sale; in this instance, the disposition would occur as soon as the seller became entitled to the sale price. In the case under discussion, the seller was not entitled to the sale price until the conditions were fulfilled and the buyer had taken possession, which occurred on January 3, 1955.

The case that actually established the "test" for disposition is the decision of the Exchequer Court in *MNR v. Wardean Drilling Ltd.*[187] This decision, which was followed by the subsequent case law, requires closer analysis.

Wardean Drilling, an oil well drilling company, wanted to purchase a drilling rig. According to the sale contract, signed in December 1963, the rig was to be delivered in February 1964 because specific modifications had to be made. The contract also provided that title would pass upon delivery. In addition, Wardean Drilling purchased subsidiary equipment from another supplier. That contract was signed in December 1963, but the equipment was not manufactured and delivered until 1964. The point in issue was whether the taxpayer could claim capital cost allowance on the rig and the subsidiary equipment for the 1963 taxation year—that is, whether it had "acquired" them during that year.

Cattanach J held that the acquisition had occurred in 1964. He first established that the decisive factor was not the moment at which the parties signed an enforceable sales contract, but rather the following:

> As I have indicated above, it is my opinion that a purchaser has acquired assets of a class in Schedule B 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.[188]

Thus, property is "acquired" when title of ownership is transferred, if the property exists at that moment, or when the incidents of title,[189] such as possession, use, and risk, are transferred if ownership is retained by the seller as security for the sale price.

After establishing this twofold test, the court went on to examine the private law in Alberta, in order to determine the moment at which title is transferred. Under Alberta's Sale of Goods Act,[190] title is transferred at the time specified by the parties to the contract. If the parties fail to make this stipulation, the statute determines the time of transfer.

Having reviewed the contract of sale for the rig, Cattanach J concluded that the parties intended title to pass on delivery. Since this took place in 1964, the property was "acquired" at that time. The contract for the subsidiary equipment did not set out the intention of the parties on this point; accordingly, the court referred to Alberta law, which provided that ownership was transferred when the property was finished and ready for delivery—in this instance, in 1964.

The ratio decidendi of this decision was that under provincial law, the title of ownership was transferred in 1964. The court did not base its decision on the

moment when the incidents of title (such as use, possession, and risk) were transferred because this was not a case in which the seller had retained title as security. The second part of the "test" was therefore an obiter dictum.

In spite of appearances, *Wardean Drilling* supports the theory that provincial private law is complementary, since the court examined the moment at which ownership was transferred under the relevant provincial private law. As discussed above, at common law, ownership may be held simultaneously by a legal owner and a beneficial owner. I am in agreement with the analysis of Noël JA, dissenting, in *Construction Bérou Inc. v. The Queen*:[191]

> In setting forth that rule Cattanach, J. did not have it in mind to overturn applicable private law, since the judgment he rendered was to the exact opposite effect. As Chief Judge Couture explained in the case at bar, Cattanach J. in stating that rule:
>
> > "is merely confirming the distinction [at common law] between the owner who holds legal title and the beneficial owner of the property, that is, the one to whom ownership belongs subsequent to a transaction, but who will receive title to the property at a later date."[192]

In a footnote, Noël JA attempts to find an explanation for the second part of the test:

> See *Black's Law Dictionary*, which defines a "beneficial owner" as being *inter alia*: "One who does not have title to property but has rights in the property which are the normal incident of owning the property." It may safely be assumed that the second part of the rule of acquisition stated by Cattanach, J. derives from the Supreme Court of Alberta judgment in *Hendrickson* v. *Mid-City Motors*, [1951] 3 D.L.R. 276, in which it was held that a conditional sale agreement gave rise to a sale under Rule I of s. 21 of the Alberta *Sale of Goods Act*, despite the fact that ownership title remained with the seller. At that time the Court said the following, at 284:
>
> > "I conceive 'title' and 'property' to be two entirely different things. One person may hold bare title to property while the whole beneficial ownership rests in some other person. A reservation of title does not necessarily imply that no property shall pass to the purchaser. . . .
> >
> > In my opinion, the whole effect of the agreement . . . is to transfer to the purchaser the 'property' in the goods in question, while reserving to the seller a seller's lien and the right to defer the conveyance of legal 'title' to the property until payment in full."
>
> The Supreme Court of Alberta came to this conclusion in accordance with the intent of the parties as disclosed by the wording of the contract. See also Douglas S. Ewens, "When is a 'Disposition'?," *Report of Proceedings of the Twenty-Sixth Tax Conference*, November 11-13, 1974, at p. 538. As regards application of the rule that a change in the beneficial ownership of property results in a disposition for tax purposes, see *Grey* v. *Inland Revenue Commission*, [1960] A.C. 1, at 12-14.[193]

Thus, when Cattanach J affirmed in the second part of the "test" that the buyer "acquired" the property even though legal ownership remained with the seller as

security, this affirmation was nothing more than the application of the relevant provincial private law—that is to say, the common law.

Furthermore, in my view, it is incorrect to state (as some have in summarizing the test set out in *Wardean Drilling*) that the moment of disposition is either the transfer of title or the transfer of the incidents of title, whichever arises first. In my view, the second part of the test as articulated by Cattanach J applies only where the seller retains title as security for payment of the sale price. Therefore, a transfer of beneficial ownership would be equivalent to a disposition only when the seller retains legal ownership as *security*. Nonetheless, some decisions have interpreted *Wardean Drilling* to mean that disposition occurs as soon as the incidents of title, such as possession, use, and risk, are transferred.

The Federal Court Trial Division applied the *Wardean Drilling* test several years later in *The Queen v. Henuset Bros. Ltd. [No. 1]*.[194] This case involved a "conditional sales agreement"—that is, a sale in which ownership was reserved until the price was paid in full. Once the contract was signed, the buyer enjoyed all the incidents of title, such as possession, use, and risk. The court concluded:

> The clause in the conditional sales agreements obliging the buyer to insure the tractors against such risks as the vendor specified is evidence that the risk had passed to the buyer. Its failure to insure does not alter the legal effect of this obligation. On the completion of the sale the buyer had the right to use the tractors and could have taken delivery of the tractors at Peoria if it had had any use for them in that vicinity. It follows that all the incidents of ownership other than the legal title reserved in the vendor by the conditional sales agreements such as possession, risk and the right to use the tractors were acquired by the buyer on December 30, 1971. *In my opinion the reservation of the legal title to the tractors in the vendor as security did not affect the issue any more than the taking of security on the tractors in the form of a chattel mortgage would have done* [emphasis added].[195]

This is clearly a direct application of the test established in *Wardean Drilling*. This time, however, the test is applied to a situation where the incidents of title were transferred before title, which was retained by the seller as security for the balance of the sale price, in much the same way as a mortgage or hypothec.

Courts faced with tax disputes arising in common law provinces have thus adopted a broad interpretation of the term "disposition," as well as the test established in *Wardean Drilling*. I will now examine whether the courts have applied this jurisprudence to cases arising in Quebec.

In Quebec

The Supreme Court of Canada interpreted the meaning of "disposed of" under the ITA in *The Queen v. Compagnie Immobilière BCN Ltée*,[196] a case that involved an emphyteutic lease. First, the court rejected the argument that the meaning of the expression "disposed of" was restricted by the narrower meaning of the French term "aliénés" used in the French version of the same provision. The court held

that "disposed of" should have the same meaning, whether the translation is "disposés" or "aliénés."

The Supreme Court also confirmed the broad interpretation of disposition:

> In the context of s. 20(5), the definitions of "disposition of property" and "proceeds of disposition" cannot be said to be exhaustive; these expressions must bear both their normal meaning and their statutory meaning; it would be wrong to restrict the former because of the latter.[197]

The definition is not exhaustive. It does not narrow the ordinary meaning of the word "disposition" but adds concepts that would not normally be included in the ordinary meaning.

The Supreme Court then examined the meaning of the verb "disposer" in civil law:

> The substantive definitions of "disposition of property" and "proceeds of disposition" in s. 20(5)(b) and (c) are a clear indication that the words "disposed of" should be given their broadest possible meaning.
>
> In French, the verb "disposer" would convey the same idea as "to dispose of." In discussing the *jus abutendi* which is one of the three main attributes of the right of ownership, Mignault (*Droit civil canadien*, vol. 2, at p. 477) wrote: . . .
>
> > (TRANSLATION) The jus abutendi, or right of disposal, is the right to make some final use of the thing, which will not be repeated, at least for the same person. Disposing of a thing means transforming, consuming, destroying or, finally, *alienating it, that is, transferring it to another person*.
>
> The same view is expressed by Mazeaud (*Leçons de droit civil*, t. 2, v. 2, #1332 and 1333): . . .
>
> > (TRANSLATION) 1332.—Because it is absolute, the right of ownership is a total right: the owner has complete powers over the thing. This collection of powers may be broken up into three attributes: the jus utendi, or right to make use of the thing, the jus fruendi, or right to receive income produced by it, and the jus abutendi, or right to dispose of the thing: to preserve, *give*, *sell*, destroy or abandon it. . . .
> >
> > 1333.—Prerogatives of the jus abutendi. The right of disposal includes, besides the right to abandon the thing and the right to destroy it two important prerogatives: the right to *alienate the thing whether gratuitously or for consideration*, and the right to preserve it in the estate [emphasis added].[198]

The Supreme Court thus implied the meaning of "disposition" in the Act is the civil law meaning—that is, to abandon, destroy, give, or sell a thing. The meaning is unquestionably broader than "to alienate," to which the taxpayer tried to limit it in this case, but certainly does not extend far enough to encompass, within the term "disposition," transfer of the incidents of title such as possession, use, and risk.

Indeed, the texts cited by the Supreme Court draw a parallel between the term "disposition" and the concept of abusus, which is the right *to dispose of* the

thing—that is to say, to divest oneself of *ownership* in the thing. All the examples given by Mignault and Mazeaud refer to acts by which the owner divests himself of ownership. The transfer of possession or use, for example, is never mentioned; these rights are linked to the usus, not the abusus. The logical conclusion is that the Supreme Court, far from having approved the application in civil law of the *Wardean Drilling* test, implied that the concept of disposition in civil law is linked to abusus, the right to abandon *ownership* in the thing.

The "incidents of title" test established in *Wardean Drilling* was introduced into civil law by the 1980 decision of the Federal Court Trial Division in *Olympia & York*.[199] The taxpayer, who owned an apartment complex, entered into a bilateral promise of sale. The agreement stated that the possession of the building, the income generated by it, and the risk of loss would be transferred to the buyer as of the date of signature, August 31, 1969. However, the agreement specifically provided that such transfer did not constitute the equivalent of a sale and did not confer upon the buyer any rights of ownership; title would remain in the hands of the seller until the execution of the deed of sale, which would take place once a specified portion of the purchase price had been paid.

Addy J first addressed the question whether this arrangement constituted a "sale." Since the facts occurred in Quebec, he referred to civil law in considering this question. Addy J commented as follows regarding the complementarity of civil law:

> It is evident that the rights of the parties to the contract and all matters governing various agreements and legal relations arising from the actions of the parties to those agreements must be determined in accordance with the law of the Province of Quebec.
>
> The rights of the parties arise out of the agreement filed as Exhibit 1 and full consideration must be given to its terms. Since there is no special definition of the word "sale" or any special meaning to be attached to it in the *Income Tax Act*, one must consider that word in the light of the law of the Province of Quebec as applied to the relationship created by the agreement Exhibit I.[200]

Addy J then analyzed the civil law rules that applied and concluded that there had not been a sale. Under the Civil Code, a promise of sale with a transfer of possession is equivalent to a sale, but this rule is supplementary. The parties are free to stipulate otherwise and did so in the case at bar, where they indicated their intention that ownership was not to be transferred immediately.

Having so concluded, however, Addy J continued his line of reasoning and examined whether there had been a "disposition" within the meaning of ITA paragraph 20(5)(b), which corresponds to the definition of "disposition of property" in ITA subsection 13(21). He first affirmed that the definition of disposition in the Act is not exhaustive and must be given a broad interpretation. He then referred to the interpretation of "acquired" in *Wardean Drilling*, because, in his view, these terms are perfect antonyms and therefore contain substantially the same elements:

> The word "acquired" used in section 20(5)(e) is obviously the direct opposite of "disposed" (or disposition) as used in the same section and must contain substantially the same elements viewed from the side of the person acquiring the asset as opposed to the person disposing of it.[201]

He concluded that, on the basis of the rule established in *Wardean Drilling*, there had been a disposition in the case before him:

> In the case at Bar, the Plaintiff had, after executing the agreement and upon delivering possession of the property to First General in September 1969, *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 the legal title*. It was absolutely and irrevocably obliged to execute and deliver a clear deed to the purchaser upon receipt of the balance of the purchase price which was payable to it. *Any additional rights to which it was entitled under the agreement were solely and exclusively for the protection of that balance of purchase price and are rights which would normally be granted to a mortgagee to protect his security.*
>
> Having regard to what the Supreme Court of Canada said in *Her Majesty The Queen* v. *Compagnie Immobilière BCN Limitée*, *supra*, as to how the concepts of "disposition of property" and "proceeds of disposition" must be interpreted and having regard also to the statement of Cattanach, J. in *The Minister of National Revenue* v. *Wardean Drilling Limited*, *supra*, (with which I fully agree) I find that there was in the circumstances of the present case, in September 1969, a "disposition" of Place Cremazie Complex by the Plaintiff within the meaning of section 20 of the former Act (section 13 of the new Act) [emphasis added].[202]

This is a very significant ruling because it was the first time a court applied the definition of "disposition" in *Wardean Drilling* to Quebec. It is strange and difficult to understand why Addy J, who insisted on the necessity of referring to civil law in order to determine whether a "sale" had occurred, did not even consider whether it was pertinent to do likewise when interpreting the concept of "disposition" under the ITA, or whether a common law precedent was applicable in civil law.

Nonetheless, it is apparent that Addy J understood the test in *Wardean Drilling* as it has been described above. Applying the second part of the test, he underlined the fact that the seller retained title only as security for the payment of the sale price.

This decision was followed in *Robert Bédard Auto Ltée v. MNR*.[203] The Tax Court of Canada had to decide whether a lease with an obligation to purchase within five years of the date of signing, at a predetermined price including any rent paid, constituted a "disposition" under the Act. Tremblay J held that under civil law the transaction was a lease, not a sale; however, in his opinion, a disposition had occurred for tax purposes because the buyer had the possession and use of the building and had assumed the risks.

This jurisprudence was also followed by the Federal Court of Appeal in *Construction Bérou*.[204] The facts of this case can be summarized as follows. The

taxpayer had signed contracts for the lease of trucks. The lease agreements contained an option to purchase the trucks at a price significantly lower than the probable market value at the time the option became exercisable. The contracts stipulated that the lessee, Construction Bérou, assumed all risks of loss of the trucks once the contract had been signed, and would have to continue paying the rent in the event the leased property was lost. In addition, the lessee assumed all charges and expenses associated with the leased property, such as insurance, repairs, maintenance, and taxes, and would indemnify the lessor in respect of any liability. The taxpayer claimed capital cost allowance, deductions for interest on the "sale price," and the investment tax credit for the year in which the contract was signed.

On the basis of *Wardean Drilling* and *Olympia & York*, Couture J of the Tax Court of Canada[205] concluded that Construction Bérou had "acquired" the trucks within the meaning of the Act, even though it was not yet the "owner." The taxpayer was thus entitled to deductions for interest and to the investment tax credit.

The Federal Court Trial Division[206] overturned the decision of the Tax Court of Canada. Tremblay-Lamer J agreed with the minister that the trucks had not been "acquired" by Construction Bérou within the meaning of the Act. She based her decision primarily on the fact that the lessee did not have the obligation to exercise the purchase options and, consequently, could not be considered to have "acquired" the property, even if the broad definition in *Wardean Drilling* was applied.

The Federal Court of Appeal granted the taxpayer's appeal. The majority held that the property had been "acquired" within the meaning of the Act and allowed the deductions in question. Noël JA, dissenting, was of the view that the trucks had not been "acquired" under civil law. Since the majority refers to the opinion of Noël JA, it will be examined first.

Noël JA described the issue as follows:

> It is true that when Parliament frames its statutes by reference to private law concepts without defining them or otherwise attaching to them any particular meaning, it in effect adopts the laws of the provinces. The question is one of intent: it must be determined in light of the provisions at issue whether Parliament, in assigning fiscal consequences to property "acquired," was referring to the concept of ownership as it exists under the laws of the provinces or, as the appellant contends, to a separate concept peculiar to the Act.[207]

Ownership was clearly not transferred in civil law. The question was whether Parliament had overlooked the civil law in favour of a rule specific to tax law. In other words, Noël JA discussed complementarity or dissociation.

Noël JA then conducted an exhaustive review of all the relevant case law, as well as *Interpretation Bulletin* IT-233R.[208] He set out his conclusions as follows:

> It appears from this review of the case law that to the extent that *Olympia & York* authorized the courts to ignore the effects of Quebec law in cases arising in Quebec, it has not been followed. Only Judge Tremblay relied on this decision in *Bédard*

> *Auto Ltée* as a basis for concluding that a sale had occurred for tax purposes, even though the contrary result arose under the civil law. He subsequently adhered to the civil law in *Goulet*. In my view, the trial judge and the Tax Court judges before her were right to ignore *Olympia & York*, since *the Act does not cast aside private law. The word "acquired" contained in each of the provisions in issue must be understood in its ordinary sense that is as referring to the acquisition of ownership of property and in the absence of some indication to the contrary, ownership of property cannot be acquired otherwise than in accordance with the applicable private law*.
>
> Additionally, this review of the cases also indicates that the rule of acquisition stated by Cattanach J. in *Wardean Drilling* has been scrupulously followed in cases from common law provinces. As indicated by the passages I have cited, this rule is that property may be acquired from the time ownership is transferred to the buyer or when a buyer has possession or use and assumes the risks inherent in the property in question, even though legal title remains with the seller to guarantee payment of the selling price.
>
> Bastin D.J. applied the second part of this rule in *Henuset* and Judge Bowman did likewise in *Gartry*. Reed J. applied this test in *Borstad* and Strayer J. in *Kirch*. I note that *none of those decisions suggests that the rule of acquisition proposed by Cattanach J. departed from the applicable private law*. As Chief Judge Couture noted in the case at bar, *in Wardean Drilling Cattanach J. was simply referring to the dismemberment of the ownership right at common law and the rule that there is a disposition of property when there is a change in the beneficial ownership, even though the legal ownership remains unchanged* [emphasis added].[209]

Noël JA concluded that the Act did not define a peculiar concept of acquisition, dissociated from provincial private law, that would cast aside the principle of complementarity. This concept must therefore be interpreted in conformity with civil law. He also held that acquisition in civil law is directly tied to ownership and that the jurisprudence that followed *Wardean Drilling* is not applicable in Quebec.

Noël JA then went on to examine the provisions of ITA subsection 248(3). In his opinion, these provisions had been enacted in order to introduce concepts equivalent to beneficial ownership for application in Quebec. In any event, he considered this provision irrelevant to the resolution of the dispute before the court.

Finally, Noël JA emphasized the importance of the parties' intent in civil law. The parties are free to contract the terms and conditions they desire, including, specifically, the time at which ownership is to be transferred. Therefore, a stipulation that the lessor retains ownership of the property until the option is exercised is valid. Neither the minister nor the parties themselves can ignore the terms of a contract freely negotiated. To this effect, IT-233R has no basis in law:

> In short, I come to the conclusion that *Bulletin* IT-233R, to the extent that it attempts to anticipate the future and lay down a rule that property leased under a leaseback contract is sold on signature of the contract if the price of exercising the option is "substantially less" than the "probable" value of the leased property, or if at the time the contract was signed "no reasonable person would fail to exercise the said option," is devoid of any legal basis.

> In legal terms, there is nothing to prevent the parties to a contract from validly stipulating that ownership of the leased property will remain with the lessor even if the cost of exercising the option as compared with the "probable" value of the leased item may appear to be "substantially less" at the time the contract is signed.[210]

I believe that Noël JA correctly interpreted the law, and I agree with his conclusions, particularly his interpretation of acquisition under civil law. I will return to this question later in this paper.

Létourneau JA appeared to adopt a position diametrically opposed to that of Noël JA. His main concern, it seems, was that taxpayers in Quebec and the common law provinces should receive equal treatment. He relied primarily on the former wording of ITA subsection 248(3):

> However, I agree with him [Noël JA] that subsection 248(3) of the *Income Tax Act* ("the Act") evidences a valuable effort by Parliament to treat beneficial ownership in property in the same way as various forms of ownership recognized in the civil law of Quebec *so as to obviously offer to the taxpayers in Quebec the same benefits that this concept affords the taxpayers in the common law provinces*. This was not an easy task to perform at the time because the concepts of ownership were different in the two legal systems, and the divisions of the ownership right, more limited in civil law than in common law, were not conceptually necessarily identical to those of the common law. Yet, *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. Hence, the necessity for a judicial interpretation which allows for the implementation of this legislative intent.*
>
> In addition, subsection 248(3) of the Act, in my view, provides a legislative basis for the application in Quebec of *Interpretation Bulletin* IT-233R. That subsection confirms and supports the conclusion which I have reached in light of the Act regarding the concept of acquisition of property for purposes of a capital cost allowance [emphasis added].[211]

Thus, Létourneau JA was of the view that *Wardean Drilling* and *Olympia & York* stated the applicable law for Quebec, as far as disposition and acquisition under the ITA are concerned: an acquisition or a disposition occurs when the incidents of title, such as possession, use, and risk, are transferred. In his view, Parliament's intent in enacting section 54 and subsection 248(3) was to apply the same criteria to Quebec taxpayers as to taxpayers in other provinces. He added the following in support of this interpretation:

> For practical purposes *this interpretation has the merit of recognizing, for tax legislation that applies throughout Canada, a business practice that has no boundaries and of avoiding the danger of becoming too embroiled in unnecessary, sectoral and above all sterile and inequitable legalism at a time when the trend in the civil law is to approximate more closely to the common law*. In addition, it is significant that Parliament, which annually amends the Act *inter alia* to alter legislative provisions when they are so interpreted that they do not meet the objectives sought, has

> not thought it appropriate to overturn this thirty-year-old interpretation. Further, this interpretation is consistent with the legislative intent stated in subsection 248(3) of the Act, which, as I have already mentioned, is intended to treat beneficial ownership of property in the same way as various forms of ownership recognized in the civil law of Quebec [emphasis added].[212]

With respect, in my view, Létourneau JA's interpretation runs entirely counter to the principle of complementarity of provincial private law, and to the rule that tax law is an accessory system that is subordinate to the legal relationship between the parties. Again, if Parliament wants a single legal concept to apply across the country, it can and should expressly amend the Act to this effect.[213]

Moreover, the legislative intent behind subsection 248(3) (now ITA paragraph 248(3)(f)) may have been to equate certain civil law dismemberments of ownership, such as the usufruct, with beneficial ownership. However, this subsection in no manner recognizes that the incidents of title, such as use, possession, and risk, are equivalent to beneficial ownership in civil law. This provision equates various civil law institutions to "beneficial ownership," and according to the interpretation rule *ejusdem generis*, equivalency cannot be extended to a concept that is not itself a civil law institution. Therefore, one could not argue that subsection 248(3) expresses Parliament's intent to apply the *Wardean Drilling* test in Quebec. Michael Templeton is of the same view:

> The majority of the Court of Appeal appears to interpret the provision as making the broad statement that whenever the Civil Code recognizes a property interest that is similar to a property interest that is recognized at common law as beneficial ownership, for the purposes of the Act, the Civil Code property interest shall be treated as beneficial ownership. However, the language used in subsection 248(3) does not appear that broad. *The provision states that certain Civil Code property interests (those specifically listed in the subsection) are to be treated as beneficial ownership for the purposes of the Act; however, it is only those property interests that are specifically listed that are to be given this treatment* [emphasis added].[214]

It must also be pointed out that, in the case under discussion, it was the taxpayer who argued that the Act should be applied uniformly across the country, while the minister relied on the civil law; the opposite situation is seen more frequently. In addition, the minister in this instance adopted a position contrary to the department's own position published in IT-233R and relied upon by the taxpayer. Létourneau JA appears to have been influenced by the apparent unfairness toward the taxpayer:

> It is a matter for surprise that in the appeal at bar the respondent is using the special nature of Quebec civil law as a reason for denying the appellant a deduction which is granted to taxpayers and businessmen operating under the common law system. . . .
>
> In my view, it would be inappropriate for this Court to ignore or repudiate the content of the said *Bulletin* 17 years later, as the respondent is asking us to do in the

> case at bar, since the *Bulletin* clearly and correctly reflects the state of the legislation and case law applicable in tax matters at the time to property acquired by a taxpayer through a leasing transaction.[215]

Desjardins JA analyzed the wording of section 54 and subsection 248(3). She referred to the Carter commission, which recommended that, for purposes of taxing capital gains, the word "disposition" be given a broad meaning so as to cover a range of situations. Parliament subsequently adopted the definition of disposition in section 54, and "as there had to be only one meaning of 'disposition' applicable throughout Canada, subsection 248(3) was adopted for its application in the civil law."[216] Desjardins JA then held:

> The federal Parliament accordingly devised, for tax purposes and for all of Canada, a common concept covering the ideas of "disposition" ("*disposition de biens*") and "beneficial ownership" ("*propriété effective*"), both in civil and common law.[217]

It is entirely possible that Parliament intended to dissociate itself from provincial private law and to establish a specific definition that is uniformly applicable for the purposes of the Act. As discussed earlier, however, the problem is that Parliament refers to common law concepts (beneficial ownership and legal ownership) in the definition of "disposition" but fails to define them.

Furthermore, subsection 248(3) does not exhaustively define "beneficial ownership" for purposes of applying the Act in Quebec. It only provides examples of Quebec civil law concepts that are deemed equivalent to beneficial ownership. Consequently, one must refer to provincial private law in order to complete the definition. How, then, can it be maintained that Parliament defined a common concept of "beneficial ownership" for all of Canada? Moreover, the test involving the incidents of title, such as possession, use, and risk, is nowhere to be found in subsection 248(3). It is the case law, not the neutral definition found in the Act, that has led to the importation of this criterion into civil law. The confusion is clearly illustrated in this excerpt from Desjardins JA's decision:

> However, in 1982 when the leasing contracts were signed s. 248(3) of the Act was already in place and provided that for tax purposes certain contracts were capable of transferring the "beneficial ownership." For the sake of comparison, and to clarify my analysis, I would add that although a usufructuary is not the owner of property at civil law he can in fact have "beneficial ownership" of the property within the meaning of s. 248(3) of the Act, *since that subsection creates its own ideas of "beneficial ownership*."
>
> In the case at bar, despite clause 20 of the contracts governing the parties rights at civil law, tax law by s. 248(3) of the Act recognized that the appellant had acquired beneficial ownership of the dump trucks since it met the three requirements, possession, use and risk *recognized by the courts* [emphasis added].[218]

Desjardins JA herself was forced to admit that these criteria have not been enacted by ITA subsection 248(3), which supposedly "creates its own ideas of

'beneficial ownership,'" but by "the courts"—that is, cases on tax law that interpreted the concept of acquisition in a common law context.

For reasons already discussed, I cannot agree with the majority's conclusion in this case. In my view, the reasoning therein, which is essentially based on considerations of fairness and on the objective of a uniform application of the Act, should not be followed. As I stated earlier, in my view, Noël JA has correctly explained the state of the law.

To summarize, the common law jurisprudence, which has interpreted the concept of "disposition" and its reciprocal concept "acquisition," has established that a disposition occurs on the transfer of title, or of the incidents of title (such as possession, use, and risk) if the seller has retained the title as security.

The civil law cases are divided as to the application of these tests. There is a trend toward adopting the common law criteria in the name of a uniform application of the concept of "disposition" throughout Canada. An opposing trend, based on the complementarity of civil law, favours an interpretation consistent with civil law institutions where the concept of disposition is to be applied in Quebec. In my opinion, the second trend seems better founded in law.

The Retroactivity of Conditional Obligations in Civil Law

Let us now consider how the cases deal with suspensive and resolutory conditions in civil law, and how they apply retroactivity in determining when a "disposition" takes place.

There is a trend in favour of recognizing the retroactivity of conditional obligations. Recall that, according to case law, a contract that no longer exists can have no tax consequences because the necessary basis for the tax is no longer present.[219] The following question arises: does the extinction of a contract affect tax consequences for the future only?

In *Dominion Engineering*, the Supreme Court of Canada wrote as follows, per Rand J:

> If, in the legal result, the actual transaction ceases to be one of sale, then the necessary support for the tax disappears. That result, *at least where the termination of the contract does not effect a total rescission*, will not affect the right to taxes on any portion of the price paid to the seller nor does it touch those that have been collected or reduced to judgment by the Crown [emphasis added].[220]

Thus, Rand J, in obiter dictum, held that the extinction of the contract does not affect taxes already collected, at least where there has not been a total rescission of the contract. Was he implying that in the contrary case—that is, where there has been a "total rescission" or resolution of the contract—tax previously paid should be refunded because the essential basis for the tax is no longer present? Further on, Rand J held that

> where the obligation of such an executory contract is by operation of law destroyed, then unpaid taxes related to its terms, themselves suffer a corresponding effect. If

> that were not so, sellers with unsold property on their hands would be liable for taxes in respect of purchase price not only unpaid but the legal right to which had been annulled.[221]

Surely this situation, which Rand J considers absurd, is precisely that of a seller subject to a resolutory or suspensive condition who has repossessed property following the resolution of the sale.

In a context similar to *Dominion Engineering*, the Federal Court of Appeal, in *Price (Nfld.) Pulp & Paper Ltd. v. The Queen*,[222] wrote in obiter:

> [I]t may also be that even tax paid on accrued instalments may become refundable if a total rescission of the agreement of sale occurs.[223]

In *Perini Estate v. The Queen*,[224] a case involving contingent liability[225] in common law, the Federal Court of Appeal held that a fulfilled condition had a retroactive effect in the same manner as conditional obligations in civil law.

The taxpayer in that case had sold all the shares in a company. The sale contract provided that the sale price was to include a certain sum payable immediately plus additional sums calculated as a percentage of future profits (earnout). The contract also stipulated that interest, computed from the date of the sale, would be payable on these supplementary amounts.

The minister assessed that interest as interest income. The taxpayer argued that the payments were not interest as defined under the Act since the principal against which they were calculated—that is, the earnout referred to in the contract—did not exist until it was calculated on the basis of the financial statements. An essential element was therefore missing in order for the interest to be "interest" within the meaning of the Act, which requires the existence of a principal amount on which interest accumulates.[226] The minister, for his part, argued that the earnout, once determined, had a retroactive effect, such that the principal was deemed to have always existed, and that the interest could have accumulated on the principal from the date on which the contract was signed.

Having established that the obligation to pay the supplementary amounts was a contingent liability at common law, Le Dain J, on behalf of the court, wrote as follows:

> The learned Trial Judge concluded that the fulfilment of the condition had a retroactive effect. This conclusion is contained in the following passage from his reasons:
>
> > "Once it was ascertained that the profits had been made and could be calculated and the vendor was still alive his obligation for the payments in each of the years 1969, 1970 and 1971 became due, and the condition having been fulfilled it had a retroactive effect to the date of the contract. Interest ran from that day on the payments due in accordance with the terms of the contract."
>
> He based this conclusion on the assumption that *the common law as to the effect of the occurrence of a contingency did not differ in principle from the rule in article*

> *1085 of the Quebec Civil Code that "The fulfilment of the condition has a retroactive effect from the day on which the obligation has been contracted"* [emphasis added].[227]

The Federal Court of Appeal agreed with the trial judge that the contingent liability had a retroactive effect, *just like suspensive conditions in civil law*. On the basis of a decision of the Privy Council[228] that drew an analogy between contingent liabilities in English law and conditional obligations in Scottish civil law, the Court of Appeal concluded that the contingent liability in Canadian common law resembled the conditional obligation in Quebec civil law, and therefore had the same retroactive effect.

Thus, the Federal Court of Appeal established that both civil law conditional obligations and common law contingent obligations have a retroactive effect. However, the court then stated that, in any event, the common law does not clearly exclude retroactivity and that the parties are therefore free to do so. This is what occurred in the case under discussion, where the contract indicated that "interest" would be payable on the "principal" calculated on the future profits.

In any event, even if the Federal Court of Appeal did not go so far as to state that contingent liabilities necessarily have a retroactive effect, there does not appear to be any doubt as to the retroactivity of conditional obligations in civil law. In addition, this retroactivity applies in tax law, at least with respect to interest.

In *Construction Bérou*, Tremblay-Lamer J of the Federal Court Trial Division also stated, in obiter, that the retroactive effect of a suspensive condition applied to the concept of acquisition in the ITA:

> The cases hold that the taxpayer may have "acquired" property where the transaction is considered to be a conditional sale of a suspensive nature. . . .
>
> Since the transaction is characterized as a sale on a suspensive condition, the effect, once the condition is performed, is to transfer the ownership as of the day the contract is signed.[229]

Opposing this trend that seems to favour the recognition of the retroactivity of conditions in tax law, in other cases it has been held that the retroactive effect of resolutory conditions does not apply in the tax context. It should, however, be noted that these decisions were rendered under particular circumstances involving obvious bad faith or the deductibility of employer contributions.

The decision of the Federal Court Trial Division in *Alepin v. The Queen*[230] has been cited in support of the proposition that retroactivity cannot be applied against third parties, including the Department of National Revenue.[231] In *Alepin*, three brothers had sold their land to Jar Investments Ltd. The balance of the sale price was secured by a resolutory clause that applied in the event of the buyer's default. As discussed above, such a clause has the same retroactive effect as a resolutory condition.

A dispute arose between the Alepin brothers and the department regarding the nature of a significant payment made by Jar Investments Ltd. on the balance of the sale price. The taxpayers argued that it was capital and thus that the payment,

received in 1970, was totally tax-exempt. The department claimed that part of the payment was on account of accumulated interest and was therefore taxable as interest income.

In 1975, several years after the payment had been received and the transaction had been assessed by the department, the Alepin brothers exercised their rights under the resolutory clause and took back possession of the land by way of "giving in payment" (dation en paiement). The resolutory clause specifically provided that, if the sale was resolved, all payments received up to then would be deemed to be damages for breach of contract. For this reason, the taxpayers submitted that the payment received in 1970 was on account of capital.

Marceau J rejected that argument:

> [TRANSLATION] So far as the subsidiary argument based on the retroactivity of the giving in payment in 1975 is concerned, I do not see how it applies. A contract subject to a resolutory condition acquires full legal force from the moment it is executed and, until the event contemplated by the said condition occurs, it continues to have full force and effect. When payment was received in 1970, a part of this payment covered the interest due under the contract and was immediately taxable, and this legal situation could not subsequently be modified or extinguished by the effect of a subsequent annulment of the contract itself. The occurrence of the resolutory condition to which a contract is subject may well extinguish the obligations arising from the contract but it can affect third parties who have meanwhile acquired rights on the basis of the contract only to the extent that these rights themselves accrued conditionally. *Furthermore, in the case at bar the resolution did not take place independently of the parties: it required a free, deliberate act by one of them*, and was in fact brought about by a freely concluded contract of giving in payment: *how could one reasonably think that an ex post facto resolution in 1975 could modify the destination of payments made in 1970, and extinguish their consequences for the tax authorities?* (Cf. *Malkin* v. *Minister of National Revenue*, [1942] Ex. C.R. 113.), [1942] C.T.C. 135, 2 D.T.C. 587) [emphasis added].[232]

This statement appears categorical: the retroactive effect of resolution can have no tax consequences. Nonetheless, certain qualifying factors should be noted. First, the resolution of the contract in issue was clearly intended to avoid the tax consequences of the transaction following the assessment and the ensuing dispute. Marceau J unquestionably took this obvious bad faith of the parties into consideration. Moreover, the judge relied on *Malkin*, where the parties, subsequent to a first contract, signed a second one that modified the nature of the amounts received. That case did not involve a resolutory condition that was part of the contract from the outset, and it also originated in a common law province; thus, the claim of retroactivity was not based on the Civil Code.

Second, the *Alepin* case involved a resolutory clause, not a resolutory condition. As discussed previously, a condition is an extrinsic event, independent of the will of the parties. The court's argument that the resolution required a voluntary and free act of one of the parties would not apply to a true resolutory condition.

In *Larose v. MNR*,[233] the taxpayer sold land but the Superior Court subsequently annulled the sale at the taxpayer's request. At the Tax Court of Canada, the taxpayer argued that the tax consequences of the sale were retroactively cancelled by the court-ordered resolution.

The Tax Court rejected this argument, relying principally on the decision of Marceau J in *Alepin*:

> The judgment nullifying the sale rendered by Mercure J in April 1990 certainly cannot affect the rights that the Respondent acquired as a result of the sale of the buildings in 1979. Relatively large sums were payable to the Respondent as a result of this transaction. In addition, *the evidence established that the main object of that legal proceeding was to enable the Appellant to be discharged of his debts to the Minister of National Revenue*. This Court is of the opinion that such a situation is directly dealt with in the case law as reflected in such judgments as *Malkin* (para. 4.02(1)), *Alepin* (para. 4.02(2)) and *Adam* (para. 4.02(3)). In these cases, the courts have held that any attempt to retroactively change the nature of certain payments in order to benefit from a more advantageous tax treatment could not affect the Minister of National Revenue. This is why such a principle applies *a fortiori* when a taxpayer attempts to annul a transaction retroactively in order to eliminate the tax consequences to which it gives rise [emphasis added].[234]

It should be noted that the court in this case also wanted to penalize the taxpayer for his bad faith and refused to endorse the "retroactive tax planning" from which the taxpayer hoped to benefit.[235] In addition, the retroactive nature of a resolutory condition in civil law was not an issue in this case.

Some decisions have also refused to recognize the retroactive effect of suspensive conditions in tax matters. For example, in *Fédération des Caisses populaires v. The Queen*,[236] the Tax Court of Canada considered the question whether the employer could deduct employer contributions related to vacations earned but not yet taken by employees. In calculating its income, the employer deducted an amount for holidays accumulated by its employees during the year but not yet taken. This deduction was accepted by the department. However, the employer also claimed deductions for its contributions to various social programs (retirement pension, employment insurance, Quebec pension plan, group insurance, etc.) calculated on the vacation pay earned but not yet taken.

The department disallowed the deduction for these employer contributions under ITA paragraph 18(1)(e), claiming that they were non-deductible reserves. The issue was whether or not these deductions constituted a reserve in respect of contingent liability—in other words, whether the employer's obligation to pay these contributions came into existence at that moment, even though they were not due to be paid until the employee actually took the vacation.

The Tax Court held that the obligation to make contributions under the various statutes did not arise until the vacation pay was actually paid to the employee. This obligation was considered to be subject to a suspensive condition and was not a term obligation. Consequently, the court ruled that the contributions were

not deductible until the fulfillment of the condition, because the obligation did not exist until that moment. The court unfortunately failed to consider the retroactive effect of the condition in civil law.

In any event, this decision was reversed on appeal.[237] The majority was of the opinion that the obligation was a term obligation and not an obligation subject to a suspensive condition. The dissenting judge did not discuss suspensive conditions.

To summarize, there are two opposing trends in the case law regarding the recognition, in tax law, of the retroactive effect of conditional obligations. One favours retroactivity while the other maintains that it should be ignored. However, there has not been a direct ruling on whether the fulfillment of a condition has a retroactive effect regarding the time of disposition of property within the meaning of the Act.

While it is very difficult to predict what the courts would decide on this question, in my view, the current case law does not support an automatic rejection of retroactivity. On the contrary, it is reasonable to believe that the Federal Court of Appeal would likely recognize retroactivity, as suggested by its decision in *Perini Estate*.

As for the scholars, some support retroactivity in tax matters,[238] while others have criticized such a stance.[239]

An article by Diane Bruneau is one of the few to specifically analyze the application of the retroactivity of conditional obligations in tax law. Having established that a disposition occurs when the seller is entitled to the sale price, as affirmed in *Victory Hotels*,[240] Bruneau states that the right to the proceeds of disposition arises at the moment when ownership is transferred. At that point, she writes, we are back at square one and must determine whether the transfer of ownership can be retroactive in the case of a suspensive condition, or can be revoked in the case of a resolutory condition.

Turning to the central issue of retroactivity of the condition, Bruneau writes:

> [TRANSLATION] Even in civil law the retroactivity of the right of ownership cannot erase the provisional situation that existed before the condition was fulfilled. Thus, income earned from property does not have to be repaid to a person who acquires it retroactively. Likewise, if the property is completely destroyed, a purchaser under suspensive condition does not assume the risk thereof. However, these effects may be modified at the time the agreement is entered into. For the other situations not specifically provided for by law, Faribault writes as follows:
>
> > Since the retroactivity of the fulfilled condition is a legal fiction, it must be given a narrow interpretation. If there is any doubt, the decision must be that it does not exist because its fictitious nature cannot prevent a fact from having occurred in the past.
> >
> > Where the object of the obligation is a specific thing, this fiction cannot erase the fact that the conditional debtor had possession of it *pendente conditione*. If this possession escapes the retroactivity of the condition, all that naturally and rationally derives therefrom must also escape it, such as, for example, acts of administration performed by the debtor, and the fruits he collected during that possession.

Mignault, for his part, states the following:

> [T]he retroactivity attached to the fulfilled condition concerns only matters *of law*. It was conceived both in the interest of the purchaser, who, without it, would have been required to be subject to the alienations, servitudes or hypothecs granted *pendente conditione* by the alienator, and in the interest of his heirs. It does not apply to matters *of fact*; the acquisition of the fruits by collection is a fait accompli that the fulfillment of the condition cannot erase. . . .
>
> According to these authors, the retroactivity of the sale protects the purchaser's title but cannot modify reality. *To date, the view adopted in the tax case law is that a disposition may result from a fact situation. It could then be argued that, even if, in law, there may be a retroactive sale, in fact, disposition takes place only when the condition is fulfilled* [emphasis added].[241]

Bruneau refers to *Olympia & York* in support of her statement that "the view adopted in the tax case law is that a disposition may result from a fact situation." She notes that in that case, "[TRANSLATION] the mere transfer of the incidents of ownership was found to be sufficient to hold that a disposition had occurred, even if title of ownership had not been transferred and a sale had not yet taken place."[242]

My understanding of Bruneau's contention is as follows: on the one hand, in tax law, a disposition can result from a situation of fact, namely, the transfer of possession, use, and risk; on the other hand, in civil law, since retroactivity applies only to matters of law and not to matters of fact, it has no effect on a disposition that arises in fact.

Bruneau also points out several practical obstacles to the application of retroactivity in tax law: its ambivalent effects; the absence of provisions permitting amendment of previously filed returns; prescription; equity; and the impact of statutory amendments. She concludes that, given these difficulties and the factual nature of dispositions, conditional obligations should not be accorded a retroactive effect in tax law.

With respect, I disagree with the premises underlying this reasoning. I have already suggested that the civil law "principle" whereby retroactivity applies only to matters of law does not appear to be well established.[243] At the very least, this principle should apply only to "real and incontestable" or "ineffaceable" facts—that is, the cases expressly provided for in the Civil Code, namely, fruits and acts of administration. With respect to the burden of risk, under the new Code, it is no longer linked to ownership, but rather to possession; consequently, the fact that retroactivity does not apply to risks does not actually follow from the alleged principle.

Further, Bruneau's statement that disposition results from a situation of fact is based on the decision in *Olympia & York*.[244] As I explained earlier, in my view, this decision erroneously introduced into civil law the "incidents of title" test, articulated in *Wardean Drilling*; rather, the concept of "disposition" should be interpreted according to civil law when it is to be applied in Quebec.

In addition, the concept of disposition cannot be assimilated with a question of "incontestable" fact. In my view, disposition is tied to the transfer of *ownership*, and the transfer of ownership cannot be considered a "real and incontestable" fact that escapes the retroactive effect of the condition. The right of ownership is no less a "legal fiction" than retroactivity itself, and it is the principal object to which retroactivity applies.

My disagreement with Bruneau's position arises from my reliance on different premises to support my reasoning. As explained above, I am proceeding from the principle of complementarity of the private law, and I take the position that if Parliament wishes to set aside the private law meaning of a term, it must expressly define the term in issue. Bruneau implicitly seems to proceed from the dissociation principle: according to her, there is a distinct concept of "disposition," particular to tax law and defined by the jurisprudence.

Other Retroactive Situations in Civil Law

An earlier section of this paper referred to certain civil law concepts that can have retroactive effect. Here I will examine the tax consequences of these events on the basis of the current state of the law.

Resolution of Contract for Non-Performance of an Obligation

As discussed above, the resolution of a contract produces the same effects as a resolutory condition. However, resolution for non-performance is unique in that it results from the debtor's default, generally the default of payment. ITA sections 79 and 79.1 apply to the return of property following the debtor's failure to pay.

Essentially, these sections provide that, in the case of default, there are two successive dispositions of the property. They also establish rules for calculating the debtor's proceeds of disposition in respect of the property and the cost to the creditor.

The question is, in what circumstances will these sections apply? Subsection 79(3) establishes the rules that apply to a debtor where "a particular property is surrendered at any time by a person . . . to a creditor of the debtor." Subsection 79(2) states that a property is surrendered by a person (the debtor) to another person (the creditor) when the creditor acquires or reacquires the "beneficial ownership" of the property from the debtor, in consequence of the debtor's failure to pay an outstanding debt. Conversely, subsections 79.1(2) and (6) address the case where a creditor seizes property—that is, acquires or reacquires the "beneficial ownership" in the property following the debtor's default.

Two points can be made regarding these rules. First, as we have seen, the Supreme Court held that the obligation to pay the sale price is not a condition as understood by the civil law.[245] Therefore, these sections will almost never be applied to true conditional obligations. They will apply only where the contract is resolved for non-performance or in the case of default on an instalment sale. Second, whether or not the creditor acquires "beneficial ownership" following

the debtor's default where the contract is resolved for non-performance depends on whether retroactivity under the Civil Code applies to tax law in general. If it does, then one must conclude that ownership was never transferred, and the creditor cannot "reacquire" ownership that was never given up.[246]

It should also be noted that subsection 79(2) gives rise to the same problem as the definition of "disposition": it refers to "beneficial ownership," a concept that has meaning only in a common law context. Can a Quebec creditor, deemed by the Civil Code never to have disposed of ownership, give up beneficial ownership and then recover it following the debtor's failure to pay? Archambault posed the question in the following terms:

> [TRANSLATION] Finally, in order for section 79 of the Act to apply, there must be an "acquisition" or "reacquisition" of the "beneficial ownership" or ownership of the property. Under the Civil Code [the CCLC], no such acquisition or reacquisition of property exists. Rather each party returns that which he received and things return to the same state as if the contract had never existed (article 1088 of the Civil Code). It is therefore appropriate to question whether section 79 of the Act applies in these circumstances.[247]

Instalment Sales

As discussed earlier, an instalment sale is a term sale, not a conditional sale. Ownership is transferred in civil law only when the term ends (that is, when the sale price is fully paid), and there are no retroactive effects.

Nonetheless, the question still arises as to when a disposition occurs in tax law. If the test of *Wardean Drilling* is applied, there is a disposition when the contract is signed, even though ownership is retained as security for the payment of the sale price: possession, use, and risk of loss are transferred to the buyer from that moment.

Moreover, there is the issue of whether sections 79 and 79.1 apply, since if the buyer defaults on payment, the seller will take back the property that he never stopped owning. If, however, it is held that the seller gave up beneficial ownership, these provisions will apply.

Nullity as a Sanction of Conditions of Formation of Contracts

Since nullity has the same effects in civil law as a resolutory condition, it produces the same tax consequences. Hence, the comments made earlier regarding conditional obligations also apply to annulled contracts.

Sales with a Right of Redemption

Because a sale with a right of redemption is essentially a sale subject to a resolutory condition, it should have the same tax consequences. The use of the word "rachat" ("repurchase") in the French version of the Code should not lead the courts to conclude that there are two dispositions, and to deny the sale its

retroactive effect. Contrary to what the term "rachat" might suggest, the redemption is not a second purchase, nor does it refer to a second sale. It is simply a retroactive cancellation of the first sale in the same manner as if a resolutory condition had been fulfilled. The legislator unfortunately created this confusion in choosing the term "rachat" to replace the previous term "réméré."

In any event, a sale with a right of redemption is often contemplated by paragraph (j) of the definition of "disposition" in ITA subsection 248(1), which states that the term "disposition" does not include

> any transfer of the property for the purpose only of securing a debt or a loan, or any transfer by a creditor for the purpose only of returning property that had been used as security for a debt or a loan.

Indeed, a sale with a right of redemption is most often intended to secure the seller's debt to the buyer.[248]

Trial Sales

Similarly, a trial sale is simply a type of sale subject to a suspensive condition where possession and use of the thing are transferred immediately. It should therefore have the same effects in tax law as a sale subject to a suspensive condition, depending on whether or not the retroactive effect of conditional obligations is recognized.

Promises of Sale

As we have seen, a promise of sale with delivery and possession is equivalent to a sale under the Civil Code, unless the parties provide otherwise. Thus, in such circumstances, it could be concluded that a disposition for tax purposes takes place upon delivery, and that conclusion would be consistent with civil law.

This is what occurred in *Dubois v. The Queen*,[249] where the issue was the deductibility of interest attributable to a period during which the buyer had possession of the property and assumed all the charges, but before a notarial contract of sale had been signed. The minister submitted that there had been no disposition before the closing of the sale.

The court held that there was a promise of sale with a transfer of possession, and that the parties had intended to transfer ownership immediately even though the notarial contract was only to be signed later. Thus, at the moment possession was taken, a sale occurred under civil law, since the parties had agreed that ownership would be transferred at that moment. As a result, the interest that ran from that date was deductible, since it pertained to property "acquired" at that date.

Thus, according to the court, the date of "acquisition" (within the meaning of the Act) coincided with the transfer of ownership (as civil law understands it.) Although neither retroactivity nor suspensive conditions were involved in this case,[250] the court nonetheless stated that the moment property is acquired must be

determined with reference to the moment at which civil law considers ownership to have been transferred.

The result in *Dubois* is therefore the same as in common law when the incidents of title are transferred to the buyer before the deed of sale is actually signed. In *Kozan v. MNR*,[251] for example, the parties agreed to make the sale effective in November 1979; the possession, use, and risk were transferred at that date, but the signing of the deed of sale was postponed until certain formalities were completed. The deed of sale was finally signed in 1980, but the court nonetheless held that the disposition had taken place in 1979 because of the parties' conduct: they had treated their transaction as complete from the moment the incidents of title were transferred.

While these two cases conform with the private law of their respective province of origin, the courts arrived at the same tax result in both decisions.

Conversely, in both *Robert Bédard Auto*[252] and *Olympia & York*,[253] the court held that, even though the promise of sale was accompanied by delivery and transfer of possession of the thing sold, there had not been a sale within the meaning of the Civil Code because the parties had expressed their intention to delay the transfer of ownership until the deed of sale was signed. Nonetheless, the court found that a "disposition" had taken place within the meaning of the ITA, on the basis of the common law precedents that applied the test in *Wardean Drilling*.[254]

Retroactivity Provided For by Contract

As explained earlier, the parties to an agreement can stipulate that the contract is to take effect at a date earlier than the signing date, provided that they reached a definitive agreement on this earlier date (the effective date) regarding the essential elements of the contract. The question then becomes whether the effective date is the transaction date for tax purposes. Because the issue is the same in both civil law and common law, the answer should also be the same; the relevant authorities in both systems will thus be reviewed.

For tax purposes, ownership can validly be transferred before the signing of the contract of sale, if the parties so intend. In *Dubois* and *Kozan*, the court held that there had been a disposition within the meaning of the ITA as soon as there was a promise of sale with a transfer of possession, even though the contract of sale was not signed until a later date.[255]

In *Reilly Estate v. The Queen*,[256] the Federal Court Trial Division held that a disposition for tax purposes had occurred as soon as the parties entered into a binding agreement.

The taxpayer in this case had agreed, in a letter of agreement signed in 1972, to sell some parcels of land. The final agreement was not signed until 1973. Muldoon J determined the time of disposition on the basis of a binding agreement test: he examined the letter of agreement and held that, according to common law rules, it was a valid contract binding the parties because they had agreed on all

the essential elements of the contract. The final contract reproduced the terms of the letter of agreement, except for a few details. The court held that the sale had taken place as soon as the letter of agreement was signed, and that it was therefore at this moment that a disposition had occurred. As decided in *Victory Hotels*, this was the event that entitled the seller to the proceeds of disposition.[257]

In *Miller v. The Queen*,[258] the Federal Court Trial Division recognized the retroactivity stipulated by the parties. The taxpayer, a teacher, was party to a collective agreement that expired in December 1979. Arbitration ensued and the new agreement, to take effect in 1981, provided for a retroactive increase to January 1, 1980, plus interest payable on the increase.

The minister claimed that the additional amount was not interest since there was no principal at the time the interest accrued. However, the taxpayer relied on *Perini Estate* and submitted that it constituted interest, even if the amount of the principal could not be determined in advance.

Reed J agreed with the taxpayer because she was of the view that this case was similar to *Perini Estate* and that the retroactive effect stipulated by the parties in their agreement had to be applied:

> Equally, I cannot find in the *Perini* and *Huston* cases a requirement that in order to constitute an interest payment the formula for such payment must be decided upon prior to the commencement of the time period to which the interest relates. *It is open to the parties to govern their relationship by retroactive agreements*: *Trollope & Colls et al. v. Atomic Power Constructions, Ltd.*, [1962] 3 All E.R. 1035. And it is open to them, when they do so, to provide for interest to be payable on the outstanding sum left due over the relevant period of time. In my view the taxpayer's situation in this case is similar to that of the taxpayer in *Perini*. . . .
>
> In my view the $62.51 was genuinely a payment of interest. *The parties agreed that their relationship would be governed on the basis of the retroactive agreement.* This involved the retention of monies owing to the Plaintiff for which compensation was ultimately paid. The compensation paid was described by the parties and the arbitration board as interest. It was calculated on an accrual basis by reference to a normal rate of interest then current or with respect to the employer's cost of borrowing. I can see no reason why this does not fall within the meaning of the word "interest" as it is used in section 110.1 of the *Income Tax Act* [emphasis added].[259]

As for the scholars, most are of the opinion that the effective date is valid in tax law provided that the parties had a legally binding agreement at this earlier date. For an agreement to be legally binding, an offer must have been accepted and all the essential terms of the contract must have been definitively determined.[260]

Retroactivity Under the Civil Code

Earlier it was explained that the Civil Code provides for retroactivity in a number of situations, notably in respect of dissolution of the matrimonial regime and successions. Is this retroactivity recognized in tax law?

In *MNR v. Faure*,[261] the Supreme Court of Canada answered this question in the affirmative. The issue in that case was whether the property of the deceased spouse had "passed" to the surviving spouse at the time of death within the meaning of the Estate Tax Act.[262] The spouses were married under community of property according to the rules of the Belgian Civil Code, which the parties agreed would be treated like the rules contained in the CCLC. The marriage contract stipulated that the whole of the community property would belong to the surviving spouse.

The Supreme Court held that the property had not "passed" to the surviving wife upon her husband's death because in civil law she was deemed to have acquired the community property retroactively to the date of marriage. Writing for the court, De Grandpré J held:

> *Whatever the nature of the community may be, on its dissolution by the death of the husband, giving rise to application of the above-mentioned stipulation in the marriage covenants, the widow became owner of all the property, retroactively to the date of the marriage* [emphasis added]. In *Sura* v. *Minister of National Revenue*, [1962] S.C.R. 65, speaking of the share of the community property going to the spouse in a case in which the exclusive right of the survivor was not at issue, Taschereau J., as he then was, stated (at p. 71):
>
> > [TRANSLATION] . . . If the wife was not co-owner of the community property, she would have to pay succession duties on dissolution of the community, because there would then be a passing of property from her husband. However, this is not the case here, because there was no *passing*, but partition, in which she took the share coming to her, which had belonged to her since the marriage. What she received did not come from the estate of her husband [italics in original text].
>
> In support of his views, Taschereau J. cited as authorities several authors, including *Mignault*, who stated, in volume six of his *Droit Civil*, p. 337, that in the event of renunciation *the interest is retroactively terminated, the other spouse being* [TRANSLATION] "*deemed to have always been the sole owner of the property which made up the community*" [emphasis added].[263]

Thus, the Supreme Court expressly recognized that retroactivity provided by a provincial statute—the Civil Code in the present case—applied to tax law. The court held that the Civil Code determined when ownership was transferred for tax purposes; and since the Code stated that the surviving spouse's ownership was retroactive, tax law had to follow suit.

The parallel with the retroactivity of conditional obligations is obvious. If the Supreme Court recognized that retroactivity in civil law applies to tax law in determining when ownership of property "passed" for the purposes of the Estate Tax Act, how could it disregard the retroactive effect of a condition when determining the time of disposition for purposes of the ITA?

The same reasoning was applied in *Furfaro-Siconolfi v. The Queen*.[264] In this case, it was necessary to determine the time at which a $30,000 gift under the

marriage contract had been "transferred" to the spouse within the meaning of ITA section 160. Although the marriage contract preceded the tax debt, the amount had been paid to the spouse three years later. The taxpayer argued that section 160 could not apply because the amount had been "transferred" when the marriage contract was signed.

Pinard J began by pointing out that the ITA does not define the term "transfer." He referred to the different ordinary and legal definitions of this word and held that the Act contemplated a simple transfer of ownership, which did not require that the beneficiary have possession of the property. He then considered Quebec civil law to determine the time at which ownership of the amount in question had been transferred:

> It is by the operation of articles 777, 782, 787, 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, a contract in fact followed by a marriage of the parties.[265]

Conversely, in *Riverin v. The Queen*,[266] the Tax Court of Canada refused to recognize the retroactive effect of a "giving in payment" for the purpose of determining when there was a "transfer" within the meaning of ITA section 160. This case involved a loan granted by the taxpayer to a third party and secured by an immovable hypothec. The debtor became insolvent and voluntarily gave the building in payment after receiving a 60-day notice. The department assessed the taxpayer for the debtor's tax liability, claiming that a "transfer" of the immovable had taken place within the meaning of ITA section 160.

The taxpayer argued that the giving in payment was not a "transfer" within the meaning of section 160 because the notice served under CCLC article 1040a forced the payment. This argument was rejected.[267] However, Archambault J also examined a second question, namely, when the transfer took place, since the giving in payment under the CCLC had a retroactive effect to the date on which the loan was signed.[268] Archambault J conceded that the transfer had occurred in February 1989 by virtue of a "legal fiction" under the CCLC. Nonetheless, relying on the article by Diane Bruneau,[269] he held that retroactivity applied only to matters of law, not to matters of fact. In his opinion, since the building was not transferred until 1990, it was at that time that the transfer took place within the meaning of ITA section 160:

> I agree with Professor Bruneau's analysis. In 1990, the immoveable passed from Mr. Demers' patrimony to Mr. Riverin's. This is a fact. In law, the effects of this transfer are deemed to be retroactive to the date of the agreement that created the giving in payment. For the purposes of subsection 160(1) of the Act, the transfer of the immoveable took place in May 1990.[270]

As I have already expressed my disagreement with Bruneau on this question, it goes without saying that I am equally in disagreement with the decision of the Tax Court in this case.

Conditions Precedent and Conditions Subsequent

I will now turn to the case law dealing with the question of when a "disposition" occurs where a condition precedent or a condition subsequent is present.

The case law has clearly established that where there is a true condition precedent within the meaning of *Turney v. Zhilka*, beneficial ownership cannot be transferred to the buyer until the condition is fulfilled.[271] As a result, before this event, there is no "disposition" within the meaning of the Act.[272] Most of the scholarly writing is in agreement with this position.[273]

It is important to emphasize that in common law the *Wardean Drilling* test is not applied in the presence of true conditions precedent; it could not be argued that where possession, use, and risk have been transferred, a disposition has taken place even though a condition precedent exists which has not been fulfilled. As already noted, the second part of the test contemplates conditional sales agreements, where the seller retains the title to *secure payment of the sale price*. This concept is more like a civil law instalment sale than a conditional obligation. In my view, where there is either a true condition precedent in common law or a suspensive condition in civil law, the second part of the *Wardean Drilling* test could not be applied.

A question that often arises is the effect of conditions precedent on the timing of the realization of income. ITA paragraph 12(1)(b) states that the following sums are to be included in the calculation of business income for the year:

> [A]ny *amount receivable* by the taxpayer in respect of *property sold* or services rendered in the course of a business in the year, notwithstanding that the amount or any part thereof is not due until a subsequent year [emphasis added].

Former paragraph 85B(1)(b) was essentially the same. The Exchequer Court established in *MNR v. John Colford Contracting Co.*[274] that for an amount to be "receivable," the creditor must have a clear, though not necessarily immediate, right to receive it:

> In the absence of a statutory definition to the contrary, I think it is not enough that the so-called recipient have a precarious right to receive the amount in question, but he must have a *clearly legal, though not necessarily immediate, right to receive it* [emphasis added].[275]

The court then affirmed that in order to determine whether the amounts in question are receivable—that is, whether the taxpayer had a clear right to the

amounts—it is necessary to examine the law of the province in which the contract was signed and executed. In common law, if the contract contains a condition precedent, the taxpayer is entitled to the amount only when the condition is fulfilled. As a result, it is only at the time of fulfillment of the condition that the taxpayer must include the amount in income.[276] The scholarly writing reflects the same view.[277]

The analogy between the time of inclusion in income and the time of disposition, while not perfect, is supported by the wording of the law. In the case of a sale, a disposition occurs when there is an "event entitling a taxpayer to proceeds of disposition," those proceeds being the sale price. In the case of an "amount receivable," the amount in question must be included in income, as provided by ITA paragraph 12(1)(b), when the taxpayer has a clear, although not necessarily immediate, right to receive it. Brian J. Arnold wrote as follows on this point:

> In summary, revenue from the sale of property is generally considered to be realized for income tax purposes when the vendor becomes legally entitled to receive and retain payment for the property. . . .
>
> Therefore, the time of recognition of business or property income under section 9 for an accrual basis taxpayer is virtually the same as the time of disposition of property for purposes of recapture of capital cost allowance and capital gains under sections 13 and 54 respectively.[278]

With respect to conditions subsequent, the case law and the scholars[279] are unanimous: disposition occurs at the time the contract is concluded, and the disposition is unaffected by the condition subsequent. On fulfillment of the condition, a second disposition occurs. Since a condition subsequent in common law has no retroactive effect, the question of retroactivity does not arise.

Other Retroactive Situations in Common Law

Retroactivity Provided For by Contract

The tax treatment of contractual retroactivity—that is, the decision of parties to a contract to choose an effective date that precedes the date of signature—is the same in both common law and civil law. For details, see the earlier discussion in this section under the heading "Other Retroactive Situations in Civil Law—Retroactivity Provided For by Contract."

Retroactivity Under Provincial Law

As discussed above, in certain cases, the courts are authorized by provincial statute to issue orders having a retroactive effect. The tax consequences of such orders will now be examined. The decision in *Hillis et al. v. The Queen*[280] is a particularly good example of the uncertainty and conflict reflected in the cases between the various approaches to this issue.

Mr. Hillis died intestate on February 21, 1977, leaving a spouse and two sons. His spouse was entitled to $10,000 plus one-third of the residue of the estate

under the Saskatchewan Intestate Succession Act,[281] and his two sons were entitled to the rest.

For unknown reasons, no concrete steps were taken toward settling the estate until 1979. Mr. Hillis's widow filed a motion under the Dependant's Relief Act[282] in the Court of Queen's Bench of Saskatchewan on November 29, 1979. This statute entitled dependants of the deceased to ask that the court allocate a fair and equitable share of the estate for their support. The Court of Queen's Bench issued an order on December 14, 1979 vesting all the property of the deceased in Mrs. Hillis.

Section 14(1) of the Dependant's Relief Act, which was crucial in this case, provides as follows:

> 14(1) Where an order is made under this Act, then for all purposes, including the purposes of enactments relating to succession duties, the will 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.[283]

Thus, an order of the court made under section 14(1) of the Dependant's Relief Act is retroactive to the date of death.

In the case before the court, the issue was whether Mrs. Hillis was entitled to benefit from ITA subsection 70(6), which, as it then read, provided for a rollover to the surviving spouse in the following circumstances:

> [I]f the property can, within 15 months after the death of the taxpayer or such longer period as is reasonable in the circumstances, be established to *have become vested indefeasibly in the spouse or trust*, as the case may be, *not later than 15 months after the death* of the taxpayer, the following rules apply [emphasis added].

Entitlement to the rollover in this case required, first, that the property be vested indefeasibly in Mrs. Hillis within 15 months of the death of her spouse; and second, that the devolution could be established or proven within 15 months of her spouse's death or within a reasonable period in the circumstances. For present purposes, only the first condition is of interest.

At the Federal Court of Appeal, Clément, Heald, and Pratte JJA wrote separate opinions leading to totally different conclusions. I will examine only that part of their opinion that deals with the share of the estate granted to Mrs. Hillis by the order dated December 14, 1979.[284] The issue is whether the order was retroactive to the date of death for the purposes of ITA subsection 70(6).

Clément JA examined sections 4(2) and 14(1) of the Dependant's Relief Act and held as follows:

> S. 4(2) of this statute deems the existence of a will with provisions such as those made by the *Intestate Succession Act*. But this fiction does not have force until an application for relief is made by or on behalf of a dependant, and then only for the purposes of the statute which cannot include federal income tax. And by s. 14(1) it

> is not until an order is made that the fictional will, modified as to the court may seem proper in the circumstances having regard to the purposes and directives of the statute, is to have effect. Then, the deemed will is deemed to have effect from the date of death of the intestate. *These provisions are stated to be for all purposes, but obviously that can mean only for all provincial purposes. They cannot be taken to intrude fictions for provincial purposes into the interpretation and operation of the Act. The latter takes its operation in the realities of the circumstances subject only to such directives as it may itself prescribe* [emphasis added].[285]

Clément JA categorically stated that the ITA considers only the realities of the circumstances, that it is subject solely to the provisions it may itself prescribe, and that it is not subject to legal fictions born of provincial law. The principle of complementarity of provincial private law is clearly set aside.

Pratte JA held that, even if it was admitted that the order was retroactive to the date of death, the property vested only when the order was issued because the devolution did not exist before the order was pronounced. In other words, Mrs. Hillis was entitled to the estate only from the time the order was pronounced. Pratte JA explained his reasoning as follows:

> [W]hen did the estate become indefeasibly vested in Mrs. Hillis? In my view . . . when the order was pronounced since the effects of . . . the Court order, in spite of [its] retroactivity, did not exist as long as . . . the Court order was not pronounced. It is only when . . . 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 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.[286]

Heald JA established from the outset his intention to apply the principle of complementarity of private law:

> I agree with appellant's counsel that the wording of subsection 70(6) of the *Income Tax Act* contemplates the disposition of property other than by will, as well as by will, since it deals with the transfer or distribution of property after the death of a taxpayer and ". . . as a consequence thereof. . . ." This wording, in my view, makes it clear, that *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* [emphasis added].[287]

The proper approach was therefore to apply the provisions of the provincial law—in this instance, the Dependant's Relief Act. Heald JA held that under sections 4(2) and 14(1) of that statute, the retroactive effect of the order meant that the estate vested indefeasibly as of the date of death. Heald JA focused primarily on the purpose of ITA subsection 70(6) and held that Parliament had not intended to set aside provincial law in this regard.

Although the three judges were divided as to the appeal, two out of the three held that the retroactivity provided for in the provincial Act did not apply to the ITA, albeit for very different reasons. Clément JA favoured the trend in the case law supporting a uniform application of the ITA across the country regardless of provincial private law. At the other end of the spectrum, Heald JA held that provincial private law should be applied because it had not been set aside by Parliament. Pratte JA took what we might call the "factual" stance: for him, retroactivity cannot alter *facts* that occurred before the event giving rise to the retroactivity—in particular, the "devolution" of property.[288]

The Case Law and Scholarly Writing: A Summary

This completes my analysis of the concept of disposition and retroactivity under the Civil Code and the common law, as interpreted by the courts and by scholars. I have identified some major trends, although the case law is not always consistent.

The concept of disposition is interpreted broadly by the courts, because the definition of disposition in the Act is not exhaustive. Without restricting the ordinary meaning of the term, the definition includes certain concepts that would not normally be included. However, in the context of a sale, the courts are of the opinion that the definition in the Act would narrow the meaning of disposition, to include only those events that entitle the seller to proceeds of disposition—that is, the sale price.

Because the definition of disposition in the Act is not supposed to be exhaustive, it is necessary to refer to provincial private law in order to complete and interpret the meaning of the term.

I have expressed my disagreement with both the decision in *Olympia & York* and the majority opinion in *Construction Bérou* on this subject. With respect, in my view, the *Wardean Drilling* test should not have been applied to a "disposition" or an "acquisition" in Quebec. *Wardean Drilling* is a common law decision, whereas it is civil law that must complete the ITA in Quebec. Moreover, this decision is based on the division of ownership in common law between the legal owner and the beneficial owner, a division that is not recognized in civil law.

Further, the test developed in *Wardean Drilling* should not be interpreted as establishing that a disposition or an acquisition takes place at the time beneficial ownership is transferred. It is only in the situation where the seller retains ownership as security for the payment of the sale price (for example, in a conditional sales agreement or an instalment sale) that a disposition occurs at the time the incidents of title are transferred to the buyer. Therefore, in my view, even if this test were to be adopted in Quebec, it should not apply in the case of true suspensive conditions because in this situation title is not retained as security, but simply until the condition is fulfilled (or not). Similarly, in the case of resolutory conditions, the seller does not retain title as security; on the contrary, title is transferred to the buyer, and it is only if the condition is fulfilled that it will be retroactively returned to the seller as though it had never been transferred.

One must not confuse the test in *Wardean Drilling*, which is based on a *broad* interpretation of "disposition" encompassing more than that which is explicitly provided in the definition in the Act, with the *restriction* of the term provided in paragraph (e) of the definition of "disposition" in ITA subsection 248(1). That paragraph provides that a disposition does not include a transfer of property that does not result in a change in beneficial ownership. In other words, a transfer of legal ownership alone, without beneficial ownership, does not constitute a disposition within the meaning of the Act. The opposite result—that is, that a transfer of beneficial ownership without legal ownership would constitute a disposition—is not provided for. This latter interpretation does not follow from the wording of the statute but arises exclusively from the common law jurisprudence.

With respect to the definition of disposition in the Act, I emphasize that this definition is not exhaustive and must therefore be completed by recourse to private law. The complementary private law in Quebec is civil law. As suggested by the Supreme Court in *Compagnie Immobilière BCN*[289] and affirmed by Noël JA in *Construction Bérou*,[290] the concept of "disposition" in civil law refers to the disposition of the *ownership* of property, as governed by the Civil Code. Accordingly, in the case of conditional obligations, it will be necessary to determine, in the context of the Civil Code, at what time the seller *disposed* of his right of *ownership* in the thing.

Where retroactivity is provided for by provincial private law, whether under the Civil Code, common law, or provincial statute, there are three different approaches to its applicability for purposes of the ITA. The first approach rejects the application of retroactivity on the basis that the Act must be applied uniformly across the country. Clément JA expressed this somewhat marginal approach in *Hillis*.

The second approach also rejects the application of retroactivity, but for a different reason: retroactivity under the provincial law cannot alter past events, or affect third-party rights acquired in the interim, particularly those of the CCRA. This is the opinion of Pratte JA in *Hillis*; since property "vests" by order, it cannot be said to have "vested" before the order was issued, even though the order has retroactive effect. The judgments in *Alepin*,[291] *Larose*,[292] and *Riverin*[293] reflect this position. It is unnecessary to repeat the reservations I have already expressed concerning those cases.

The third approach in the case law recognizes the application of retroactivity for the purposes of the ITA. Where provincial law provides that retroactivity will apply to a specific event or private law concept, tax law must take this retroactivity into account when ascribing consequences to the private law concept. The Supreme Court recognized the retroactive effect of provincial law in *Faure*,[294] as did the Federal Court of Appeal in *Perini Estate*,[295] the Federal Court Trial Division in *Furfaro-Siconolfi*,[296] and Heald JA in *Hillis*.

In my view, the third approach is correct at law. I cannot agree with the argument put forward by proponents of the second approach that retroactivity is a legal fiction and that the ITA applies only to the factual realities. Retroactive legal

consequences imposed by provincial statute are no less "real" than other legal concepts such as ownership. I agree with Joel Nitikman when he states:

> In short, it is agreed that the Act focuses on "reality," but it is submitted that that "reality" is found in provincial/common law. A provincial statute or a rule of common law which imposes retroactive legal consequences on persons is no more, but no less, real, than a statute or a rule which imposes those consequences prospectively. The Act should recognize both equally.[297]

Responding to the argument that retroactivity is not enforceable against the CCRA, Nitikman further states:

> *If a retroactive agreement is binding as between the contracting parties in a provincial court then it is binding for tax purposes, because the tax system is an accessory to the provincial law system.* The fact that the Minister was not a party to the amending agreement is completely irrelevant; he was not a party to the original agreement but there is no doubt he is bound by it as far as the tax consequences arising from it are concerned [emphasis added].[298]

The CCRA's Administrative Position

The Concept of Disposition and Conditional Obligations

Now I will turn to the CCRA's position on disposition in general and on conditional obligations in particular. In the discussion that follows, the various statements issued by the CCRA will be reviewed in chronological order, in order to show how its position has evolved.

The first pronouncement of administrative policy concerning the concept of disposition and conditional obligations was published in *Interpretation Bulletin* IT-170R.[299]

The bulletin begins by restating, in paragraph 2, the principle from *Victory Hotels* that "the date of disposition of capital property sold occurs at the time that the vendor is 'entitled to . . . the sale price.' . . . In this manner the date of disposition is given a somewhat restricted meaning when a disposition of capital property involves a sale."

Paragraph 4 of the bulletin contains the following comments on paragraph (e) of the definition of "disposition" in ITA subsection 248(1) (formerly subparagraph 54(c)(v)), which states that there is no disposition if beneficial ownership is not transferred:

> 4. Subparagraph 54(c)(v) makes it clear . . . that *the Act is interested only in dispositions that involve a change in beneficial ownership* (unless the contrary is expressly stated). This is also the Department's view in respect of dispositions of depreciable property described in paragraph 13(21)(c) and the sale of trading assets under paragraph 12(1)(b). *A transaction that can be described as a "sale" is therefore disregarded for purposes of this bulletin if there is no concurrent change in*

> *beneficial ownership.* Such transactions will usually involve a "purchaser" who can be described as an agent, nominee, trustee or *prête-nom* corporation of a "vendor" who basically retains the right to deal with the property as though it were his own [emphasis added].

Here the department affirmed that the concept of disposition is equivalent to the transfer of beneficial ownership.

The department commented on the concept of acquisition of depreciable property in *Interpretation Bulletin* IT-50R, which has since been replaced by IT-285R2:

> 17. Generally, a taxpayer will be considered to have acquired a depreciable property at the earlier of:
>
> (a) the date on which title to it is obtained, and
>
> (b) the date on which the taxpayer has all the incidents of ownership such as possession, use, and risk, even though legal title remains in the vendor as security for the purchase price (as is commercial practice under a conditional sale agreement).
>
> In order that the cost of an asset may fall within a specified class, the purchaser must have a current ownership right in the asset itself and not merely rights under a contract, of which the asset is the subject, to acquire it in the future.
>
> 18. *In determining whether or not depreciable property is acquired by a taxpayer, the legal relationship between the vendor and the purchaser of the property should be reviewed.* For example, where chattels are being acquired, the relevant sale of goods legislation would be applicable. *Each of the provinces (other than Quebec) has a Sale of Goods Act pertaining to sales of chattels laying down substantially the same rules for the ownership rights to assets bought and sold.* The basic rule is that property in respect of specific assets passes, and is therefore acquired by the purchaser, at the time when the parties to the contract intend it to pass as evidenced by the terms of the contract, the conduct of the parties and any other circumstances.
>
> 19. If, however, the intention of the parties is not evidenced as discussed above, the following rules apply to determine when property is to pass:
>
> (a) if there is an unconditional contract for the sale of a specific asset in a deliverable state, property will pass to the purchaser when the contract is made, and it is immaterial whether the time of payment or delivery or both are postponed;
>
> (b) if there is a contract for the sale of a specific asset and:
>
> (i) the seller is bound to do something to the asset to put it into a deliverable state, or
>
> (ii) the asset is in a deliverable state, but the seller must weigh, measure, test or do some other act or thing to ascertain the price,
>
> then property does not pass until the seller has satisfied those conditions and the purchaser has notice thereof [emphasis added].[300]

Paragraph 17 is worded very similarly to the test in *Wardean Drilling*. Paragraph 18 states that the legal relationship between the parties must be examined

in light of the applicable provincial private law, in order to determine whether property has been acquired. The bulletin mentions that specific statutes govern the sale of movable property in all the provinces except Quebec and that the moment of acquisition is determined according to these statutes. The rules that exist in the other provinces are explained at the end of paragraph 18 and in paragraph 19. In the case of Quebec, the bulletin implies that it is necessary to refer to the rules in the Civil Code.

The treatment of suspensive and resolutory conditions is explained in IT-170R, which states:

> 5. . . . it is the Department's view that the sale price of any property sold is brought into account for income tax purposes when the vendor has an absolute but not necessarily immediate right to be paid. *As long as a "condition precedent"* ["condition suspensive" in the French version] *remains unsatisfied, a vendor does not have an absolute right to be paid*. However, *the fact that an event subsequent to the completion of a sale restores the ownership of the property involved to the vendor or adjusts the sale price does not alter the fact that the vendor was at a particular time entitled to the sale price and therefore disposed of the property for tax purposes at that time*. Similarly, the fact that a contract of sale is subject to ratification is of no consequence in determining a date of disposition unless it is made a condition precedent of the agreement.
>
> 6. A "condition precedent" ["condition suspensive" in the French version] is an event (beyond the direct control of the vendor) that suspends completion of the contract until the condition is met or waived and that could cancel the contract "ab initio" if it is not met or waived [emphasis added].

The department takes the position that in the case of a suspensive condition, there is no disposition until the condition is fulfilled. In the case of a resolutory condition, there is an immediate disposition that is not retroactively cancelled if the condition is fulfilled. It is obvious from the English version of the bulletin that when it refers to a "condition suspensive" in the French version, it is actually contemplating a common law condition precedent.

The bulletin does not mention the retroactive effect of a fulfilled suspensive condition. However, it seems to imply that if the suspensive condition is not fulfilled, there will be no tax consequences because the contract will be cancelled ab initio.

With respect to resolutory conditions, the comments in paragraph 19 of the same bulletin are relevant:

> 19. Many agreements contemplate the reacquisition by the vendor of property that has been sold upon the happening of a specified event, the failure of a specified event to occur or a specified default of the purchaser. Where a reacquisition of beneficial ownership occurs by reason of the purchaser's failure to pay all or any part of an amount owing, section 79 provides rules to determine the tax consequences for both vendor and purchaser. Although the Act provides no specific rules

> where reacquisition occurs in situations to which section 79 does not apply, *it is clear that such an occurrence does not retroactively nullify the effects of the original disposition for income tax purposes even if the agreement restores the vendor and purchaser to their relative positions before the sale took place* [emphasis added].

At the time, therefore, the department did not recognize the retroactive effect of a resolutory condition.

At the 1981 conference of the Association québécoise de planification fiscale et successorale ("the AQPFS"), representatives of the department were asked the following question:

> [TRANSLATION] QUESTION 17: TIME OF DISPOSITION OF PROPERTY
> The time of disposition of property by a taxpayer is an important factor in calculating capital gain and recapture of capital cost allowance. For the purchaser, whether CCA can be claimed in respect of the property depends on the time of disposition. The word "disposition" is not defined in the *Income Tax Act*. However, certain specific situations are included in this expression by subsection 54(c) I.T.A. Given the relative silence of Parliament, there may be circumstances in which the time of disposition is subject to interpretation. This is the case where there has been an assignment of the incidents of title (possession, use, risk) of a property, but the transfer of ownership is suspended pending the fulfillment of a condition. When can one say that the disposition of the property occurs in such a case?
>
> The Department's position
> It is the Department's view that, for tax purposes, and thus for the purposes of section 54 of the Act, the sale price of a property must only be taken into consideration when the vendor has acquired the absolute right to be paid. *So long as a suspensive condition* ["condition suspensive" in the original French version] *has not been met, the seller does not have the absolute right to be paid even if the purchaser has taken possession of the property* [emphasis added].[301]

Thus, the department took an unequivocal position: where a suspensive condition exists in civil law, the disposition does not occur before the condition is fulfilled. The department did not express an opinion on the issue of the retroactivity once a condition has been fulfilled, although the answer given implies that it will not be taken into account.

At the 1981 annual conference of the Canadian Tax Foundation ("the CTF"), the department expressed its intention to apply the *Olympia & York* decision:

> Q. 54 Disposition
> . . .
> 2) Has the Department of National Revenue accepted that a disposition may take place when the attributes of ownership have been transferred (possession, use and risk) even though legal title may not have been transferred? In this regard, will the Department apply *Olympia & York Developments Ltd. v. The Queen*? . . .

2) Generally, if all the incidents of ownership, that is, possession, use, and risk, are given up and the taxpayer becomes entitled to proceeds of disposition, it is the Department's view that a disposition has taken place whether or not legal title has been transferred. The *Olympia & York* decision supports us in this regard.[302]

At a round table held at the 1983 AQPFS annual conference, the department was asked the following question:

[TRANSLATION] QUESTION 3: DISPOSITION WITH A SUSPENSIVE OR RESOLUTORY CONDITION

Where a sale is made subject to a resolutory condition, the seller delivers title and possession of the sold property to the buyer. However, if the condition provided for in the contract of sale is fulfilled, the Civil Code of the Province of Quebec provides that the sale is deemed never to have occurred.

A sale can also be made subject to a suspensive condition. In such a case, ownership remains in the hands of the seller until such time as the condition is fulfilled and the buyer may or may not be given possession. However, when this condition is fulfilled, the buyer is deemed to have been owner of the thing sold since the date the contract of sale was signed, not the date the condition was fulfilled. For income tax purposes, could you confirm that no disposition is deemed to have occurred further to a sale with a resolutory condition if this condition is fulfilled? Similarly, could you confirm, for income tax purposes, that a disposition, further to a sale with a suspensive condition, is considered to have occurred when the contract of sale is signed, and not when the condition is fulfilled?

POSITION OF REVENUE CANADA TAXATION

The tax consequences of the fulfillment of a condition attached to a suspensive or resolutory clause will depend on the specific facts and circumstances of each situation.

First, it is important to stress that suspensive or resolutory conditions only have an effect on the contract of sale, and therefore do not apply to the events occurring subsequent to the date of the contract of sale. Consequently, the fulfillment of these conditions will not, for purposes of the I.T.A., cancel the transactions or acts carried out by the parties to the contract between the date of signature and the date of fulfillment of the suspensive or resolutory condition.

As for the effect of the suspensive or resolutory conditions applying to the sale itself, the Department generally [applies] the following treatment, based on the circumstances.

In the case of a conditional sale where possession or enjoyment of the property is not transferred before the condition is fulfilled (condition "precedent" under customary law) the Department's position is that no sale has occurred so long as the condition has not been fulfilled.

In the case of a suspensive condition, i.e. one that must be fulfilled to confirm the sale, where there is transfer of possession and enjoyment, so that the purchaser obtains the "beneficial ownership" as soon as the contract is signed, the Department is of the opinion that the sale took place at that time whether or not the condition is fulfilled.

> However, where the seller reacquires property due to the fulfillment of a resolutory condition the effect of which is to cancel a sale when it is fulfilled, or due to a suspensive condition that is not fulfilled, the Department's position is that there has been a disposition to the seller under paragraph 54(c)(i). Although legally, the right of ownership may be cancelled retroactively, the seller's reacquisition of the "beneficial ownership" only occurs at that time. Consequently, there will be a disposition for purposes of the I.T.A. and section 79 may apply.[303]

The wording of the answer is very ambiguous: the department speaks of "condition precedent," "customary law," "suspensive conditions," and "beneficial ownership," without specifying whether it is referring to civil law or common law concepts. Since the question was posed at a conference of a Quebec association of tax specialists, the answer should apply to civil law.

My understanding of the administrative position stated at this round table is as follows. Where there is a suspensive condition in civil law and the buyer is taking immediate possession of the property, thereby obtaining "beneficial ownership," the department's position is that there has been a "sale," whether or not the condition is subsequently fulfilled. (It is difficult to assess whether the department is referring solely to the transfer of possession, or whether it requires that all the incidents of title be transferred. Since this position seems to be based on *Wardean Drilling*, it is likely that possession, use, and risk, at the very least, must have been transferred.)

With respect to conditions precedent, in common law, beneficial ownership cannot be transferred to the buyer as long as an unfulfilled true condition precedent exists.[304] Thus, in tax law, there cannot be a disposition before a condition precedent is fulfilled. The answer given at the round table confirms this position implicitly, without clearly articulating it.

Conversely, in a sale subject to a suspensive condition *without* immediate transfer of possession, the department's position is that the "sale" takes place only once the suspensive condition has been fulfilled. It should be noted that the retroactive effect of the suspensive condition in civil law is still not mentioned.

The department has therefore changed its position with respect to suspensive conditions: contrary to what was stated in 1981, it will take into account the transfer of possession (and possibly other incidents of title) to determine whether a sale subject to a suspensive condition gives rise to an immediate disposition. It appears that this change of position follows the decision of the Federal Court in *Olympia & York*.

It is also interesting to note that the department, at this round table, uses the term "sale" rather than "disposition"; the response explains the circumstances in which the department will consider that a "sale" has occurred. Thus, it seems that the tax authorities themselves are using the terms "sale" and "disposition" as synonyms. This interchange of terms supports my own position that disposition is tied to the transfer of ownership.

In addition, the response specifies that if the suspensive condition is not fulfilled where possession has been transferred to the buyer, or if the resolutory condition is fulfilled, the department considers the return of the property to the seller to be a second disposition for tax purposes, since there is a second transfer of beneficial ownership.

In 1987, at the CTF annual conference, the department was asked to comment on the following question:

> Q. 70 Transfer of Property: Timing of Income
> A taxpayer purchases the assets of a business from an arm's-length vendor and the completion of the transaction is conditional upon receipt of approval from Investment Canada. The purchaser and vendor agree that the transaction will be regarded as effective as at a previous date, and the profits from the operation of the business by the purchaser between that effective date and the date of completion will be regarded as profits of the purchaser.
>
> Does the department consider the reporting of such income by the purchaser appropriate for tax purposes, notwithstanding that the assets are not transferred until the date of completion?
>
> Department's Position
> As stated in paragraphs 5 and 6 of *Interpretation Bulletin* IT-170R, *where the transfer of property is subject to a true condition precedent* ["véritable condition suspensive" in the French version], *the disposition will not occur until the condition precedent* ["condition suspensive" in the French version] *is satisfied*. Accordingly, for the purposes of the Act, the transfer of the business will not occur until approval of Investment Canada is received. Any agreement between the taxpayer and the vendor purporting to give retroactive effect to the transfer is not effective for tax purposes. *Any income from the operation of the business prior to the transfer will be income of the vendor* [emphasis added].[305]

At first glance, the department seems to be returning to its previous position, as expressed in 1981 at the AQPFS conference, according to which a suspensive condition in civil law does not give rise to a disposition before its fulfillment, independently of the transfer of possession. However, it appears that the department's response pertained only to conditions precedent in common law.[306] There are two reasons for this supposition.

First, this response was given at a conference of the Canadian Tax Foundation, a Canada-wide association. Further, the English version of the response uses the term "true condition precedent,"[307] which, as discussed previously, prevents disposition so long as it is not fulfilled, since it is impossible to transfer beneficial ownership.

Second, the question mentioned that "the assets are not transferred until the date of completion"—a reference to the closing date. Thus, this question did not refer to suspensive conditions in civil law where possession is transferred immediately, nor did it refer to the question whether suspensive conditions are retro-

active. Rather, the gist of the question is whether the department would recognize the effective date of the transaction agreed upon by the parties. I shall return to this issue later.

At the 1989 conference of the Association de planification fiscale et financière ("the APFF"), the following question was asked during a round table discussion:

> [TRANSLATION] 1.29.—SALE SUBJECT TO A SUSPENSIVE CONDITION
> According to civil law, a taxpayer who sells immovable property subject to a suspensive condition (for example, by retaining ownership until the full payment of the price) remains the owner of the property. In the event of the non-fulfillment of the condition, the obligations of the parties to each other are cancelled. From a taxation point of view, Revenue Canada will treat a sale subject to a suspensive condition like a disposition.
>
> Consider the case where a Quebec taxpayer makes such a sale in consideration for a balance of sale price, payable over five years. Following a default in payment in the first year, the taxpayer retakes possession of the property. The taxpayer had claimed a reserve under subparagraph 40(1)(a)(iii) of the *Income Tax Act* (the Act) for the taxation year of the sale.
>
> In circumstances such as these, is it the policy of Revenue Canada to apply section 79 of the Act, even if, in civil law, the Quebec taxpayer has not acquired or reacquired the "beneficial ownership" or the ownership of the immovable following a default in payment?
>
> Response of Revenue Canada
> The Department's view is that such a sale subject to a suspensive condition is a disposition for the purposes of the Act.
>
> *If the property is returned* following a default in payment, *the Department considers that there has been a second disposition for the purposes of the Act*, and that section 79 of this Act may be applicable.
>
> We refer you in this respect to the responses given at the 1981 CTF round table discussions (Q. 54(2)) and the 1983 AQPFS conference (Q. 3) [emphasis added].[308]

Thus, the department reiterated the position it had articulated at the 1983 AQPFS conference: there is a disposition at the time possession is transferred even if the suspensive condition is not fulfilled, and a second disposition occurs when the property is returned to the seller if the condition fails.

This time, the question asked during the APFF conference clearly contemplated Quebec civil law. In addition, it implied that there had been a transfer of possession to the buyer *pendente conditione*. It should be noted, however, that this question concerned an instalment sale, not a true suspensive condition. *Venne* had probably not yet been decided at the time.

The department confirmed its position on resolutory conditions in a 1989 technical interpretation, in the context of a sale with a right of redemption. A second disposition occurs when the right of redemption is exercised, even if in civil law the sale is retroactively cancelled.[309]

In 1991, in response to a question asked during the round table at the CTF annual conference, the department once again took the position adopted in 1987 regarding the contractual effective date of a transaction. The French and English versions of the question and response are reproduced below:

> Q. 41 Répartition du revenu lorsqu'une condition suspensive existe
> En réponse à la question 70 de la table ronde de 1987, le Ministère a déclaré que, lorsqu'un bien est vendu, les revenus qui proviennent du bien entre la date de signature de l'offre de vente et d'achat et la date de transfert de la propriété appartiennent au vendeur s'il existe une condition suspensive. Si le vendeur et l'acheteur concluent une entente exécutoire par laquelle le vendeur est constitué agent de l'acheteur pour la période concernée, le revenu appartiendra-t-il à l'acheteur? La réponse serait-elle la même s'il n'existait aucune condition suspensive?
>
> Position du Ministère
> La position du Ministère demeure la même que celle donnée en 1987. Puisque *la disposition n'a pas lieu, aux fins de l'impôt, tant que la condition suspensive n'est pas remplie*, tout revenu que le bien génère avant le transfert n'appartiendra pas à l'acheteur, malgré l'existence d'une entente par laquelle le vendeur est constitué agent de l'acheteur pour la période concernée. Aucune convention visant à donner au transfert un effet rétroactif n'est valable aux fins de l'impôt. *La date de disposition d'un bien vendu est la date où la propriété effective du bien doit passer à l'acheteur et le moment où le vendeur a un droit absolu, quoique pas nécessairement immédiat, de se faire payer.*
>
> Pourvu que le vendeur ait droit à son paiement et que la propriété effective ait été transférée, tout revenu que le bien produit entre la date de signature de l'offre de vente et d'achat et la date de transfert de la propriété doivent être reconnus par l'acheteur.[310]
>
> Q. 41 Allocation of Income Where a Condition Precedent Exists
> The department stated in question 70 of the 1987 round table that, in a property sale, income arising between the effective date and the closing date belongs to the vendor where a condition precedent exists. If the vendor and purchaser enter into a legally binding agreement that appoints the vendor as the purchaser's agent for this period, will the income belong to the purchaser? Would the answer be the same if no condition precedent existed?
>
> Department's Position
> The department's position remains as stated in the response given in 1987. As *the disposition will not occur for tax purposes until the condition precedent is satisfied*, any income arising before the transfer will not belong to the purchaser regardless of an agreement appointing the vendor as the purchaser's agent for this period. Any agreement purporting to give retroactive effect to the transfer is not effective for tax purposes. *The date of disposition of property sold is the date on which beneficial ownership is intended to pass to the purchaser and the time at which the vendor has an absolute but not necessarily immediate right to be paid.*

> Provided that the vendor is entitled to payment and beneficial ownership has been transferred, any income earned in the period between the effective date and the closing date must be recognized by the purchaser [emphasis added].[311]

The department's response, particularly in the French version, which uses the term "condition suspensive," suggests that where there is a suspensive condition, a transfer of beneficial ownership alone will not lead to a disposition; the seller must also have an absolute right to the sale price—that is, the suspensive condition must be fulfilled.

This statement appears to contradict the 1983 position, reiterated in 1989, pertaining to suspensive conditions in civil law where possession is immediately transferred to the buyer. However, in my view, the department's response contemplated only the case of conditions precedent in common law, as it did at the 1987 CTF conference. The English version supports this view, since it uses the term "condition precedent" rather than "suspensive condition."

Furthermore, since beneficial ownership cannot be transferred in common law until the condition precedent is fulfilled, it seems obvious that those two events must occur before a disposition can take place. The department simply wanted to remind us that in order for there to be a disposition, it is not enough that the condition precedent be fulfilled; beneficial ownership must also be transferred, either at the same time or subsequently, as implied in paragraph (e) of the definition of "disposition" in ITA subsection 248(1).

Practitioners would nonetheless find it helpful if the CCRA could clarify its position as to whether it contemplates civil law suspensive conditions or common law conditions precedent, and whether these two concepts are to be treated differently in tax law.

Recently, at the 1998 APFF conference, both the Department of National Revenue and the Department of Finance were asked the following question. The responses are interesting.

> EFFECT OF RESOLUTORY AND SUSPENSIVE CLAUSES
>
> Property transfers are subject to the principles of civil law and tax law. It has been established that the principles of tax law are subordinate to those of civil law (Perron v. MNR (1960) 25 TAX A.B.C. 166).
>
> Articles 1507 and 1750 of the Quebec Civil Code set out the rules governing contracts containing suspensive conditions and resolutory conditions. A suspensive condition can be defined as a condition which suspends "the effects of the contract" while a resolutory condition can be defined as a condition which suspends the "cancellation of the contract." This resolutory condition, when satisfied, cancels the sale retroactively.
>
> From a tax standpoint, the sale produces its full effects as soon as it is concluded and the vendor is immediately entitled to the sale price. Hence, disposition occurs at that moment. In the event that the transaction is not completed by reason of a resolutory condition, Revenu Québec recognizes the retroactivity from a tax standpoint and does not apply sections 484 to 484.13 of the Quebec Taxation Act.

According to paragraphs 5 and 17 of Interpretation Bulletin IT-170R, Revenue Canada does not recognize the retroactivity of the cancellation from a tax standpoint and applies sections 79 and 79.1 ITA depending on the case.

Does the Department of Finance of Canada recognize this position? Is it willing to review it in light of the rules of the Quebec Civil Code?

Does Revenue Canada still maintain this position? Is it willing to review it in view of the Quebec Civil Code which governs transactions effected in Quebec?

REVENUE CANADA'S REPLY

There are two legal principles which are in conflict in this question. As you point out, tax law applies to the effects produced by civil law. *However, the Department must, in computing the taxes payable for a taxation year, operate on the basis of the facts as they exist at the end of a taxation year.*

In our opinion, recognition of the retroactive effect of the cancellation of a sale is not compatible with the Act read as a whole. *The Act is not designed to allow the application of new facts that occur during a taxation year to a prior taxation year. To this end, it does not allow reassessments in respect of statute-barred taxation years* in order to apply retroactivity.

Moreover, in Clément Alepin (79 DTC 5259) and Michel Larose (92 DTC 2045), the courts refused to apply, for the purposes of the Act, the retroactivity provided for in civil law. In these two cases, the honourable justices stressed that the rights of the Department could not be affected following the cancellation of sale contracts.

DEPARTMENT OF FINANCE REPLY

The Department of Finance agrees that the tax legislation must take the relevant provincial law into account. However, certain basic principles of tax law, such as those applicable to retroactivity, may not be entirely compatible with certain effects of provincial law. This is also the case of partnerships, which, regardless of their attributes, rights and obligations under provincial law, are generally not recognized in tax law.

We wish to examine the analysis of Revenue Canada, Revenu Québec and Justice Canada on this question in greater detail before concluding that Revenue Canada's position is not appropriate in the circumstances. *However, we share Revenue Canada's concerns about certain practical aspects, such as the restrictions imposed in the case of statute-barred years* [emphasis added].[312]

It is clear that the primary concern of both departments, with respect to retroactivity of conditional obligations, is the difficulty of amending tax returns filed in previous years in order to take into account a retroactive effect caused by an event in a subsequent year. This concern applies mainly to statute-barred years.

With regard to *Alepin* and *Larose*, I have already expressed my reservations concerning the general application of these decisions.

To conclude, the current position of the CCRA on civil law conditional obligations can be summarized as follows:

- With regard to a sale, a disposition occurs at the time the seller has an absolute, but not necessarily immediate, right to the sale price.

- When a sale is subject to a suspensive condition *with* immediate transfer of possession to the buyer, the disposition occurs as soon as possession is transferred.
- In such a case, there are no tax consequences once the condition is fulfilled because the disposition has already occurred. If the condition fails and the seller takes back the property, there will be a second disposition for tax purposes.
- When a sale is subject to a suspensive condition *without* immediate transfer of possession to the buyer, the disposition occurs only when the condition is fulfilled. There will be no retroactivity to the day the contract was signed.
- If possession is not transferred and the suspensive condition fails, there is no disposition for tax purposes.
- In the case of a sale subject to a resolutory condition, a disposition occurs as soon as the contract is signed. If the condition is fulfilled, there is a second disposition in favour of the seller. The first disposition will not be cancelled as a result of the retroactivity.

Contractual Retroactivity

The issue with respect to contractual retroactivity is whether the date of entitlement agreed upon by the parties applies for tax law purposes. IT-170R adopted a somewhat liberal position on contractual retroactivity:

> 7. Formal agreements of purchase and sale are frequently explicit as to the date of exchange and, unless circumstances indicate that a specified date was changed or was not the true intent of both parties, the date so specified is presumed to be the date of entitlement.[313]

However, the position expressed in the bulletin was contradicted by the position set out at the 1987 CTF conference[314] and reiterated at the 1991 CTF conference.[315] The latter states that any business income earned by the property (or business) before the closing date will be attributed to the seller, unless the seller had an absolute right to the sale price (that is, there is no condition precedent) and beneficial ownership was transferred.

The department indicated in 1994 that in certain situations, a disposition could occur at a date before the closing date if all the parties to the contract agreed and if the use of that effective date did not result in a significant tax benefit:

> You have described a hypothetical situation wherein:
>
> - the purchase and sale agreement stipulates both an effective and a closing date;
> - the terms of the agreement are such that *the beneficial ownership and assumption of liabilities relating to these properties pass to the purchaser on the effective date*, except for a few minor liabilities, which pass on the closing date; and

> • *there are no conditions precedent* to be met under the purchase and sale agreement and all that is required prior to closing is the usual due diligence and completion of appropriate documentation. . . .
>
> In this situation, *the transfer is not legally effective until the closing date*, and the vendor is legally liable to report the income between the effective date and the closing date. However, there have been instances where the Department has administratively accepted that the transfer occurred on the effective date where:
>
> • both parties to the transaction agree that the effective date should be used;
> • no significant tax benefit arises from the use of this date [emphasis added].[316]

This technical interpretation seems, not to increase the number of cases in which the department will recognize that the contract took effect at a date agreed upon by the parties, but rather to impose additional conditions. The department had already conceded, at the 1987 CTF conference, that the income could be attributed to the buyer at the time the seller had an absolute right to the sale price and there was a transfer of beneficial ownership. Here, the department not only reiterated these two conditions but added two new ones—namely, that the parties to the transaction agreed to use the effective date (a requirement that seems self-evident in the case of a contract), and that this arrangement did not create a tax benefit. In my view, the second requirement appears to have no basis in law.

In fact, the CCRA's position on the application of a contractual effective date to tax matters is not well founded, in light of the jurisprudence analyzed earlier in this paper. In effect, if the parties can prove that they had agreed on the essential elements of the contract on the date in question, the contract became valid as of that moment and the subsequent agreement only serves to confirm it.

ITA Paragraph 248(3)(f)

As discussed previously, Parliament enacted ITA subsection 248(3) in order to deem certain civil law concepts to be equivalent to beneficial ownership in common law. In *Construction Bérou*, the majority at the Federal Court of Appeal interpreted this subsection as including in the concept of beneficial ownership, for the purposes of its application in Quebec, the incidents of title such as possession, use, and risk.

The CCRA, however, maintains that the court's interpretation in *Construction Bérou* applies only to the former version of ITA subsection 248(3), on which the court commented, and which is different from the amended version, effective since 1991. The CCRA expresses its opinion as follows:

> [TRANSLATION] We believe that, although the wording of paragraph 248(3)(f) is essentially similar to the Act at that time, it is now different, and cannot be interpreted to mean that the incidents of title, such as possession, use and risk, can give rise to a right of ownership. On the contrary, the current version of paragraph 248(3)(f) states that *a person must first have the full ownership of the property before that person is deemed to hold the "beneficial ownership" for the purposes of the Act. . . .*

> The Agency is therefore of the view that the decision of the Federal Court of Appeal in *Construction Bérou Inc.* can be limited to similar cases that arose in tax years prior to 1991, to comply with the court's interpretation of subsection 248(3) as it was previously worded [emphasis added].[317]

Therefore, according to the CCRA, paragraph 248(3)(f) could not support the view that a transfer of "beneficial ownership" could occur, in Quebec, without a transfer of legal ownership; "beneficial ownership" would be limited to the concepts listed in the provision—namely, ownership, the rights of a lessee under an emphyteutic lease, and the rights of a beneficiary of a trust.

I agree with this interpretation of ITA paragraph 248(3)(f), but I do not believe that the situation changed following the 1991 statutory amendments. Rather, it seems that the CCRA did not agree with the decision of the majority of the Federal Court of Appeal in *Construction Bérou* and is trying to avoid its application by introducing subtle distinctions.

Conditional Obligations in Quebec Tax Law

Although this paper is concerned with the harmonization of the Income Tax Act with the Civil Code of Quebec, it is interesting, for the purposes of comparison, to analyze the treatment accorded to conditional obligations by Quebec tax law and by the Ministère du Revenu du Québec.

The relevant provisions of the Taxation Act[318] and the Regulation Respecting the Taxation Act[319] are as follows:

> 248. 1) Disposition of property.—For the purposes of this title, the disposition of property includes, except as expressly otherwise provided:
>
> a) any transaction or event entitling to proceeds of disposition of property; . . .
>
> 2) Restriction.—A disposition of property does not include however: . . .
>
> d) any other transaction provided in the regulations.

> 248R1. For the purposes of section 248 of the Act, any transfer of a property governed by a common law jurisdiction which does not entail a change in the beneficial ownership thereof is not a disposition of property.
>
> Similarly, any transfer of a property governed by civil law which does not entail a change in the right of the person who has the full ownership thereof, although such property be subject to a servitude, or in the right of the usufructuary, the emphyteutic lessee, an institute in a substitution or a beneficiary in a trust, is not a disposition of property.

> 251. Proceeds of disposition of property.
>
> The proceeds of disposition of property include, for the purposes of this Title, the same elements as the proceeds of disposition of property referred to in paragraph f of section 93.

> 93. f) "proceeds of disposition."—"proceeds of disposition" of property includes:
>
> i. the sale price of property disposed of.

Apart from a few minor differences, the provisions of the TA are very similar to those found in the ITA. One of the differences is the use of the term "aliénation," found only in the French version, rather than "disposition." Like the definition of "disposition" in the ITA, the definition of "disposition" ("aliénation") in the TA is not exhaustive, and it is necessary to refer to its everyday meaning to define the term:

> [TRANSLATION] Since the term "aliénation" is not defined in the Act, we should apply the general meaning of the word given by Le Petit Robert: "[TRANSLATION] the transfer by a person of a property or a right, whether by onerous title or gratuitously."[320]

Given the definition found in the TA, it is clear that a sale constitutes a disposition:

> [TRANSLATION] It is surprising to find that a detailed section like section 248 TA, whose role is to define the disposition of property for the purposes of Title IV of the Act, does not allude to the concept of sale. This section provides, however, that the disposition of property includes a transaction or event that triggers entitlement to the sale price of the property disposed of. This is the obvious conclusion when subparagraph 248(1)(a), section 251 and subparagraph 93(f)(i) TA are read together.
>
> For the purposes of both the *Income Tax Act* and the *Taxation Act*, *it is necessary to refer to the Civil Code of Quebec to determine what constitutes a sale and at what moment the right to the sale price arises* [emphasis added].[321]

Furthermore, regulation 248R1 contains one specific rule for property governed by common law and another rule for property governed by the Civil Code. In effect, the expression "beneficial ownership"[322] is used for property governed by common law; however, for property governed by civil law, the relevant concepts are full ownership, usufruct, emphyteutic lessee, institute in substitution, and beneficiary in a trust. These concepts are essentially the same as those found in ITA paragraph 248(3)(f).

ITA sections 79 and 79.1 also have an equivalent under the TA: sections 484 et seq. TA section 484.1, which corresponds to ITA subsection 79(2), reads as follows:

> 484.1 Surrender of property—For the purposes of this subdivision, a property is surrendered at any time by a person to another person where the *beneficial ownership* of the property is acquired or reacquired at that time from the person by the other person and the acquisition or reacquisition of the property was in consequence of the person's failure to pay all or part of one or more specified amounts of a debt owed by the person to the other person immediately before that time [emphasis added].

This section generally applies to property acquired or reacquired after February 21, 1994.[323] Before that amendment, section 484 provided as follows:

> 484. Where a creditor has acquired or reacquired, at any time in a taxation year, the *possession as proprietor or full ownership* of property in consequence of the debtor's

> total or partial failure to pay the creditor's claim, the following rules apply [emphasis added].

Does replacing the expression "the possession as proprietor or full ownership" with "beneficial ownership" change the meaning of this provision? The term "beneficial ownership" is not defined in the TA.

An authorized representative of the Ministère du Revenu du Québec has confirmed that the administrative policy regarding the application of sections 484 et seq. remained unchanged after the expression "beneficial ownership" was introduced in 1994. This leads us to believe that the new expression reflects the same reality as the prior expression, "possession as proprietor or full ownership."

Interpretation Bulletin IMP. 484-2/R1 sets out the position of the Ministère du Revenu du Québec on the effects of resolution of a contract:

> 4. Where dissolution ["résolution" in the French version] is involved, section 484 of the *Taxation Act* (the "Act") is not applicable since the creditor has not acquired or reacquired the possession as proprietor or the full ownership of property. Indeed, his demand for *dissolution leads to annulment of the contract with respect to both the past and the future, such that he is deemed never to have ceased to be the owner of the property*. . . .
>
> 6. Moreover, *the seller may be reimbursed for the tax paid* in respect of the capital gain or the income from a business, as the case may be, or in respect of the recaptured depreciation relating to the sale. As opposed to this, if the sale allowed him rather to deduct a terminal loss, he must pay the tax in respect of this deduction for the taxation year of the sale.
>
> Where the seller has financed, in whole or in part, the payment of the sale price, he cannot be reimbursed for the tax paid in respect of the interest paid by the purchaser though. Indeed, dissolution of the sale leads to resiliation of the loan contract; i.e., it is annulled for the future only.
>
> 7. In order to obtain the reimbursement of the tax paid on income which, owing to the dissolution, is deemed never to have been earned, the seller must file a modified fiscal return. The current version of bulletin IMP 1010-2 provides for the possibility of a reassessment by the Ministère where prescription is acquired. This bulletin should be consulted in such cases.
>
> 8. *The Ministère du Revenu, though, considers that the income earned from property acquired by the purchaser, throughout the period it was in his possession, remains the purchaser's.*
>
> In addition, *the Ministère will not disallow the capital cost allowance claimed by the purchaser, in the years the property was in his possession*, when computing his income in respect of depreciable property, to the extent that the deduction does not exceed the amount prescribed by the *Regulation respecting the Taxation Act*.
>
> 9. The capital cost or the adjusted cost base of the property subject to dissolution is equal to what that capital cost or the adjusted cost base would be immediately before the sale as if the disposition had never taken place [emphasis added].[324]

Thus, the Ministère du Revenu du Québec recognizes the retroactive effect of resolution, whether it stems from a resolutory condition or from another cause of resolution contemplated in the Civil Code. Since the sale is deemed never to have taken place, the seller is considered never to have disposed of the ownership of the property. He may therefore recover the income tax paid on the capital gain, the business income, or the recaptured depreciation. He may produce an amended return to claim the refund of the income tax paid, even if the taxation year in question is statute-barred.

Not all of the effects of retroactivity are produced, however: if the buyer had possession of the property *pendente conditione*, it is he who must pay tax on the income earned during that period, and he who may claim capital cost allowance. Consequently, the seller is not entitled to retroactively claim capital cost allowance for the period during which he is deemed to have been the owner while the buyer had possession of the property.

This position is consistent with civil law, which recognizes that "[t]he fruits and revenues of the property being restored belong to the person who is bound to make restitution."[325] As for depreciation, although it is more difficult to justify the fact that the buyer is entitled to the deduction, this solution seems to be based on considerations of equity. Indeed, since the buyer retains the income and pays the tax on this income, it is logical that he should be allowed to claim capital cost allowance.

With respect to suspensive conditions, an authorized representative of the Ministère du Revenu du Québec has confirmed that the administrative position applied to resolutory conditions applies, mutatis mutandis, to suspensive conditions.

Other Quebec statutes relating to the tax consequences of the retroactivity of conditional obligations also should be examined. For example, the Act Respecting Duties on Transfers of Immovables[326] provides for duties collected by municipalities on transfers of immovables. The definition of the term "transfer" found in section 1 of that Act refers, inter alia, to the transfer of the right of ownership of a property. A nearly identical definition is found in section 1 of the Land Transfer Duties Act.[327] The Ministère du Revenu du Québec has stated its position on the application of the latter Act in cases where the right of redemption was exercised further to the sale of an immovable by a municipality for unpaid taxes:

> 2. Pursuant to section 532 of the *Cities and Towns Act* (RSQ, chapter C-19), the registration of an authentic copy of a deed before a notary establishing the reimbursement of the monies and the redemption of the immoveable restores to the transferee the right of ownership of the immoveable possessed by him at the time of sale.
>
> 3. Therefore, following sale of an immoveable for non-payment of taxes, the land shall only belong to the purchaser when the time limit within which the owner may redeem the immoveable has expired. If, within this time limit, the owner recovers the immoveable through the exercise of his right of redemption, his right of ownership shall be restored in the state in which it was at the time of sale.

> 4. The purchaser who becomes the owner of land following a municipal sale for unpaid taxes *does so subject to its being redeemed. If the owner exercises his right to rescind the sale by redeeming, the redemption of the immoveable shall restore to the owner exactly the same ownership right he possessed at the time of sale*.
>
> 5. . . . Hence, exercise of the right of redemption does not constitute a transfer within the meaning of the *Land Transfer Duties Act since it does not lead to a transfer of rights between the transferor and the transferee* [emphasis added].[328]

One may therefore conclude that in the case of a resolutory condition, the fulfillment of the condition produces its retroactive effects in regard to transfer duties under both the Land Transfer Duties Act and the Act Respecting Duties on Transfers of Immovables. According to Marie-Pier Cajolet, not only would the deed of retrocession not be governed by these Acts, but the annulment of the original deed of sale would create an obligation for the municipality to refund the transfer duties previously collected.[329]

With respect to sales taxes, pursuant to the federal Excise Tax Act[330] and the Act Respecting the Québec Sales Tax,[331] the event that gives rise to tax is a "taxable supply." The term "supply" is defined in both statutes as "the provision of property or a service in any manner, including sale."[332] The French version of the AQST uses the term "délivrance" to translate "provision," while the French version of the ETA uses "livraison."[333] Yet, both "délivrance" and "livraison" imply the idea of possession, and would be better translated by "delivery." Thus, one might be tempted to believe that the retroactivity of conditional obligations has no impact on the goods and services tax or the Quebec sales tax (QST), since retroactivity cannot nullify the possession or delivery of property.[334] Nonetheless, the Ministère du Revenu du Québec appears to recognize the retroactivity of resolutory conditions in the context of the application of QST:

> [TRANSLATION] However, *if the contract as a whole constitutes a sale with right of redemption, then the transactions conducted by B to A will not be construed as taxable supplies in view of the retroactive effect of this sale*. . . .
>
> Under article 1750 of the *Civil Code of Quebec*, a sale with right of redemption *is a sale under a resolutory condition* by which the seller transfers ownership of property to the buyer while reserving the right to redeem it [emphasis added].[335]

The opinion concerns a sale with a right of redemption, but since such a transaction is a sale under a resolutory condition,[336] one can reasonably infer that the opinion would apply to any resolutory condition.

Finally, it should be noted that the retroactivity of a resolutory condition is not always recognized for purposes of computing paid-up capital in respect of the tax on capital under part IV of the TA. In one particular case, the Ministère du Revenu stated that position,[337] based on TA section 1131, which provides that the tax payable on capital in a taxation year is tied to the paid-up capital shown in the financial statements of the corporation for the year. In this case, generally accepted accounting principles did not allow for the financial statements to be amended

and resubmitted to the shareholders for the prior years affected by the retroactivity of the transaction in question.

THE TAX TREATMENT OF CONDITIONAL OBLIGATIONS: A CRITICAL ANALYSIS

The foregoing discussion has explained the current state of the law on conditional obligations, in civil law, in common law, and in tax law. This final section of the paper presents a critical analysis of the ITA, the case law, and the CCRA's administrative position, in order to determine whether tax law conflicts with civil law in the treatment of retroactivity of conditional obligations.

Following that analysis, I will suggest some possible solutions and offer proposals for amendment of the legislation.

Conflicts Between Federal Tax Law and Civil Law

Suspensive Conditions

The CCRA's position on suspensive conditions distinguishes between situations in which possession and enjoyment of the property have been transferred to the buyer *pendente conditione* and situations in which they have not.

Without Transfer of Possession

Where there is no transfer of possession, the CCRA considers that there is no disposition until the condition is fulfilled because until that moment, the seller does not have an absolute right to the sale price.

This position is based on the criteria established by the Exchequer Court in *Victory Hotels*, according to which, in the case of a sale, a disposition occurs at the time the seller has the right to the sale price.

With respect to the period before fulfillment of the condition, this solution is consistent with civil law: since the obligation has not yet come into existence, there is no transfer of ownership. Similarly, if the condition fails, there are no consequences either in civil law or in tax law.

The situation obviously becomes more complicated where the condition is fulfilled. The CCRA's position in this situation is that the disposition occurs at the moment the condition is fulfilled. Yet, the transfer of ownership is deemed to have occurred when the contract was signed, owing to the retroactive effect of the suspensive condition under the Civil Code. Since the tax authorities do not recognize this retroactive effect, a conflict arises with civil law.

The CCRA's position creates difficulties for the taxpayer, particularly with respect to tax planning. If the retroactivity of the condition is not recognized, the transaction is subject to any legislative amendments that might be introduced *pendente conditione*. Thus, planning for the tax consequences of any transaction is encumbered by uncertainty. For example, consider a sale of qualified small business corporation shares under a suspensive condition. If the capital gains exemption

were to be abolished, or if the company no longer qualified as a small business corporation before the condition was fulfilled, the seller would no longer be entitled to the exemption, and the tax consequences could be disastrous.

In my view, however, the CCRA's position is not well founded in the current law, because it relies on erroneous judicial applications of the test in *Wardean Drilling*, particularly the decision in *Olympia & York*. As discussed earlier, the current provisions of the ITA do not specifically set aside the retroactive effect of suspensive conditions. Because of the accessory nature of tax law in relation to private law, and because of the principle of complementarity of provincial private law, it is necessary to have recourse to civil law in order to interpret and complete the meaning of "disposition" as it is to be applied for purposes of the Act.

The Supreme Court, in *Compagnie Immobilière BCN*,[338] implicitly recognized that the civil law concept of disposition refers to the moment at which *ownership* is transferred. Transfer of ownership, under the Civil Code, is deemed to take place when the contract is concluded; therefore, a disposition for tax purposes should occur at the same moment.

Interestingly, disposition in common law is also dependent on the concept of ownership or title. Common law recognizes the division of ownership between a beneficial owner and a legal owner, and for this reason, in common law, it can be argued that a disposition takes place when there is a transfer of beneficial ownership. I agree with Noël JA's statement in *Construction Bérou* that *Wardean Drilling* did not set aside provincial private law in cases where the definition of "disposition" is to be applied to tax matters. On the contrary, Cattanach J simply applied the applicable provincial private law—that is, the common law.

My position does not necessarily contradict *Victory Hotels*. In *Victory Hotels*, the Exchequer Court recognized that the definition of "disposition" in the ITA is not altogether complete, but then it appears to have narrowed the concept, in the case of a sale, to the point at which the seller is entitled to the sale price. This conclusion was based on the fact that the definition of "disposition of property" includes an event that entitles the taxpayer to the "proceeds of disposition" of property, which definition itself includes the sale price of the property sold.

Yet, these definitions do not mean that, in the case of a sale, a disposition takes place *only* when the seller is entitled to the sale price. This event is simply included as one of several that come within the concept of disposition; that is, there is a disposition, inter alia, when the seller is entitled to the sale price. There can be a disposition *before* the seller is entitled to the sale price, but not *afterward*. In fact, the admittedly ambiguous excerpt from *Victory Hotels* arguably supports this interpretation:

> These sections do not define but merely *include* as a disposition of property a transaction (a sale for instance) entitling a taxpayer to proceeds of disposition of property, i.e. to the sale price of the property sold. It would indeed appear that the meaning of "disposition of property" has been somewhat restricted by the Act when a disposal of property takes place by means of a sale; in such a case there is a

> disposal of property *as soon as* a taxpayer is entitled to the sale price of the property sold [emphasis added].[339]

In the case of a suspensive condition, the seller is entitled to the sale price only when the condition is fulfilled. As a result of retroactivity, the transfer of ownership occurs *before* the seller is entitled to the sale price; thus, it is not logically inconsistent to argue that a disposition occurs at the time ownership is transferred.

The Supreme Court[340] and lower federal courts[341] have recognized the applicability in tax matters of the retroactivity provided for by provincial statutes. In my view, these decisions are well founded in law because tax law must recognize the legal consequences of contracts imposed by provincial law. This principle was recently reiterated by the Supreme Court in *Shell Canada*.[342]

In my view, the argument that the retroactive effect of the suspensive condition in civil law applies only to matters of law and not to matters of fact does not preclude the application of retroactivity in tax cases.[343] My position is that disposition is a legal concept that refers, in the case of a sale, to the transfer of ownership. It cannot be assimilated with real, indisputable, and irreversible facts that are immune to retroactivity, such as the collection of fruits, the enjoyment of the property, or acts of administration performed. On the contrary, it appears that since retroactivity applies to a transfer of ownership, it should also apply to a disposition, because these two concepts are linked.

In addition, even if the *Wardean Drilling* test were applied in a civil law context, a disposition should be considered to have taken place at the time the contract was signed. In *Wardean Drilling*, the court held that a disposition occurs when ownership is transferred, or, *in the situation where the seller retains title as security for the sale price*, at the time of transfer of the incidents of title. Where a suspensive condition exists, ownership is not retained by the seller as security, as it is in the case of an instalment sale. It is then necessary to apply the first part of the test, which provides that a disposition occurs on the transfer of ownership, which, in civil law, is the time when the contract is signed, because of retroactivity.

One other argument might, however, be raised against this position. That argument flows from paragraph (e) of the definition of "disposition" in ITA subsection 248(1), which states that a transfer of property that does not result in a change in beneficial ownership does not constitute a disposition. In other words, despite the transfer of title at an earlier date, there will be no disposition until the time beneficial ownership is transferred. According to this argument, even where, as a result of the retroactivity of the condition, ownership was transferred when the contract was signed, no disposition will take place until the transfer of beneficial ownership—that is, until fulfillment of the condition.

Nonetheless, this argument can be rebutted, because ITA paragraph 248(3)(f) states that for the purposes of the application of the Act in Quebec, "beneficial ownership" specifically means ownership of property. Therefore, when ownership is transferred, the transfer of "beneficial ownership" takes place at the same time—that is, at the time determined in accordance with civil law.

With Transfer of Possession

Where a sale subject to a suspensive condition is accompanied by the immediate transfer of possession of the property to the buyer, the CCRA's position is that a disposition occurs within the meaning of the Act at the time possession is transferred.

This position is based on *Olympia & York*, where the Federal Court Trial Division held that there had been a disposition for tax purposes even though, in civil law, there had been no sale.[344] This decision was itself based on the criteria established in *Wardean Drilling*. As previously stated, in my view, *Olympia & York* is not well founded in law because it imported a common law precedent into civil law, which precedent, in addition, was based on a concept foreign to civil law—the division of ownership between the legal owner and the beneficial owner. Consequently, in my view, the CCRA's position equally is not well founded in law.

In civil law, the sale cannot take place until the suspensive condition is fulfilled, and the seller is not entitled to the sale price before the sale occurs. This rule is recognized by the CCRA where the suspensive condition is not accompanied by a transfer of possession, and there is no reason to treat the situation differently when possession is transferred *pendente conditione* to the buyer. Indeed, as previously explained, disposition in tax law is related to the transfer of ownership as determined by civil law; and the latter, contrary to common law, does not give the possessor of property any right of ownership.

Ironically, once the suspensive condition has been fulfilled, the CCRA's position produces the same result as that obtained by civil law: the disposition occurs at the time the contract was signed. This result is merely coincidental because it arises for different reasons: in civil law, the retroactivity of the condition causes ownership to be transferred when the contract was signed, while according to the CCRA's position, there is a disposition at that moment for tax purposes because possession, use, and risk are transferred.

When the suspensive condition fails, the CCRA takes the view that there is a second disposition, this time in favour of the seller. For the reasons just discussed, in my view, this position also is incorrect because, in civil law, ownership was never transferred. The seller is simply taking back the property, which he always owned. In this case, there is a conflict between tax law and civil law.

This conflict has significant tax consequences for the seller. If the CCRA's position is applied in the case of immovable property other than depreciable property, the seller will be taxed on the capital gain realized on "disposition," even if he was never entitled to the sale price. When he takes back the property, the adjusted cost base of the property will be increased to the amount of the sale price. This will result in an "involuntary crystallization" of the adjusted cost base of the property, which in many cases will not entitle the seller to the capital gains exemption.

Therefore, the seller must pay capital gains tax even though he still owns the property and does not have the money from the sale price with which to pay the tax. This is precisely the situation that the Supreme Court refused to allow in *Dominion Engineering*.

For the buyer of such property, there will be no capital gain because the deemed proceeds of disposition, or the sale price, is by definition the same as the capital cost.

When the CCRA's position is applied to depreciable property, the seller will be taxed on the recaptured depreciation as soon as possession of the property is transferred to the buyer. When the property is returned following the failure of the condition, he will not be allowed to claim a refund of any tax previously paid and will obtain only the corresponding increase in capital cost. Conversely, the buyer, who will have claimed capital cost allowance while he had possession of the property, will also pay tax on recaptured depreciation because he will be deemed to have "resold" the property for the original sale price.

What happens if there is a capital or terminal loss? Logically, applying the CCRA's position, the seller should be allowed to claim the loss and should not have to reimburse any tax saved when the property is returned. In this case, the seller is considered to have bought the repossessed property for the amount of the sale price, which becomes the new adjusted cost base. The seller has therefore "cashed" a latent capital loss or terminal loss without giving up ownership of the property. In such cases, the denial of retroactivity benefits the taxpayer.

Another problem arises in the case of a sale of voting shares of a corporation, and that is the question of acquisition of control. In effect, if the shares are sold subject to a suspensive condition, the CCRA considers they are disposed of at the time the buyer takes possession of the shares. If the number of shares disposed of is sufficient to transfer control of the company to the buyer, the acquisition-of-control rules provided by the Act will apply, notably the deemed year-end and the restrictions on loss carryovers. If the condition fails and the seller takes back his shares, there would be a second acquisition of control. The seller would not be entitled to the loss carryover even for losses incurred before the transaction, even though, according to the Civil Code, he has never sold his shares. Pierre Martel noted this problem and added that this interpretation would be contrary to the spirit of the anti-avoidance provisions applicable to acquisitions of control.[345]

One of the arguments invoked by the CCRA to justify its position is that the Act, read as a whole, does not allow for the "reopening" of returns filed in previous years in order to correct the tax consequences of retroactive conditions.[346] However, a taxpayer would be entitled, under the new fairness provisions, to claim a refund for the statute-barred years. The limitation provisions of the Act could be amended to allow the CCRA to reassess and claim any amounts due in such instances. The Ministère du Revenu du Québec already applies these administrative procedures, apparently without any problems. In any event, this argument does not hold where a suspensive condition fails, and the contract was signed, in the same taxation year. The CCRA nonetheless takes the position that a taxable disposition has occurred in such a situation.

Resolutory Conditions

In the case of a resolutory condition, the CCRA's position is that a disposition occurs when the contract is signed. A second disposition occurs when the condition is fulfilled and the contract is resolved.

This position is correct in civil law, *pendente conditione*. As long as the condition is not fulfilled, the civil law considers a sale subject to a resolutory condition to be a pure and simple sale; ownership is transferred to the buyer immediately, and the seller is entitled to the sale price.

This interpretation is also in keeping with the tax cases discussed above dealing with resolutory conditions and conditions subsequent. Since civil law and common law treat these conditions similarly, it is logical that they should receive identical tax treatment.

If the resolutory condition is never fulfilled, the situation remains the same: there is a disposition in civil law and in tax law as soon as the contract is signed, and no conflict arises.

When the resolutory condition is fulfilled, the result of retroactivity provided for by the Civil Code is that ownership is deemed never to have been transferred. Since the tax authorities do not recognize retroactivity, there is a conflict with civil law.

In my view, in light of the tax jurisprudence, the CCRA's position is not well founded in law. Disposition in tax law refers to the transfer of *ownership* as governed by the civil law, and retroactivity provided for by the civil law applies in tax matters. If the resolutory condition is fulfilled, a disposition for tax purposes will not have taken place because ownership was never transferred. Similarly, in my view, the seller's right to receive the sale price is retroactively extinguished. The seller was never entitled to the sale price because the event that triggered this right is deemed never to have occurred. In fact, this is why the sale price is returned.

The CCRA's refusal to recognize resolutory conditions gives rise to the same problems discussed in relation to suspensive conditions with transfer of possession: the seller is taxed on a capital gain, the seller and the buyer are taxed on recaptured depreciation, and the acquisition-of-control rules may be applied.

The CCRA also considers that ITA sections 79 and 79.1 could apply in such circumstances. As stated previously, these sections apply only to property repossessed following the buyer's failure to pay, and they are therefore irrelevant in the case of a true resolutory condition. Nonetheless, the CCRA considers that a transfer of beneficial ownership has occurred when the sale is resolved for nonperformance by the debtor, even though ownership has not been transferred under civil law. Since ITA paragraph 248(3)(f) stipulates that the term "beneficial ownership" contemplates ownership in civil law without including the simple transfer of possession, use, and risk, the CCRA's position appears to be incorrect.

Proposed Solutions

As the law currently stands, the interpretation of the concept of disposition in tax law is necessarily subordinate to civil law. There are two reasons for this. First, the ITA does not exhaustively define this concept; it only includes in the definition concepts that would otherwise not have been included. Second, the definition in the Act refers to a private law concept—beneficial ownership—again without defining it exhaustively. Since the Act has not set aside private law in this respect, I conclude that the retroactivity of conditional obligations must be applied in tax law.

Having said this, it may very well not be desirable, from the viewpoint of tax policy, for the Act to recognize the retroactivity provided for in civil law. If this is the case, the Act should be expressly amended to set aside provincial private law on this issue and establish a distinct regime for the application of tax law. In other words, if Parliament wishes to dissociate itself from provincial private law on this matter, it should do so explicitly.

In the remaining pages, I will first consider the relevance of recognizing the retroactive effect of conditional obligations in tax law, and then I will attempt to determine what the tax policy behind the concept of disposition ought to be. Finally, I will recommend legislative amendments that I consider to be appropriate.

The Consequences of Retroactivity in Tax Law

What would be the consequences if tax law recognized the retroactive effect of conditional obligations?

In the case of a sale subject to a suspensive condition, the capital gain should be recognized only when the condition is fulfilled, but retroactively to the date on which the contract was signed. The taxpayer should declare the capital gain by filing an amended return for the taxation year in which the contract was signed, if it was signed in a prior year. The same logic applies to the recognition of business income or recaptured depreciation.

In the reverse situation, if a taxpayer incurs a capital loss or terminal loss, he should be allowed to file an amended return in order to claim that loss.

The provisions of the Act related to the assessment and reassessment periods should obviously be amended to allow the CCRA to reassess a particular year, even if it falls outside the normal reassessment period.

Certain problems arise with the application of retroactivity in the case of suspensive conditions. First, a seller who has claimed capital cost allowance *pendente conditione* finds himself, once the condition has been fulfilled, in a situation where he has claimed capital cost allowance on property that he did not own during the taxation years in question. Should the tax savings resulting from these deductions be reimbursed? In addition, can the buyer, who retroactively owns the property from the date on which the contract was signed, claim capital cost allowance for the years during which the condition was suspended? Either of these solutions might be inequitable for one of the parties to the transaction. If the seller retained possession, enjoyment, and control of the property and assumed the risks and charges

during the period of uncertainty, it does not seem fair that the buyer should be able to claim capital cost allowance for that period. On the other hand, if the buyer had possession of the property in the same way during the years in question, it would be equally unfair to deny him the right to claim capital cost allowance.

A solution to this problem would be to adopt a position similar to that of the Quebec tax authorities, whereby a party need not reimburse any capital cost allowance previously claimed and the other party cannot retroactively claim it. The parties would therefore be free to stipulate which of them would be entitled to claim capital cost allowance and to file a joint election, as is currently the practice with leasing agreements.[347] However, the problem would still exist where the parties failed to file a joint election. Legally, if retroactivity is recognized, the right to claim capital cost allowance must be withdrawn from the seller and given to the buyer, but this result could lead to the inequities mentioned above and also cause increased administrative complexity.

As previously mentioned, the retroactivity of a suspensive condition shelters the taxpayer from any statutory amendments that might be introduced before the condition is fulfilled. While this protection undoubtedly places the taxpayer in an advantageous position, it clearly results in a loss of tax revenue for the government. It could also open the door to many advantageous tax-planning opportunities for the taxpayer, and Parliament would once again be forced to complicate the Act in order to prevent avoidance transactions.

For resolutory conditions as well, the application of retroactivity would give rise to a number of problems.

In the case of a sale subject to a resolutory condition, a capital gain or loss, recaptured depreciation, or a terminal loss would be recognized for the taxation year in which the contract was signed. If the condition was fulfilled, the disposition would be deemed never to have occurred, and the taxpayer would be required to file an amended return seeking a refund of taxes paid on the capital gain or the recapture. Similarly, he would have to pay any tax previously saved through the deduction of a capital loss or a terminal loss. The comments made earlier regarding legislative amendments to the rules on the periods of reassessment also apply in this case.

The question of who can claim capital cost allowance during the *pendente conditione* period must also be addressed in the context of resolutory conditions. The buyer will have claimed capital cost allowance for the years during which he had possession of the property, assumed the risks and the charges, and received the income. If the condition is fulfilled, he is then in the position of having claimed capital cost allowance in respect of property that he did not acquire, and the seller, who never disposed of the property, could theoretically claim capital cost allowance for the years in question. However, in contrast to a situation involving a suspensive condition, the buyer not only has possession *pendente conditione*, but also has a true right of ownership, which is retroactively extinguished. Thus, the fair solution would be for the buyer to claim capital cost allowance during this period. This is the remedy adopted by the Quebec tax authorities.

Parliament's Intent

At the 1991 APFF tax conference, the Department of Finance made the following comments on the decision of the Tax Court of Canada in *Fortin & Moreau* (*Construction Bérou*):

> The Department of Finance feels that it is important to define the concepts of acquisition and ownership under the civil law in the same way as under the common law in order to avoid inconsistency between the taxation of transactions occurring in Quebec and the taxation of transactions occurring in a common law province.[348]

This statement clearly expresses the objective of applying the Act uniformly across the country in respect of the concepts of acquisition and disposition.

Although in my view tax law, *as it currently stands*, should recognize the retroactivity of conditional obligations, I am also aware of the importance of this objective of uniform application. From a tax policy viewpoint, it is understandable that the Department of Finance wishes the Act to apply in the same manner in Quebec as in the other provinces, thereby encouraging interprovincial trade and equity in the application of the Act.

This objective, however, collides with both civil law and common law, the two private law systems in Canada, because the concept of ownership and the consequences of conditional obligations are fundamentally different in both systems. Thus, if the Act is to be applied uniformly, it is essential to have a definition of disposition specific to tax law that does not refer to either system of private law, or that takes their different concepts into consideration.

It must be recognized that Parliament originally intended to enact an expansive definition of disposition. The *Report of the Royal Commission on Taxation*,[349] commonly called "the Carter report," published in 1966, favoured a comprehensive tax base that would include any increase in economic wealth, including any increase in the market value of property held, whether or not this appreciation was realized. For practical purposes, however, the commission recommended that appreciation should not be taxed until the property was "disposed of." Since this concession compromised the theoretically ideal tax base, it was recommended that a broad concept of disposition be adopted.[350]

Nonetheless, the government of the day did not consider it wise to go as far as the Carter commission recommended.[351] Parliament ultimately adopted the same definition of disposition that had been in force since 1949 for the purposes of recaptured depreciation.[352]

A significant number of civil and common law cases have attempted to apply a uniform concept of disposition for the purposes of the Act. These cases have equated disposition with the transfer of beneficial ownership. Although I cannot agree with this trend in the jurisprudence, in light of the wording of the Act and the principle of complementarity of private law, I admit that the objective is desirable: appreciation of property should be taxed when it is realized—that is, when the gain is definitively determined.

In my view, the tax policy underlying the taxation of capital gains or recaptured depreciation is that a gain is to be taxed when it is *realized*—that is, when the right of the seller to receive the sale price is *certain* and *absolute*.

The requirement that revenue must be realized before it is subject to tax is a basic principle of taxation in Canada, the United Kingdom, and the United States.[353] One of the main reasons underlying this principle is that it is at this time that the value of the property ceases to fluctuate and the gain or loss can thus be calculated with precision. It is also at this time that the seller has the necessary cash to satisfy his liability for income tax.[354]

Proposed Amendments

I will attempt to suggest legislative amendments that strike a balance between the objective of uniform application of the Act across Canada and respect for the two systems of private law. It should be noted that I have not conducted an exhaustive analysis of all the possible solutions, such analysis being beyond the scope of this paper; rather, the proposals put forward here are intended to serve as a helpful starting point.

One possible solution would be to define the concept of disposition clearly and exhaustively, in order to expressly set aside the principle of complementarity of provincial private law. The definition could refer to the time at which the seller has an absolute, although not necessarily immediate, right to the sale price. It would, however, be extremely difficult to develop an exhaustive definition of the concept of disposition which would also be neutral—that is, a definition that would not make reference to any concept of private law (such as ownership or beneficial ownership) in order to be complete.

It seems that it would be more appropriate to define the concept of disposition by establishing, on the one hand, what it entails in Quebec and, on the other hand, what it means in common law. For application in Quebec, the definition could include the following elements:

1) A disposition takes place at the time the following conditions are met:
   a) the seller has an absolute, although not necessarily immediate, right to the sale price of the property; and
   b) possession of the property, the right to use it, the right to collect its fruits, and the risks of loss are transferred to the buyer.
2) In the case of a sale subject to a suspensive or resolutory condition, the fulfillment of the condition is deemed to have no retroactive effect, but to bring about only future events.

For application in the other provinces, the definition could provide that a disposition occurs once the beneficial ownership is transferred, whether or not legal ownership is retained by the vendor.

According to this definition, in Quebec, in the case of a sale under a suspensive condition, a disposition would occur only when the condition was fulfilled, because it is at that time that the seller would have an absolute right to the sale price. In the case of a resolutory condition, because the obligation arises immediately, a disposition would occur at the time the contract was signed.

By setting aside the retroactive effect of the condition, this definition would avoid the difficulties mentioned earlier and would simplify the application of the Act by eliminating the need for amended tax returns. While the inconveniences caused by a denial of retroactivity would remain, that is the price that must be paid for a uniform federal tax statute; it would be the legislator's choice. At least, a clearly drafted Act would allow Quebec taxpayers to know, in advance, that the retroactive effects of their transactions would not apply for income tax purposes.

In common law provinces, the proposed definition would provide that in the presence of a condition precedent, a disposition would occur only when the condition was fulfilled because, in common law, it is only at that time that beneficial ownership is transferred. In the case of a condition subsequent, since such conditions do not prevent the transfer of beneficial ownership, there would be an immediate disposition.

Thus, the tax treatment of conditional obligations in civil law would be identical to that in common law, and the goal of uniform application of the Act would be achieved.

In addition, under the proposed definition, an instalment sale in civil law would give rise to a disposition as soon as the contract was signed. When such a sale occurs, possession, use, the right to collect the fruits, and the risks of loss are transferred to the buyer, and the seller has an absolute right to the sale price, even though it is subject to a term.

Finally, this definition respects the concepts and terminology of both civil law and common law, in accordance with the principles of harmonization of federal law with civil law.

With regard to the resolution of a contract following non-performance by the debtor, ITA subsections 79(2) and 79.1(2) should be amended to remove any reference to "beneficial ownership." Instead, reference should be made to the concepts included in the proposed definition of disposition. Similarly, the retroactive effect of a resolved contract also should be set aside.

CONCLUSION

In this paper, I have discussed the law applicable to conditional obligations, in civil law and in common law, and the tax consequences of those obligations.

Through examination of the various concepts, in civil law and common law, relating to conditional obligations and retroactivity, I have identified their similarities and differences. An analysis of the tax consequences of these different private law concepts has led to the conclusion that current tax law essentially

follows the rules of private law in determining the time of disposition of a property, despite the existence of contradictory trends in the case law and ambiguities in the ITA itself.

This conclusion is based on the principle of complementarity, which holds that where the Act does not exhaustively define a term that makes reference to private law, the applicable rules are those of civil law for Quebec and of common law for the other provinces.

Finally, I have concluded that if Parliament wishes to set aside provincial private law and impose its own rules of tax law, it must do so expressly. In this respect, I have proposed amendments to the legislation, keeping in mind the objective of uniform application of tax law across the country while respecting the concepts and the terminology of both systems of private law, civil law in Quebec and common law in the other provinces.

Notes

1 Albert Mayrand, "Le droit comparé et la pensée juridique canadienne" (1957), vol. 17, no. 1 *Revue du Barreau* 1-4, at 2.

2 14 George III, c. 83 (UK).

3 It should be noted that the Quebec Act did not arise from the modern objective of bijuralism, but rather from the need of the British government, confronted with the imminent threat of the American revolution, to assure itself of the loyalty of catholic French Canadians. See Jacques Lacoursière, *Histoire populaire du Québec*, vol. 1 (Sillery, QC: Septentrion, 1995), 391.

4 30 & 31 Vict., c. 3 (UK).

5 Ibid., section 92(13).

6 *The Queen v. Lagueux & Frères Inc.*, 74 DTC 6569, at 6572 (FCTD).

7 Jean-Maurice Brisson, "L'impact du Code civil du Québec sur le droit fédéral : Une problématique" (1992), vol. 52, no. 2 *Revue du Barreau* 345-60; 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), 215-64; and Marc Cuerrier, Sandra Hassan, and Louis L'Heureux, "Harmonisation des lois fiscales fédérales avec le droit civil québécois et le bijuridisme canadien," in *Congrès 2000* (Montréal: Association de planification fiscale et financière, 2001), 16:1-57.

8 Official Languages Act, RSC 1985, c. 31 (4th Supp.), as amended.

9 Cuerrier, Hassan, and L'Heureux, supra note 7, at 16:6.

10 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act" or "ITA").

11 SQ 1991, c. 64 (herein referred to as "CCQ" or "the Civil Code").

12 For commentary on this definition, see Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les Obligations*, 5th ed. (Cowansville, QC: Yvon Blais, 1998), no. 584, at 458.

13 CCQ article 1500; and Baudouin and Jobin, supra note 12, no. 588, at 460-61.

14 Baudouin and Jobin, supra note 12, no. 584, at 458-59; Henri Mazeaud, Léon Mazeaud, and Jean Mazeaud, *Leçons de droit civil*, 3d ed., vol. 2 (Paris: Montchrestien, 1968), no. 1039, at 881; and Jean Pineau, Danielle Burman, and Serge Gaudet, *Théorie des obligations*, 3d ed. (Montréal: Éditions Thémis, 1996), no. 374, at 545.

15 Baudouin and Jobin, supra note 12, no. 585, at 459.

16 Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1027, at 876; Pierre-Basile Mignault, *Le droit civil canadien*, vol. 5 (Montréal: Théoret, 1901), 433; and Pineau, Burman, and Gaudet, supra note 14, no. 377, at 552.

17 Baudouin and Jobin, supra note 12, no. 592, at 463; Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1030, at 877; Mignault, supra note 16, at 443; and Pineau, Burman, and Gaudet, supra note 14, no. 377, at 552.

18 Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1030, at 877; and Mignault, supra note 16, at 443.

19 CCQ article 1744.

20 Ministère de la justice, *Le Code civil du Québec—Commentaires du ministre de la Justice*, vol. 1 (Québec: Les Publications du Québec, 1993), 925.

21 Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 878-79. To the same effect, see Léon Faribault, *Traité de droit civil du Québec*, vol. 8bis (Montréal: Wilson and Lafleur, 1959), no. 73, at 49; Vincent Karim, *Commentaires sur les obligations*, vol. 2 (Cowansville, QC: Yvon Blais, 1997), 21-22; Mignault, supra note 16, at 443; and Pineau, Burman, and Gaudet, supra note 14, no. 377, at 554.

22 Baudouin and Jobin, supra note 12, no. 595, at 465; Gabriel Baudry-Lacantinerie and L. Barde, *Traité théorique et pratique de droit civil*, 3d ed., vol. 13, t. 2, "Des obligations" (Paris: Sirey, 1908), no. 815, at 44; and Karim, supra note 21, at 22.

23 Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1036, at 880; and Pineau, Burman, and Gaudet, supra note 14, no. 377, at 554.

24 Pineau, Burman, and Gaudet, supra note 14, no. 377, at 554.

25 CCQ article 1497.

26 Baudouin and Jobin, supra note 12, no. 597, at 466; Faribault, supra note 21, no. 95, at 73; Denys-Claude Lamontagne, *Droit de la vente* (Cowansville, QC: Yvon Blais, 1995), no. 130, at 57; Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1037, at 880; Mignault, supra note 16, at 447; and Pineau, Burman, and Gaudet, supra note 14, no. 378, at 555.

27 Mignault, supra note 16, at 448.

28 Ibid.

29 Pineau, Burman, and Gaudet, supra note 14, no. 378, at 555. See also Baudouin and Jobin, supra note 12, no. 598, at 466-67; Faribault, supra note 21, no. 97, at 74; Karim, supra note 21, at 23; Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1038, at 880; and Mignault, supra note 16, at 447.

30 Faribault, supra note 21, no. 108, at 81; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1038, at 881.

31 Pineau, Burman, and Gaudet, supra note 14, no. 378, at 555.

32 Mignault, supra note 16, at 434.

33 Pineau, Burman, and Gaudet, supra note 14, no. 378, at 556. See also Faribault, supra note 21, no. 102, at 77.

34 CCQ article 1507.

35 Condition pending: a reference to the period between the signing of an agreement and the fulfillment of the condition. Albert Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (Cowansville, QC: Yvon Blais, 1985), 203.

36 Pineau, Burman, and Gaudet, supra note 14, no. 377, at 554.

37 CCQ article 1606.

38 CCQ article 1422.

39 Karim, supra note 21, at 554.

40 Jean-Louis Baudouin, *Les Obligations*, 3d ed. (Cowansville, QC: Yvon Blais, 1989), no. 772, at 467 and no. 775, at 468-69; Baudry-Lacantinerie and Barde, supra note 22, no. 815-18, at 44-46; Faribault, supra note 21, no. 77, at 52-53 and no. 106, at 79; Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 879 and no. 1038, at 880-81; and Mignault, supra note 16, at 444 and 448.

41 Pineau, Burman, and Gaudet, supra note 14, no. 207, at 304-5; and Baudouin and Jobin, supra note 12, no. 798, at 628.

42 Baudouin, supra note 40, no. 772, at 467 and no. 775, at 468-69; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 879.

43 CCQ article 2943, paragraph 1. See Karim, supra note 21, at 23.

44 Pineau, Burman, and Gaudet, supra note 14, no. 414, at 602; and Baudouin and Jobin, supra note 12, no. 799, at 630.

45 CCQ article 2943, paragraph 2.

46 "[TRANSLATION] No one may give that which is not his": Mayrand, supra note 35, at 171.

47 Pierre-Gabriel Jobin, "Précis sur la vente," in *La Réforme du Code civil—Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec*, vol. 2 (Québec: Presses de l'Université Laval, 1993), 359-620, at 424-25, notes 378 and 381; and Lamontagne, supra note 26, no. 130, at 57-58.

48 Baudouin and Jobin, supra note 12, no. 595, at 465.

49 Ibid., no. 598, at 467.

50 Pineau, Burman, and Gaudet, supra note 14, no. 207, at 303. See the discussion in the text immediately following note 79, infra.

51 Faribault, supra note 21, no. 77, at 53.

52 "[TRANSLATION] The thing perishes for the owner": Mayrand, supra note 35, at 250.

53 Pineau, Burman, and Gaudet, supra note 14, no. 418, at 608-9.

54 Faribault, supra note 21, no. 87, at 65.

55 Ibid., no. 87, at 66. See Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 879.

56 Ministère de la justice, supra note 20, at 926.

57 CCQ article 950.

58 "[TRANSLATION] The thing perishes for the debtor": Mayrand, supra note 35, at 250.

59 Jean Pineau, "Theory of Obligations," in *Reform of the Civil Code—Texts written for the Barreau du Québec and the Chambre des notaires du Québec*, vol. 2-A (Montreal: [s.n.], 1993), 11-112, at 83. The quotation in the second paragraph is translated from Ministère de la justice, supra note 20, at 884.

60 Pineau, Burman, and Gaudet, supra note 14, no. 420, at 613. To the same effect, see Karim, supra note 21, at 27.

61 CCQ article 950.

62 See the text immediately preceding and following note 39, supra.

63 Pineau, Burman, and Gaudet, supra note 14, no. 421, at 613.

64 Ibid., no. 421, at 614. For an opposing view, see Lamontagne, supra note 26, no. 131, at 58.

65 Faribault, supra note 21, no. 106, at 79-80.

66 See the text immediately following note 31, supra.

67 Mignault, supra note 16, at 446.

68 Although Baudouin and Jobin believe that the seller, being the owner, should assume the risks, they add that in practice, this situation is one that contracting parties seek to override because it would be unfair to place the risks on the shoulders of a seller who no longer has any control of the item sold: see Baudouin and Jobin, supra note 12, no. 783, at 611.

69 CCQ article 949.

70 Faribault, supra note 21, no. 78, at 57; and Mignault, supra note 16, at 445.

71 Baudry-Lacantinerie and Barde, supra note 22, no. 824, at 49-50; Philippe Derouin, "Pour une analyse 'fonctionnelle' de la condition" (1978), vol. 76, no. 40 *Revue trimestrielle de droit civil* 1-41, at 22-23; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 880. For an opposing view, see Dollard Dansereau, "La rétroactivité de la condition" (1936-1937), vol. 15, no. 3 *Revue du Droit* 179-85, at 184.

72 Baudry-Lacantinerie and Barde, supra note 22, no. 824, at 49-50.

73 Faribault, supra note 21, no. 78, at 58.

74 Mignault, supra note 16, at 445.

75 Baudry-Lacantinerie and Barde, supra note 22, no. 823, at 48-49; Faribault, supra note 21, no. 78, at 56-57; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 880 and no. 1038, at 881. For an opposing view, see Dansereau, supra note 71, at 183-84.

76 Baudry-Lacantinerie and Barde, supra note 22, no. 823, at 48.

77 Amédée Leloutre, "Étude sur la rétroactivité de la condition" (1907), vol. 6 *Revue trimestrielle de droit civil* 753-74, at 764.

78 Faribault, supra note 21, no. 78, at 56.

79 Ibid., no. 78, at 57.

80 Pineau, Burman, and Gaudet, supra note 14, no. 207, at 304-5.

81 Baudry-Lacantinerie and Barde, supra note 22, no. 809(I), at 37-42; Leloutre, supra note 77, at 756-58; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1035, at 879 and "Lectures," at 883-84.

82 Baudry-Lacantinerie and Barde, supra note 22, no. 809(I), at 37-42; and Leloutre, supra note 77, at 774.

83 Baudouin and Jobin, supra note 12, no. 592, at 463; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1032-33, at 877-88.

84 "[TRANSLATION] No one can transfer to another more than that to which he himself is entitled": Mayrand, supra note 35, at 175. See *nemo dat quod non habet*, supra note 46.

85 Baudry-Lacantinerie and Barde, supra note 22, no. 815-17, at 44-45; Derouin, supra note 71, no. 45, at 25-26; and Leloutre, supra note 77, at 765.

86 Baudry-Lacantinerie and Barde, supra note 22, no. 809(I), at 39-41; Leloutre, supra note 77, at 758; and Mazeaud, Mazeaud, and Mazeaud, supra note 14, *Lectures*, at 884.

87 Baudry-Lacantinerie and Barde, supra note 22, no. 809(I), at 42.

88 Faribault, supra note 21, no. 78, at 56.

89 Mignault, supra note 16, at 445.

90 Ibid., at 445, footnote 1.

91 Baudry-Lacantinerie and Barde, supra note 22, no. 823, at 49 and no. 824, at 50.

92 Leloutre, supra note 77, at 763-64.

93 See the text accompanying notes 241 and 342, infra.

94 CCQ article 1604.

95 CCQ article 1606.

96 CCQ article 1743.

97 Pineau, Burman, and Gaudet, supra note 14, no. 413, at 601.

98 CCQ article 2939.

99 CCQ article 2943. See supra notes 43 and 44.

100 Pineau, Burman, and Gaudet, supra note 14, no. 411, at 600.

101 Mazeaud, Mazeaud, and Mazeaud, supra note 14, no. 1039, at 881. See Baudouin and Jobin, supra note 12, no. 584, at 458; and Pineau, Burman, and Gaudet, supra note 14, no. 374, at 545.

102 CCQ article 1745.

103 Ministère de la justice, supra note 20, at 1091.

104 [1989] 1 SCR 880.

105 Ibid., at 900.

106 CCQ article 1508.

107 Subject to the requirements set out in CCQ articles 1745 to 1749.

108 Jobin, supra note 47, no. 218, at 508.

109 Ministère de la justice, supra note 20, at 1092.

110 Pineau, Burman, and Gaudet, supra note 14, no. 206, at 301; and Baudouin and Jobin, supra note 12, no. 392, at 325-26 and no. 403, at 332-33.

111 Pineau, supra note 59, at 35.

112 Baudouin and Jobin, supra note 12, no. 382, at 320.

113 CCQ article 1750.

114 Baudouin and Jobin, supra note 12, no. 588, at 461; and Lamontagne, supra note 26, no. 130, at 57.

115 Jobin, supra note 47, no. 228, at 516.

116 Ibid., no. 229, at 517.

117 CCQ article 1751.

118 Jobin, supra note 47, no. 234, at 519.

119 CCQ article 1752.

120 Jobin, supra note 47, no. 72, at 413-14.

121 See the text immediately following note 67, supra.

122 CCQ article 1396. See Jobin, supra note 47, no. 47, at 396; and Pineau, Burman, and Gaudet, supra note 14, no. 59, at 102.

123 CCQ article 1712.

124 Jobin, supra note 47, no. 47, at 396.

125 Ibid., no. 48, at 396-97 and no. 51, at 398.

126 Ibid., no. 56, at 400-1.

127 Ibid., no. 56, at 401. See *Olympia & York Developments Ltd. v. The Queen*, 80 DTC 6184, at 6191 (FCTD).

128 Baudouin and Jobin, supra note 12, no. 504, at 404; and Pineau, Burman, and Gaudet, supra note 14, no. 241, at 356.

129 CCQ article 1385.

130 Baudouin and Jobin, supra note 12, no. 169, at 184.

131 The date agreed upon by the parties for the coming into force of the contract is designated as the "effective date."

132 CCQ articles 331, 647, and 884.

133 *Sura v. MNR*, 62 DTC 1005 (SCC).

134 *MNR v. Faure*, 77 DTC 5228, at 5229 (SCC).

135 Benoît Mandeville, "Revenu Canada et le Code civil," in *Congrès 93* (Montréal: Association de planification fiscale et financière, 1993), 18:1-54, at 18:23.

136 CCQ article 884.

137 Andréa Boudreau-Ouellet, "Aspects conceptuels et juridiques du 'droit de propriété' " (1990), vol. 21, no. 1 *Revue générale de droit* 169-80, at 172. The author discusses the distinction between real and personal property. At common law, there are fundamental differences in the rules of ownership for these two categories of property. Despite the differences in the concept of ownership under civil law and common law, the common law concepts of real property and personal property correspond, respectively, to the concepts of immovables and movables in civil law.

138 *Halsbury's Laws of England*, 4th ed., vol. 35 (London: Butterworths, 1994), paragraphs 1227-28. See also Brian J. Arnold and David A. Ward, "Dispositions—A Critique of Revenue Canada's Interpretation" (1980), vol. 28, no. 5 *Canadian Tax Journal* 559-84; and Douglas S. Ewens and Michael J. Flatters, "Toward a More Coherent Theory of Dispositions" (1995), vol. 43, no. 5 *Canadian Tax Journal* 1377-1411.

139 Barbara Pierre, "Classification of Property and Conceptions of Ownership in Civil and Common Law" (1997), vol. 28, no. 2 *Revue générale de droit* 235-74, at 247.

140 *Black's Law Dictionary*, 6th ed.

141 Pearl E. Schusheim, "Trust Basics: An Overview," in *Report of Proceedings of the Fiftieth Tax Conference*, 1998 Conference Report (Toronto: Canadian Tax Foundation, 1999), 32:1-31, at 32:2.

142 *Laliberté v. Larue*, [1931] SCR 7, at 16. The original decision of the Supreme Court of Canada is in French. The English translation of this excerpt is found in *Construction Bérou Inc. v. The Queen*, 99 DTC 5868, at 5888, note 44 (FCA).

143 Pierre A. Lessard, Constantine A. Kyres, and Charles C. Gagnon, "Treaty Benefit Entitlements of Trusts, Partnerships, and Hybrid Entities," in *Report of Proceedings of the Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998), 33:1-38, at 33:9. See also Pierre, supra note 139, at 268; Guy Fortin, "Economic Reality Versus Legal Reality; Planning for Trusts: Deemed Disposition on January 1, 1999; Subsection 107(4.1) of the Income Tax Act," in *Report of Proceedings of the Forty-Eighth Tax Conference*, 1996 Conference Report, vol. 1 (Toronto: Canadian Tax Foundation, 1997), 5:1-39, at 5:27; and Maurice Régnier, "Exportation et importation d'une fiducie," in *Journée d'études fiscales 1994* (Toronto: Canadian Tax Foundation, 1994), 6:1-23, at 6:21.

144 *Olympia & York*, supra note 127, at 6189-90.

145 *Black's Law Dictionary*, 6th ed. See also A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger's Law of Real Property*, 2d ed., vol. 1 (Aurora, ON: Canada Law Book, 1985), 301.

146 *Black's Law Dictionary*, 6th ed.

147 Howard J. Kellough, "The Legal Efficacy of Unwinding or Negating a Transaction in Whole or in Part," in *Report of Proceedings of the Thirty-Seventh Tax Conference*, 1985 Conference Report (Toronto: Canadian Tax Foundation, 1986), 9:1-37, at 9:6. To the same effect, see Steven M. Cook and David J. Christian, "Remedial Tax Planning—What Are the Limits?" in *1994 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 1994), tab 7, at 7:16; G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough, ON: Carswell, 1999), 459; and

Edwin G. Kroft, "Tax Clauses in Acquisition Agreements," in *Selected Income Tax and Goods and Services Tax Aspects of the Purchase and Sale of a Business*, 1990 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1991), 9:1-99, at 9:38.

148 [1959] SCR 578.

149 Fridman, supra note 147, at 459-60.

150 Pierre Barsalou, "L'impact des particularités du droit civil dans l'application des lois fiscales," in *Report of Proceedings of the Fifty-First Tax Conference*, 1999 Conference Report (Toronto: Canadian Tax Foundation, 2000), 8:1-31, at 8:13; and Diane Bruneau, "La rétroactivité des contrats en droit civil—impact fiscal" (1991), vol. 39, no. 3 *Canadian Tax Journal* 536-53, at 540.

151 Kellough, supra note 147, at 9:6. See Richard B. Kuzyk, "Selected Aspects of the Interplay Between Tax and Corporate Law," in *Report of Proceedings of the Forty-Second Tax Conference*, 1990 Conference Report (Toronto: Canadian Tax Foundation, 1991), 46:1-42, at 46:12; and *Greenway v. The Queen*, 96 DTC 6529 (FCA).

152 Kellough, supra note 147, at 9:7.

153 *Black's Law Dictionary*, 6th ed.

154 Kellough, supra note 147, at 9:6.

155 Ibid.

156 Cook and Christian, supra note 147, at 9; and David W. Ross, "Retrospectivity: The Income Tax Act and the Time Machine" (1988), vol. 36, no. 6 *Canadian Tax Journal* 1567-83, at 1567-68.

157 RSS 1978, c. D-25.

158 ITA clause 3(b)(i)(A).

159 ITA subsection 13(1) and element F in the definition of "undepreciated capital cost" in ITA subsection 13(21).

160 Element A in the definition of "undepreciated capital cost" in ITA subsection 13(21) and regulation 1100(1)(a).

161 *Olympia & York*, supra note 127.

162 This definition was added by SC 2001, c. 17, section 188(5).

163 *Nauss et al. v. MNR*, 78 DTC 1796 (TRB).

164 See the text immediately following note 141, supra.

165 Kuzyk, supra note 151, at 46:1; Joel A. Nitikman, "Intra-Family Transfers: When Is There a Disposition?" (1990), vol. 3, no. 9 *Canadian Current Tax* C21-C32, at C29-C30; and Brisson and Morel, supra note 7, at 246-47.

166 60 DTC 554, at 556 (TAB).

167 [1944] SCR 371.

168 The predecessor of the CCRA and referred to herein as "the department" or "Revenue Canada."

169 *Dominion Engineering*, supra note 167, at 376.

170 *Shell Canada Ltd. v. Canada*, [1999] 3 SCR 622, at 634.

171 Brisson, supra note 7, at 352-53; Brisson and Morel, supra note 7, at 230-31; and Cuerrier, Hassan, and L'Heureux, supra note 7, at 6. This principle was applied in particular in the following cases: *Continental Bank Leasing Co. v. The Queen*, [1998] 2 SCR 298; *Will-Kare Paving & Contracting Ltd. v. The Queen*, 2000 DTC 6467 (SCC); and *Kingsdale Securities Co. v. MNR*, 74 DTC 6674 (FCA).

172 Brisson and Morel, supra note 7, at 257-58. In a footnote, the authors comment, "A plausible explanation is that in such matters an underlying need for equality of treatment in taxation favours a uniform interpretation of the legislation throughout the country."

173 Ibid., at 258-59.

174 Ibid., at 262.

175 2001 FCA 63.

176 RSC 1985, c. P-36, as amended.

177 Brisson, supra note 7, at 352-53.

178 *St-Hilaire*, supra note 175, at paragraph 29.

179 Ibid., at paragraph 35.

180 Ibid., at paragraph 46.

181 Ibid., at paragraph 48. From André Morel, "Harmonizing Federal Legislation with the Civil Code of Quebec: Why and Wherefore?" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, supra note 7, 1-28, at 8-9.

182 *St-Hilaire*, supra note 175, at paragraph 51.

183 62 DTC 1378 (Ex. Ct.).

184 Ibid., at 1385.

185 Ibid., at 1386.

186 These provisions are similar to the current definition of "disposition" in ITA subsection 248(1).

187 69 DTC 5194 (Ex. Ct.).

188 Ibid., at 5198.

189 The expression "incidents of title," used by Cattanach J, is not to be confused with the civil law attributes of ownership, which are usus, fructus, and abusus. In this article, "incidents of title" will refer to the common law incidents of ownership—that is, possession, use, and risk.

190 RSA 1955, c. 295.

191 Supra note 142.

192 Ibid., at 5887.

193 Ibid., at 5887, footnote 43.

194 77 DTC 5169 (FCTD).

195 Ibid., at 5170.

196 79 DTC 5068 (SCC).

197 Ibid., at 5072.

198 Ibid., at 5073-74. The translations of Mignault and Mazeaud are in the original decision of the Supreme Court.

199 Supra note 127.

200 Ibid., at 6187.

201 Ibid., at 6193.

202 Ibid., at 6193-94.

203 85 DTC 643 (TCC).

204 Supra note 142.

205 *Fortin & Moreau Inc. v. MNR*, 90 DTC 1450 (TCC). "Construction Bérou Inc." subsequently replaced "Fortin & Moreau Inc." For the sake of clarity, reference will be made solely to *Construction Bérou*. As regards capital cost allowance, Couture J concluded that ITA paragraph 13(21)(b) (which corresponds to the definition of "depreciable property") required not only that the taxpayer had "acquired" the property but also that he be the "owner." Couture J thus denied capital cost allowance. The Federal Court of Appeal reversed the decision on this point and allowed capital cost allowance.

206 *The Queen v. Construction Bérou Inc.*, 98 DTC 6401 (FCTD).

207 *Construction Bérou*, supra note 142, at 5880.

208 *Interpretation Bulletin* IT-233R, "Lease-Option Agreements; Sale-Leaseback Agreements," February 11, 1983. This bulletin was subsequently cancelled: see *Income Tax Technical News* no. 21, June 14, 2001.

209 *Construction Bérou*, supra note 142, at 5890-91.

210 Ibid., at 5893-94.

211 Ibid., at 5870.

212 Ibid., at 5871-72.

213 Brisson and Morel, supra note 7, at 257-63, particularly at 261.

214 Michael D. Templeton, "Financial Leases: Economic Substance Prevails" (2000), vol. 48, no. 1 *Canadian Tax Journal* 148-54, at 152.

215 *Construction Bérou*, supra note 142, at 5873-74.

216 Ibid., at 5876.

217 Ibid., at 5877.

218 Ibid., at 5878.

219 *Dominion Engineering*, supra note 167; and *Perron*, supra note 166.

220 *Dominion Engineering*, supra note 167, at 376.

221 Ibid., at 377.

222 74 DTC 6591 (FCA), aff'd. 76 DTC 6397 (SCC).

223 Ibid., at 6594 (FCA).

224 82 DTC 6080 (FCA).

225 In *Winter v. Inland Revenue Commissioners*, [1963] AC 235, at 262 (HL), Lord Guest defined a contingent liability as follows: "I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen."

226 *Reference as to the Validity of Section 6 of the Farm Security Act, 1944, of the Province of Saskatchewan*, [1947] SCR 394.

227 *Perini Estate*, supra note 224, at 6084.

228 *Winter*, supra note 225.

229 *Construction Bérou*, supra note 206, at 6405.

230 79 DTC 5259 (FCTD).

231 See *Larose v. MNR*, 92 DTC 2055 (TCC).

232 *Alepin*, supra note 230, at 5262. The translation is, in part, quoted from the decision in *Larose*, supra note 231, at 2062.

233 Supra note 231.

234 Ibid., at 2062.

235 Even the objective of preventing retroactive tax planning has recently been called into question, by the Ontario Court of Appeal in *Juliar v. Canada*, 2000 DTC 6589, leave to appeal to the Supreme Court refused on May 24, 2001. See "Table ronde sur la fiscalité fédérale," in *Congrès 2000*, supra note 7, 50:5-44, question 5.2, at 50:32-33.

236 2000 DTC 1585 (TCC).

237 2001 DTC 5173 (FCA) (Fr.).

238 Pierre Archambault, "Point de vue et discussion sur la fiscalité fédérale," in *Congrès 83* (Montréal: Association québécoise de planification fiscale et successorale, 1984), 735-79, commentary on question 3, at 740-43; Jean-Pierre Beauregard, "Interaction du droit civil et de la Loi de l'impôt," in the 1985 Conference Report, supra note 147, 25:1-27; Pierre Martel, "Acquisition de contrôle d'une corporation: Analyse de concept," in *Congrès 93*, supra note 135, 8:1-31; and Nitikman, supra note 165.

239 Barsalou, supra note 150; and Bruneau, supra note 150.

240 Supra note 183.

241 Bruneau, supra note 150, at 541-42.

242 Bruneau, supra note 150, at 541, footnote 26.

243 See the discussion under the heading "The Effects of Retroactivity—Interpreting Retroactivity Restrictively."

244 Supra note 127.

245 *Venne*, supra note 104.

246 Manon Thivierge, "Forclusion d'hypothèques et reprise de biens," in *Congrès 96* (Montréal: Association de planification fiscale et financière, 1997), 11:1-21, at 11:10.

247 Archambault, supra note 238, at 743. See also Beauregard, supra note 238, at 25:26.

248 See, for example, *106443 Canada Inc. v. The Queen*, 94 DTC 1663 (TCC).

249 97 DTC 1535 (TCC).

250 The judge implies in obiter that he would not have applied retroactivity to a suspensive condition, but this remains obscure.

251 87 DTC 148 (TCC).

252 Supra note 203.

253 Supra note 127.

254 In *Marlow Enterprises Ltd. v. MNR*, 67 DTC 26 (TAB), it was held that a "sale" had occurred under the theory of the "substance of the contract," even though the parties had expressly stipulated that ownership was reserved. This theory was subsequently rejected by the Supreme Court: see *Shell Canada*, supra note 170 and *The Queen v. Singleton*, 2001 SCC 61.

255 In *Mendel v. MNR*, 65 DTC 114 (TAB), the judge refused to accept the effective date of the contract, anterior to the signing date, stipulated by the parties. However, this arrangement appears to have been an attempt at "retroactive tax planning" by the taxpayer.

256 84 DTC 6001 (FCTD).

257 Supra note 183.

258 85 DTC 5354 (FCTD).

259 Ibid., at 5358-59.

260 Cook and Christian, supra note 147; Kuzyk, supra note 151; and Ross, supra note 156. For an opposing view, see Gabrielle Richards, "The Timing of Dispositions of Property" (1986), vol. 1, no. 27 *Canadian Current Tax* C131-C137.

261 Supra note 134.

262 SC 1958, c. 29 (now repealed).

263 *Faure*, supra note 134, at 5229. The quotations are translated by the Supreme Court.

264 90 DTC 6237 (FCTD).

265 Ibid., at 6240.

266 98 DTC 1273 (TCC).

267 This is the only ground on which the Federal Court of Appeal affirmed the judgment by the Tax Court of Canada: 99 DTC 5356 (FCA).

268 The judge implied that the building could have been worth less at this date, and accordingly the taxpayer's liability would have been reduced. However, it is not clear why he considered the question of retroactivity, since it does not appear to have been raised by the parties.

269 Bruneau, supra note 150.

270 *Riverin*, supra note 266, at 1278.

271 Supra note 148.

272 *Greenway*, supra note 151; *Victory Hotels*, supra note 183; and *Nauss*, supra note 163.

273 Cook and Christian, supra note 147, at 7:17; Douglas S. Ewens, "When Is a 'Disposition'?" in *Report of Proceedings of the Twenty-Sixth Tax Conference*, 1974 Conference Report (Toronto: Canadian Tax Foundation, 1975), 515-41, at 526; Kellough, supra note 147, at 9:6; Kuzyk, supra note 151, at 46:12; and Richards, supra note 260, at C134.

274 60 DTC 1131 (Ex. Ct.), aff'd. 62 DTC 1338 (SCC).

275 Ibid., at 1135 (Ex. Ct.).

276 See *Dominion Taxicab Assn. v. MNR*, 54 DTC 1020 (SCC); *MNR v. Benaby Realties Limited*, 67 DTC 5275 (SCC); *Commonwealth Construction Company Limited v. The Queen*, 84 DTC 6420 (FCA); *The Queen v. Imperial General Properties Limited*, 85 DTC 5045 (FCA), rev'g. 83 DTC 5059 (FCTD), leave to appeal to the Supreme Court refused: (1985), 16 DLR (4th) 615N; *The Queen v. Foothills Pipe Lines (Yukon) Ltd.*, 90 DTC 6607 (FCA); *Robertson Ltd. v. Minister of National Revenue* (1944), 2 DTC 655 (Ex. Ct.); *Meteor Homes Ltd. v. MNR*, 61 DTC 1001 (Ex. Ct.); *Fedak v. MNR*, 63 DTC 586 (TAB); *Outboard Marine Corporation of Canada Limited v. MNR*, 90 DTC 1350 (TCC); and *141224 Canada Ltée v. The Queen*, 95 DTC 385 (TCC).

277 D.J. Albrecht, "Sale of Land Subject to Conditions—Meaning of "Receivable," Current Cases feature (1985), vol. 33, no. 3 *Canadian Tax Journal* 532-39, at 535; Brian J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes*, Canadian Tax Paper no. 71 (Toronto: Canadian Tax Foundation, 1983), 130; Jean-François Drouin, Denis Girard, and Raymond Lacroix, "Revenu d'entreprise et principes comptables: Développements jurisprudentiels récents" (1991), vol. 39, no. 6 *Canadian Tax Journal* 1497-1536, at 1531-32; and Edwin G. Kroft, "An Update on Select Legal Issues Relating to Dispositions and Exchanges of Property," in *Real Estate Transactions: Tax Planning for the Second Half of the 1990s*, 1995 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1996), 10:1-45, at 10:21.

278 Arnold, supra note 277, at 137.

279 See the same authorities mentioned above with respect to conditions precedent.

280 83 DTC 5365 (FCA).

281 RSS 1978, c. I-13.

282 Supra note 157.

283 This section refers to a will, but under section 4(2) of the same Act, a person who dies intestate is "deemed to be a testator and to have provided by will for distribution of his estate as on an intestacy"—that is, according to the Intestate Succession Act.

284 Clement J in particular distinguished this share of the estate from that which had vested in Mrs. Hillis under the Intestate Succession Act—that is, $10,000 plus a third of the residual estate.

285 Supra note 280, at 5369.

286 Ibid., at 5374.

287 Ibid., at 5376.

288 See also *Boger Estate v. The Queen*, 91 DTC 5506 (FCTD); *Winsor v. MNR*, 91 DTC 1170 (TCC); *Dale v. The Queen*, 94 DTC 1100 (TCC); and Vikas Sharma, "Hillis Revisited," Current Cases feature (1992), vol. 40, no. 1 *Canadian Tax Journal* 173-76.

289 Supra note 196.

290 Supra note 142.

291 Supra note 230.

292 Supra note 231.

293 Supra note 266.

294 Supra note 134.

295 Supra note 224.

296 Supra note 264.

297 Nitikman, supra note 165, at C30.

298 Ibid.

299 *Interpretation Bulletin* IT-170R, "Sale of Property—When Included in Income Computation," August 25, 1980.

300 *Interpretation Bulletin* IT-285R2, "Capital Cost Allowance—General Comments," March 31, 1994, paragraphs 17 to 19.

301 "Points de vue du ministère et du praticien sur l'interprétation de la Loi de l'impôt (loi fédérale de l'impôt sur le revenu)," in *Congrès 1981* (Montréal: Association québécoise de planification fiscale et successorale, 1982), 151-240, question 17, at 219.

302 "Revenue Canada Round Table," in *Report of Proceedings of the Thirty-Third Tax Conference*, 1981 Conference Report (Toronto: Canadian Tax Foundation, 1982), 726-66, question 54, at 764.

303 "Point de vue et discussion sur la fiscalité fédérale," supra note 238, question 3, at 739-40.

304 See the authorities cited in note 151, supra.

305 "Revenue Canada Round Table," in *Report of Proceedings of the Thirty-Ninth Tax Conference*, 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988), 47:1-103, question 70, at 47:39.

306 See Bruneau, supra note 150, at 545.

307 "Revenue Canada Round Table," supra note 305, at 47:39.

308 "Table ronde sur la fiscalité fédérale," in *Congrès 89* (Montréal: Association de planification fiscale et financière, 1990), 907-34, question 1.29, at 932-33.

309 *TaxWorks* (North York, ON: CCH Canadian) (CD-ROM database), document no. AC73844, September 8, 1989.

310 "Revenue Canada Round Table," in *Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: Canadian Tax Foundation, 1992), 50:1-83, question 41, at 50:65-66.

311 Ibid., at 50:24-25.

312 "Round Table 1998 APFF," in *TaxWorks*, supra note 309, document no. 9M18520, question 8, October 9, 1998. This document is the English translation of "Table ronde sur la fiscalité fédérale," in *Congrès 98* (Montréal: Association de planification fiscale et financière, 1999), 43:13-60, question 4.8, at 43:36-37.

313 IT-170R, supra note 299, at paragraph 7.

314 See supra note 305.

315 See supra note 310.

316 CCRA document no. 9418865, December 22, 1994.

317 "CGA Round Table—2000," in *TaxPartner* (Scarborough, ON: Carswell) (CD-ROM database), document no. 2000-0009130F, question 1.

318 RSQ, c. I-3 (herein referred to as "TA").

319 RRQ 1981, c. I-3, reg. 1, as amended.

320 *St-Laurent v. Québec (Sous-ministre du Revenu)*, [1986] RDFQ 89, at 96.

321 "Guide de l'impôt," in *Collection fiscale du Québec* (Farnham, QC: Publications CCH) (CD-ROM database), paragraph 50,460.

322 The first paragraph of section 248R1 was amended by OC 1707-97, section 98(1)(9°). The term "beneficial ownership" was replaced with "propriété à titre bénéficiaire" in the French version only. The amendment has been in force since October 30, 1996.

323 SQ 1996, c. 39, section 139.

324 Revenu Québec, *Interpretation Bulletin* 484-2/R1, "The Effect of a Dissolution of a Contract," August 31, 1993.

325 CCQ article 1704.

326 RSQ, c. D-15.1.

327 RSQ, c. D-17.1.

328 Revenu Québec, *Interpretation Bulletin* DTT 1-2, "Exercise of the Right of Redemption," February 28, 1986.

329 Marie-Pier Cajolet, "Les droits sur les mutations immobilières," in *Répertoire de droit* (Montréal: Chambre des notaires du Québec, 1996), Fiscalité, Doctrine, Document 2; and Denys-Claude Lamontagne, *La publicité foncière* (Cowansville, QC: Yvon Blais, 1994), no. 196, at 116-17.

330 RSC 1985, c. E-15, as amended (herein referred to as "ETA").

331 RSQ, c. T-0.1 (herein referred to as "AQST").

332 ETA subsection 123(1) and AQST section 1.

333 Ibid.

334 See *Collection fiscale du Québec*, supra note 321, interprétation technique 93-0105929, May 31, 1996.

335 Ibid., Mémoire d'opinion 98-0108120, March 2, 1999.

336 CCQ article 1750. See also the discussion above under the heading "Sales with a Right of Redemption."

337 This was confirmed in a telephone conversation by an authorized representative of the Ministère du revenu du Québec.

338 Supra note 196.

339 *Victory Hotels*, supra note 183, at 1386.

340 *Faure*, supra note 134.

341 *Perini Estate*, supra note 224; and *Furfaro-Siconolfi*, supra note 264.

342 *Shell Canada*, supra note 170.

343 See the discussion above under the heading "The Effects of Retroactivity—Interpreting Retroactivity Restrictively," and the discussion of Diane Bruneau's article, in the text following note 241.

344 *Olympia & York*, supra note 127, did not involve a true sale subject to a suspensive condition, but rather a promise of sale whereby the parties had expressly stipulated that transfer of ownership would take place only when the contract was signed. The parties had agreed that the contract would be signed on payment of a specified portion of the sale price.

345 Martel, supra note 238, at 8:10-11.

346 Supra note 312.

347 ITA section 16.1.

348 "Round Table on the Federal Taxation System," in *TaxWorks*, supra note 309, document number 4M04620, question 9.1, November 30, 1991. This document is the English translation of "Table ronde sur la fiscalité fédérale," in *Congrès 91* (Montréal: Association de planification fiscale et financière, 1992), 1429-70, question 9.1, at 1452-53.

349 Canada, *Report of the Royal Commission on Taxation*, vol. 3 (Ottawa: Queen's Printer, 1966).

350 Ibid., at 405.

351 See E.J. Benson, *White Paper on Proposals for Tax Reform* (Ottawa: Queen's Printer, 1969), 40.

352 See Arnold, supra note 277, at 130.

353 Ibid., at 127.

354 Ibid., at 132. See also *Dominion Engineering*, supra note 167.