CANADIAN TAX JOURNAL / REVUE FISCALE CANADIENNE (2010) VOL. 58, Nº 3, 609-30

Policy Forum: Impact of Retroactive Legislation on the Litigant

Simon Thang*

ABSTRACT

Recent cases demonstrate that legislation designed not only to retroactively overturn a court decision but also to affect the particular litigant is a real and distinct possibility. This article reviews the relevant cases, the common law regarding the ability of legislatures to retroactively interfere with vested rights, and the impact of retroactive legislation on the litigant. While the general principles regarding the circumstances in which retroactive legislation may affect the vested rights of litigants are well accepted, the cases indicate that they are difficult to apply, and guidance from the courts and from legislators is needed.

KEYWORDS: LEGISLATION ■ RETROACTIVE ■ RIGHTS ■ AUTHORITY ■ COURTS ■ LITIGATION

CONTENTS

* Of KPMG, Toronto (e-mail: sthang@kpmg.ca).

INTRODUCTION

> [T]here is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. . . .
>
> The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust.[1]

As indicated by the Supreme Court of Canada in the passage above, it is fully within the power of Parliament and the provincial and territorial legislatures to enact retroactive legislation[2]—even if it overturns the settled expectations of those affected by the law.[3] Retroactive tax legislation is in fact a fairly common phenomenon, and there have been numerous examples over the years.[4] Several recent instances have turned the spotlight on the enactment of retroactive legislation in response to court decisions, in some cases nullifying the litigant's claim. The first part of this

1 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, at paragraphs 69 and 71, per Major J.

2 For the purposes of this article, the term "retroactive legislation" is used to refer to legislation that "applies to facts that were already past when the legislation came into force. It changes the law applicable to past conduct or events; in effect, it deems the law to have been different from what it actually was." Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Markham, ON: Butterworths, 1994), 513. The term is not intended to have any pejorative connotations. Note that some courts and commentators have attempted to distinguish "retroactive" from "retrospective" legislation. This distinction has been criticized (ibid., at 511) and is not adopted here.

It should also be noted that this article focuses on certain legal issues that arise with respect to retroactive legislation. For a thorough discussion of policy issues, see Thomas E. McDonnell, "Retroactivity: Policy and Practice," in *Report of Proceedings of the Fifty-Eighth Tax Conference*, 2006 Conference Report (Toronto: Canadian Tax Foundation, 2007), 2:1-33.

3 An exception is criminal law, the retroactivity of which is limited by section 11(g) of the Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being schedule B of the Canada Act 1982 (UK), 1982, c. 11 (herein referred to as "the Charter").

4 For example, in 1994 the Department of Finance enacted section 141.01 of the Excise Tax Act, RSC 1985, c. E-15, as amended (herein referred to as "the ETA"), retroactive to December 17, 1990, the date on which the goods and services tax (GST) legislation received royal assent. Section 141.01 clarifies the requirement to apportion GST paid on inputs for registrants who make both taxable and exempt supplies, and therefore expressly restricts input tax credits (ITCs) for such inputs allocated to taxable supplies. A number of other examples are referred to below. Prior to the enactment, some taxpayers—notably, financial institutions—took the position that full ITCs could be claimed in respect of indirect inputs that were acquired only in part for use in taxable supplies.

article reviews the decision of Ontario Court of Appeal in *Procter & Gamble*[5] and the legislative responses to the Supreme Court of Canada's decisions in *Kingstreet Investments*[6] and *Confédération des syndicats nationaux*.[7] The second part will contextualize these developments and provide some commentary focusing on the following aspects: (1) the concept of "vested rights"; (2) the requirements for legislation interfering with vested rights; and (3) the impact of retroactive legislation on the litigant.

RECENT EXAMPLES OF RETROACTIVE LEGISLATION

Procter & Gamble

The decision of the Ontario Court of Appeal in *Procter & Gamble Inc. v. Ontario (Finance)*[8] is the latest development in a protracted sales tax dispute between Procter & Gamble ("P & G") and the Ontario Ministry of Finance. P & G leased wooden pallets from a third party to package and transport various consumer goods in the course of its business. P & G paid Ontario retail sales tax (RST) on the rental but later claimed refunds on the basis that the rental was exempt.[9] The minister of revenue denied the refunds and, following unsuccessful objections, P & G filed appeals to the Ontario Superior Court under section 27 of the Retail Sales Tax Act.[10]

While the appeals were pending, P & G took the somewhat unusual approach of bringing an application under rule 14 of the Rules of Civil Procedure,[11] for a declaration that the RST that it had paid on the rentals was not payable.[12] P & G hoped to

5 Infra, note 8.

6 Infra, note 36.

7 Infra, note 44.

8 2010 ONCA 149; leave to appeal to the Supreme Court of Canada filed April 30, 2010, [2010] SCCA no. 173. For additional commentary on the Ontario Court of Appeal's decision, see Robert G. Kreklewetz and Jenny Siu, "Procter & Gamble Appeal" (2010) vol. 18, no. 5 *Canadian Tax Highlights* 5-6.

9 The technical point at issue in the case will likely no longer be relevant under the harmonized sales tax (HST) that took effect in Ontario and British Columbia on July 1, 2010. Under the HST, companies engaged in commercial activities will generally be able to recover GST/HST paid on items such as pallets used in the course of such activities. There will, however, be temporary restrictions on ITCs for the provincial HST component of certain supplies acquired by "large businesses" and certain other persons.

10 RSO 1990, c. R.31, as amended (herein referred to as "the RSTA").

11 RRO 1990, Reg. 194.

12 Rule 14.05(3)(d) authorizes the commencement of a proceeding by application where the relief claimed is "the determination of rights that depend . . . on the interpretation of a statute, order in council, regulation or municipal by-law or resolution." Following the decision of the Superior Court of Justice on the rule 14 application, this avenue was foreclosed for Ontario RST disputes by the addition of section 29.1 to the RSTA, which precludes anyone other than the minister from bringing an application under rule 14.05(3) "in respect of any matter arising under this Act."

use the court's declaration under rule 14 as a binding finding of law in support of its pending appeals on the refunds under the RSTA.

The Rule 14 Declaration

P & G succeeded in obtaining a rule 14 declaration from the Superior Court of Justice[13] to the effect that P & G was "exempt from retail sales tax" under section 7(1)(41) of the RSTA when it acquired the pallets. Section 7(1)(41) exempts tangible personal property (TPP) purchased for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into TPP for the purpose of sale, except for purchasers of "returnable containers." The court concluded that the pallets were acquired for the purpose of attachment or incorporation into TPP for sale, in the form of "palletized" goods. Further, the pallets were not excluded from the exemption as "returnable containers," which—at the time—was defined narrowly (in section 1(1) of the RSTA) to mean "a container that is intended to be returned to be refilled by a manufacturer." In the court's view, the pallets did not meet this definition because they were not returned to P & G but were picked up by the lessor. They could also not be said to be "refilled," as a bottle or other vessel would be, and they were reused by a variety of customers as well as by manufacturers. The declaration was upheld by the Ontario Court of Appeal.[14] The minister initially filed but later abandoned an application for leave to appeal to the Supreme Court of Canada.[15]

The Retroactive Legislation

Instead of pursuing an appeal, the Ontario government responded by amending the RSTA to broaden the definition of "returnable container" in order to capture the reuse of pallets, thereby excluding them from the exemption in section 7(1)(41). The amended definition of "returnable container" in section 1(1) reads as follows:

> A container or other tangible personal property,
>
> (a) that is used in the packaging, storage or shipping of tangible personal property, and
>
> (b) that is intended to be returned, directly or indirectly, to a person for reuse in the packaging, storage or shipping of tangible personal property.

This provision and a related amendment in section 7 were enacted under the Budget Measures and Interim Appropriation Act, 2008, assented to on May 14, 2008, but "are deemed to have come into force on May 7, 1997"[16]—the date on which the definition of "returnable container" was originally enacted.

13 *Procter & Gamble v. Ontario (Minister of Finance)*, 2006 CanLII 29664 (Ont. SCJ).

14 2007 ONCA 784.

15 [2008] SCCA no. 7.

16 SO 2008, c. 7, schedule R, sections 1(2) and 7(2).

The Rule 21 Motion

Following the amendment, the Crown brought a motion under rule 21 of the Rules of Civil Procedure to determine whether the changes nullified P & G's claim for refunds under the outstanding appeals.[17] It was not disputed that an amendment is assumed to be prospective and not retroactive unless there is clear language to the contrary.[18] However, P & G argued that it is presumed that legislation does not take away "adjudicated rights" unless specific intent is expressed.[19] P & G argued that while the amendment of the definition of "returnable container" indicated an intention to have retroactive effect in general, it lacked the required specific intent to affect rights that had already been adjudicated in obtaining the declaration. The motions judge disagreed. The judge concluded that in making the retroactivity effective to May 7, 1997, the legislature "is taken to be keenly aware of the claim of P & G which dates back to that date"[20] (although, as discussed below, the judge's statement on the timing of the effective date was a misapprehension). In the judge's view, intent to affect P & G's rights was also supported by documents for the 2008 Ontario budget, which noted that the amendments in question were in response to a recent court interpretation. Thus, the judge was satisfied that the legislature had "turned its mind to the effect of retroactivity and expressed its intention."[21]

On appeal to the Ontario Court of Appeal, the minister acknowledged that the motions judge erred in connecting the May 7, 1997 effective date of the retroactive amendment with P & G's refund claims, which dated back only to December 1, 1999. (The May 7, 1997 date was significant only in that this was the date on which the "returnable container" definition was originally enacted.) Further, the minister conceded that the budget statement referred to by the motions judge did not indicate a legislative intent to apply the amendments specifically to P & G. The minister, however, argued that none of this mattered since the rule 14 declaration obtained by P & G did not give it a "vested property" right[22] that would remain unaffected by subsequent retroactive legislation. The declaration merely provided an interpretation of the law as it existed at that time. Given the retroactive amendment, the law to be applied is now different.

P & G argued that even if the amended definition were valid retroactive legislation of general application, there was an exception for "adjudicated rights," which

17 2009 CanLII 9475 (Ont. SCJ).

18 The court referred to *Imperial Tobacco*, supra note 1.

19 P & G cited *Zadvorny v. Sask. Govt. Ins.* (1985), 11 CCLI 256 (Sask. CA), and *Hornby Island Trust Committee v. Stormwell* (1988), 53 DLR (4th) 435 (BCCA).

20 Supra note 17, at paragraph 14.

21 Ibid., at paragraph 18. The court also concluded that P & G could not be considered to have had settled expectations regarding its declaration of exemption, given the ministry's longstanding policy to treat the rental of pallets as taxable.

22 The concept of vested rights and the application of retroactive legislation thereto are discussed in the second part of this article.

P & G possessed by virtue of the rule 14 declaration. P & G further argued that the fact that it had obtained the declaration set it apart from other taxpayers and gave it the right to have its appeals determined according to the repealed definition of "returnable container," since there was no indication of clear legislative intent that the retroactive amendment applied specifically to P & G.

The Ontario Court of Appeal reviewed a number of the decisions relied on by P & G, including the Supreme Court of Canada's decision in *The Queen v. Canada Trustco Mortgage Co.*[23] That case involved the interpretation of the general anti-avoidance rule (GAAR) in section 245 of the Income Tax Act.[24] The taxpayer had obtained a favourable decision from the Tax Court, which allowed the appeal and vacated the assessment for the 1997 tax year, remitting the matter to the minister for reassessment.[25] After losing an appeal to the Federal Court of Appeal,[26] the minister appealed to the Supreme Court of Canada; however, before that appeal was heard, certain provisions of section 245 were amended and given retroactive application "with respect to transactions entered into after September 12, 1988" (which included the transactions at issue). In setting out the provisions of the ITA that applied in the case, the Supreme Court stated that the amendment

> has no application to the judgments under appeal. Although this amendment was enacted to apply retroactively, it cannot apply at this stage of appellate review, after the parties argued their cases and the Tax Court judge rendered his decision on the basis of the GAAR as it read prior to the amendment.[27]

In considering the relevance of *Canada Trustco*, the Ontario Court of Appeal distinguished the *Procter & Gamble* case on the basis that, given that P & G's appeals were pending, P & G had not actually obtained a decision vacating or setting aside the tax assessment. It noted that, pursuant to section 18(8) of the RSTA, the assessments remained valid and binding because they had not been varied or vacated under the objection or appeals process provided for in the RSTA. The court also downplayed the significance of the Supreme Court's comments in *Canada Trustco* as obiter: "I do not think that the Supreme Court in this dictum, which is remote from the issue decided in the case, introduced a new general principle to be applied in all cases."[28] The Ontario court similarly distinguished several other cases[29] on the basis that the plaintiffs in those cases had obtained judgments prior to the retroactive legislation in question.

---

23 [2005] 2 SCR 601.

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

25 2003 TCC 215.

26 2004 FCA 67.

27 Supra note 23, at paragraph 7.

28 Supra note 8, at paragraph 42.

29 Namely, *R v. C & E Comrs, ex p Building Societies Ombudsman Co.*, [2000] STC 892 (CA); and *Zadvorny*, supra note 19.

In the court's view, the case law did not support P & G's argument that "adjudicated rights" are always exempted from the general application of retroactive legislation unless there is a clear legislative intent to apply specifically to them.[30] There was no reason to depart from the traditional concept of "vested rights." While the court did not elaborate upon what constitutes "vested rights," it noted that P & G's declaration did not give it any vested rights to the tax refunds. Any right to a refund could arise only through an order vacating the assessments and requiring the minister to pay the claimed refunds. Therefore, it was evident that the declaration did not give rise to "an immediate and enforceable right to payment of the claimed refunds."[31] The declaration merely gave P & G the right to have the application judge's interpretation of "returnable container" applied in the assessment appeals.

While noting that a declaration of the court interpreting the RSTA would normally bind the parties on an assessment appeal, the Ontario Court of Appeal concluded that that interpretation was no longer relevant, given the subsequent retroactive change to the definition. Referring to *Gustavson Drilling*,[32] the court noted that no one has a vested right to the continuance of the law as it stood in the past: "The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued."[33]

The court concluded that the amended definition of "returnable container" is deemed to apply retroactively to the determination of taxes payable by P & G since December 1, 1999, when it began paying RST on the pallets. When the proper interpretation of the definition arises in P & G's appeals, the application judge's declaration on the former meaning "will be of no consequence" because the amended definition "now applies in the assessment appeals."[34]

Kingstreet Investments

The Decision

The amendments to the New Brunswick Liquor Control Act[35] following the Supreme Court of Canada's decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*[36]

30 Supra note 8, at paragraph 50. The court also noted a number of conceptual difficulties with P & G's position. The concept of adjudicated rights is "amorphous"; many different kinds of rights can be said to be adjudicated. There was no sound basis for differentiating persons who have acquired an interest by adjudication and persons who have acquired an identical interest otherwise than by adjudication. Furthermore, the temporal scope of exemption from the retroactive legislation claimed by P & G lacked logical demarcation. P & G did not limit its claimed exemption to the one refund for which it had filed an appeal at the time the declaration was granted but also claimed the exemption with respect to three appeals filed subsequently. Supra note 8, at paragraphs 50-52.

31 Supra note 8, at paragraph 53.

32 *Gustavson Drilling (1964) Ltd. v. MNR*, [1977] 1 SCR 271.

33 Supra note 8, at paragraph 54, quoting from *Gustavson Drilling*, supra note 32, at 283.

34 Supra note 8, at paragraph 57.

35 RSNB 1973, c. L-10, as amended (herein referred to as "the LCA").

36 [2007] 1 SCR 3.

are another example of retroactive legislation. Briefly, in the decisions of the lower courts, both the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal held that a provincial user charge levied on alcohol licensees under the LCA and the related regulations was an indirect tax and therefore ultra vires the province (since the provinces are limited to "direct" taxation under subsection 92(2) of the Constitution Act, 1867);[37] however, both courts denied the taxpayer full recovery of the illegally paid tax on the basis of various defences, which were held to bar recovery.[38] On appeal, the Supreme Court noted that when the government collects and retains ultra vires taxes, it undermines the rule of law. To permit the government to retain an ultra vires tax would condone a breach of this fundamental constitutional principle. Therefore, the court held that "a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution."[39] It rejected the various defences to recovery and held that the taxpayer was entitled to recover the illegal charges. Notably, however, the court indicated that policy concerns regarding "fiscal inefficiency and fiscal chaos" could be addressed through means such as suspending a declaration of invalidity and retroactively enacting valid taxes.[40]

The Retroactive Legislation

The government of New Brunswick subsequently amended the LCA to retroactively impose a "direct" tax on the purchaser of alcohol in an amount equal to the indirect tax previously imposed on licensees.[41] The legislation deems the purchaser to have

37 30 & 31 Vict., c. 3 (UK). For a detailed discussion of the constitutional requirements for taxation, see Simon Thang, "Constitutional Law Aspects of Commodity Tax," paper presented at the 29th Annual Canadian Institute of Chartered Accountants Commodity Tax Symposium held in Ottawa on September 20-22, 2009.

38 The trial judge denied restitution on the basis of the "passing-on" defence (which is based on unjust enrichment principles) and the policy that public authorities should be not be required to repay ultra vires taxes in order to prevent "fiscal chaos": 2004 NBQB 84, at paragraphs 58-60. The Court of Appeal was not prepared to "immunize" the province from repaying an ultra vires tax as a matter of policy. However, the court felt that the passing-on defence prevented it from allowing full restitution. In the result, it permitted recovery only of user charges paid after the commencement of legal proceedings, since those charges were paid under "protest and compulsion": 2005 NBCA 56, at paragraph 6.

39 Supra note 36, at paragraph 15.

40 Ibid., at paragraph 25. Preservation of the stability of the government's revenue base is one of the factors to be considered under the federal government's guidelines for when retroactive legislation will be proposed. See Canada, Department of Finance, *Comprehensive Response of the Government of Canada to the Seventh Report of the Standing Committee on Public Accounts* (Ottawa: Department of Finance, September 1995). These guidelines are summarized below (infra note 96) and are reviewed in McDonnell, supra note 2.

41 See New Brunswick, Public Safety Department, Communications and Public Awareness Branch, "Government To Amend Liquor Control Act," *News Release* no. 159, February 7, 2007, quoting the Public Safety minister as follows: "After a thorough review of the decision, government has decided that it is in the best interest of New Brunswick to pass legislation to

paid the "new" tax at the time he or she purchased alcohol from a licensee, and deems the licensee to have collected the tax as agent and to have remitted it to the province:

> 131.3(2) Every purchaser shall pay to the Province for the purpose of raising revenue for Provincial purposes a tax in respect of the use or consumption of all liquor purchased by him or her in the licensed premises of a licensee or permittee at any time after February 28, 1998, and before February 27, 2004, computed at the rate of 5% of the purchase price. . . .
>
> 131.3(4) A purchaser shall be deemed to have paid the tax at the time he or she purchased the liquor.
>
> 131.3(5) At any time after February 28, 1998, and before February 27, 2004, a licensee or permittee shall be deemed to have been an agent of the Province for the purpose of collecting the tax and shall be deemed to have collected the tax from the purchaser at the time the purchaser purchased the liquor and to have remitted the tax to the Province.

The amendments further deem any monies paid on account of the prior invalid tax to have been collected and retained by the province as payment for the new tax, "notwithstanding any judgment obtained by any person for recovery of any of the money, whether the judgment is obtained before, on or after the enactment" of the amendments:

> 131.3(7) Where, at any time after February 28, 1998, and before February 27, 2004, money was collected or purported to have been collected as user charges pursuant to New Brunswick Regulation 89-167 under this Act, the money shall by this section be conclusively deemed to have been collected and retained by the Province, without compensation, as payment for the tax notwithstanding any judgment obtained by any person for recovery of any of the money, whether the judgment is obtained before, on or after the enactment of this section.

The amendments are deemed to have come into force on March 1, 1998 and are "retroactive to the extent necessary to give it effect on and after that date."[42] The net effect of these enactments is essentially to allow the government to retain the monies paid on account of the invalid fee imposed on the licensees under the prior legislation and to offset those amounts against the purchaser's liability for the new tax under the amended provision, which the licensee is deemed to have collected. Since the new tax is in the same amount as the prior fee and the purchaser is deemed to have paid the tax, no additional liability arises. The enactments, however,

---

retroactively establish a tax between 1998 and 2004 in line with the Supreme Court decision in the appeal of Kingstreet Investments for repayment." The news release noted that reimbursement of the fee to all liquor licensees in the province would cost $12 million.

42 SNB 2007, c. 23, s. 3.

effectively preclude recovery of the prior fee by the licensees notwithstanding any judgment obtained at any time for the recovery of the fee.[43]

Confédération des Syndicats Nationaux

The Decision

In *Confédération des syndicats nationaux v. Canada (Attorney General)*,[44] a group of taxpayers challenged the constitutional validity of the premium-setting mechanism under the federal employment insurance (EI) system. Numerous premium-setting mechanisms have been used since the system's inception. Effective 1996, rates were set by the Employment Insurance Commission pursuant to section 66 of the Employment Insurance Act,[45] which mandated a relatively stable rate in order to accumulate adequate reserves. In 2002, 2003, and 2005, the governor in council set the rate under a new premium-setting mechanism in sections 66.1 and 66.3, which omitted legislative criteria to guide the setting of rates.

The Supreme Court of Canada found that this new premium-setting mechanism lacked sufficient connection with the regulatory framework of the EI system and that it therefore imposed a tax rather than a regulatory charge during the applicable years. The authority to impose a tax had not been delegated expressly and unambiguously to the governor in council and therefore violated section 53 of the Constitution Act, 1867. Accordingly, the Supreme Court declared sections 66.1 and 66.3 of the EIA as applicable in 2002, 2003, and 2005 to be invalid, and it held that the employment insurance premiums in those years "were collected unlawfully." (In contrast, the premiums imposed in 2004 were valid because the rate was specified in the EIA itself.) The Supreme Court, however, suspended the declaration of invalidity for 12 months "to allow the consequences of that invalidity to be rectified."[46]

The Retroactive Legislation

Not surprisingly, given the fiscal impact of the alternative (namely, refunding EI premiums for the years at issue), the federal government accepted the Supreme Court's invitation to rectify the law. This was done by enacting retroactive provisions

43 The additional step of offsetting a prior invalid tax against liability for the new tax has been adopted in a number of cases to justify retention of a tax held to be unconstitutional. It appears to be aimed at addressing the concern that permitting governments to retain monies collected under an ultra vires tax would be offensive to constitutional principles and tantamount to allowing the government to do indirectly what it cannot do directly (see *Amax Potash Ltd. etc.*, [1977] 2 SCR 576). Courts have affirmed, however, the government's ability to retain and apply amounts collected on account of the ultra vires tax against liability for a new, valid tax: see *Air Canada v. British Columbia*, [1989] 1 SCR 1161; and *Canadian Bar Assn. v. British Columbia (Attorney General)*, [1994] BCJ no. 1013 (SC).

44 2008 SCC 68.

45 SC 1996, c. 23 (herein referred to as "the EIA").

46 Supra note 44, at paragraph 94.

in the 2009 budget implementation legislation.[47] Pursuant to that statute, sections 66.1 and 66.3 of the EIA are deemed to have set out the same rates previously set by the governor in council for 2002, 2003, and 2005:

> 227. Section 66.1 of the *Employment Insurance Act*, as enacted by section 9 of chapter 5 of the Statutes of Canada, 2001, is deemed to have read as follows:
>
> 66.1 Notwithstanding section 66, the premium rates for the years 2002 and 2003 are 2.2% and 2.1%, respectively.
>
> 228. Section 66.3 of the *Employment Insurance Act*, as enacted by section 25 of chapter 22 of the Statutes of Canada, 2004, is deemed to have read as follows:
>
> 66.3 Notwithstanding section 66, the premium rate for the year 2005 is 1.95%.

Since the premium rate is set out in the legislation, the taxing authority is considered to be exercised by Parliament itself. This approach (which is identical to the approach taken for 2004, which was held to be valid) presumably does not involve delegation of authority to the governor in council as under the prior legislation.

CONTEXT AND COMMENTARY

The decision of the Ontario Court of Appeal in *Procter & Gamble* and the legislative responses to *Kingstreet Investments* and *Confédération des syndicats nationaux* reviewed above raise a number of legal issues regarding retroactive legislation. The following commentary will attempt to contextualize these developments focusing on three main aspects: (1) the concept of "vested rights"; (2) the requirements for legislation interfering with vested rights; and (3) the impact of retroactive legislation on the litigant.

Retroactivity and Vested Rights

The two primary common-law rules governing the temporal application of legislation can be summarized as follows:[48]

1. It is presumed that legislation is not intended to have a retroactive application.
2. It is presumed that legislation is not intended to interfere with vested or accrued rights.

Both presumptions may be rebutted with evidence of sufficiently clear expression of intent to the contrary.

Retroactivity in General

With respect to the first rule, as the Supreme Court of Canada noted in *Imperial Tobacco*, neither the rule of law nor Canada's constitution embodies a requirement

47 SC 2009, c. 2, sections 227 and 228.

48 Sullivan, supra note 2, at 508. See also *Gustavson Drilling*, supra note 32, at 279 and 282.

of legislative prospectivity, even though retrospective and retroactive legislation may overturn settled expectations and may be perceived as unjust.[49] Accordingly, while there is a presumption of statutory interpretation that a statute should not be given retroactive effect, such effect may be given if it is clearly expressed. This premise was accepted by the Ontario Court of Appeal and the Ontario Superior Court in *Procter & Gamble*. Both courts were of the view that the language deeming the amended definition of "returnable container" to have come into force on May 7, 1997 (that is, prior to the transactions at issue) was sufficiently clear to rebut the presumption against retroactive application.[50]

The Concept of Vested Rights

The main point of contention in *Procter & Gamble* concerned the second rule and whether the presumption against interference with vested rights could be expanded to "adjudicated rights" acquired prior to the enactment of the retroactive legislation. P & G's position was that the legislation lacked the specific intent required to interfere with its rights. This is similar to the position taken by the taxpayer in *C.I. Mutual Funds Inc. v. Canada* (discussed below) that, while

> there must be some retroactive application of this legislation, . . . Parliament's use of bland and inconclusive language . . . should not act to interfere with the rights of litigants whose appeals were in progress and specifically known to the government at the time the legislation was drafted.[51]

In *Procter & Gamble*, the Ontario Court of Appeal eschewed recognition of "accrued rights," in part because it considered the concept to be "amorphous."[52] It acknowledged the "traditional concept of vested rights" but did not elaborate or comment on what constitutes a "vested right," other than to note that P & G did not have an "immediate and enforceable right" to the refunds.[53]

It has been noted that the concept of "vested rights" is itself somewhat vague.[54] While certain categories of vested rights have been recognized (examples are property

49 See supra note 1 and the accompanying text. As noted above, however, retroactive criminal legislation is limited by section 11(g) of the Charter. Other rights embodied in the Charter have also been raised as potential limits to retroactive legislation. See *Clitheroe*, infra note 83 and the accompanying commentary.

50 This view is consistent with prior case law. For an analysis of the retroactive effect of the phrase "deemed to have come into force," see *C.I. Mutual Funds Inc.*, [1997] GSTC 84 (TCC), discussed in the text below at note 75 and following. In appeal of this decision, the Federal Court of Appeal noted that a number of different ways of expressing retroactive intent have been accepted by the courts: [1999] 2 FC 613, at paragraph 11 (FCA).

51 Ibid. (FCA), at paragraph 9.

52 Supra note 8, at paragraph 50.

53 Ibid., at paragraph 53.

54 See Sullivan, supra note 2, at 528-32.

rights, contractual rights, and rights to damages or other common-law remedies), it is often difficult to predict whether other interests or expectations will be recognized as a "vested right":

> Outside these traditional categories it is difficult to predict when a given interest or expectation will be recognized as a vested or accrued right. There is a vast range of claims that may be made pursuant to a statute for benefits, authorizations, exemptions, remedies, orders and the like. The methods of establishing and enforcing those claims follow no fixed pattern. *In each case the court must decide whether at the moment of repeal the individual's statutory claim was sufficiently defined and developed, and sufficiently in his or her possession, to count as a vested right.*[55]

In the context of tax disputes, the question often arises of precisely when vested rights can be said to exist. On the basis of the case law reviewed by the Court of Appeal in *Procter & Gamble*, it appears that vested rights that benefit from the presumption against interference by retroactive legislation have been recognized to arise where the litigant has obtained an actual court decision on the disposition of the substantive matter prior to the amendment at issue.[56] Therefore, had P & G followed the statutory process for appeals under the RSTA and obtained a judgment for refund, presumably some form of vested right to the refund would have arisen.

The decision is not, however, entirely clear on this point, and there remain a number of important uncertainties. For example, are we to understand the Court of Appeal as suggesting that an "immediate and enforceable right" is a necessary hallmark of a vested right? Must all relevant appeal periods expire before a judgment can give rise to "vested rights"?[57] Can a vested right arise where the disposition of an appeal is not an order for a return of monies or property but, for instance, the vacating of an assessment?[58] Do vested rights arise if the order is to remit the matter

55 Ibid., at 531 (emphasis added).

56 The court cited the following cases. *C & E Comrs*, supra note 29: the tax tribunal had allowed the taxpayer's application for refund, which was actually paid to the taxpayer, prior to the enactments at issue; *Canada Trustco*, supra note 23: the Tax Court had allowed the taxpayer's appeal of the assessment, vacated the assessment, and remitted the matter back to the minister for reassessment, prior to the enactments at issue; *Zadvorny*, supra note 19: the plaintiff had obtained recovery at trial prior to the enactment at issue; *Hornby Island Trust*, supra note 19: the lower court had dismissed the action against the respondent prior to the enactments at issue; and *Canada v. Gibson*, 2005 FCA 180 and *C.H.S. v. Alberta (Director of Child Welfare)*, 2008 ABQB 513, both of which involved court decisions rendered prior to the amendments at issue.

57 The motions judge in *Procter & Gamble*, supra note 17, at paragraph 17, for example, stated that the "accrued rights of P & G could only have been considered settled between the time of *the decision of the Court of Appeal* in November 2007 and the change to the Statute in May 2008" (emphasis added). As noted above, the minister began but subsequently abandoned a further appeal to the Supreme Court of Canada.

58 Tax appeals may not necessarily involve the refund of monies—for example, an appeal of an assessment for failure to collect GST under the ETA.

back to the minister for reassessment? Can vested rights arise simply through the filing of a notice of objection or appeal?

The Canadian International Trade Tribunal considered this last scenario in *Jostens Canada Ltd. v. Minister of National Revenue*,[59] a case that involved an appeal of the minister's rejection of applications for rebates for the federal sales tax (FST) inventory rebate under section 120 of the Excise Tax Act.[60] On June 10, 1993, shortly after the hearing and prior to the tribunal's decision, the definition of "inventory" in section 120 was amended and deemed to have come into force on December 17, 1990. The new provision, if applicable, had the effect of precluding the rebates for the FST in respect of certain goods that could not be said to have been held "separately" for sale.[61] The tribunal held that the amended definition was clear in its retroactive effect and applied to the case under consideration:

> The Tribunal is of the opinion that, since the amendments are clear as to their retroactive effect to December 17, 1990, they must be applied. *It is a long-standing principle of Canadian law that legislation enacted after a case is commenced is to apply to such a case where it is clear from the language of that legislation that it is to have retroactive effect when it is adopted*.[62]

In *Kingstreet Investments*, it appears that the litigant would have possessed a vested right to recovery of the amounts paid on account of the ultra vires tax upon the Supreme Court's decision. The Supreme Court overruled the lower courts, which had denied recovery on various grounds, and held that "the appellants are entitled to recover all user charges paid on or after May 25, 1995."[63]

In contrast, it appears that no vested rights to recovery arose with the Supreme Court's decision in favour of the litigant in *Confédération des syndicats nationaux* (overturning the lower courts), given that the court suspended its declaration of invalidity and the government subsequently enacted remedial legislation.

All in all, it remains difficult to glean much more beyond general principles that can be applied to the various scenarios in which retroactive legislation may arise.[64]

---

59 Appeal no. AP-92-195. See also *IBM Canada Ltd. v. Canada*, 2001 FCT 1175 (FC); aff'd. 2002 FCA 420. The Federal Court proceeded on the basis that the retroactive amendments to subsection 120(2.1) of the ETA applied and dismissed the taxpayer's appeal notwithstanding that the rebate claims and notice of objection were filed prior to the enactment of the amendments.

60 Supra note 4. See also *Gruenberg v. Minister of National Revenue*, Appeal no. AP-92-252.

61 The amendment to the definition of "inventory" added the requirement that the tax-paid goods be held for sale, lease, or rental *separately*, which would exclude goods incorporated into other goods.

62 *Jostens Canada*, supra note 59, at 3 (emphasis added). One of the cases that the tribunal referred to was *Western Minerals*, infra note 68, discussed in the accompanying text.

63 Supra note 36, at paragraph 62.

64 There have been a number of proposed amendments to the ETA in response to court cases in favour of the taxpayer. See *State Farm Mutual Auto Insurance Co. v. The Queen*, 2003 CanLII

Perhaps the best approach is to heed the Ontario Court of Appeal's statement in *Procter & Gamble* that each situation is to be addressed on an individual basis, taking into account the particular statutory and factual context: "It makes better sense to treat rights and interests according to their content and the specific terms of the retroactive legislation at issue in any case."[65] It has been suggested that the ultimate question is whether the particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued.[66]

Expression of Intent To Affect Vested Rights

As noted above, even where vested rights are considered to arise, they may be overturned where the legislative intent is sufficiently clear. This raises the question of the language that would be sufficient to evidence a clear legislative intent to overturn vested rights.[67] There are instances (reviewed below) where legislatures have used very clear and explicit language to express not only retroactive effect but also the intent to interfere with vested rights. But there are also instances where more generic language has nonetheless been determined to be sufficient.

---

691 (TCC) and the November 17, 2005 proposed changes to section 220, which would be retroactive to the introduction of the GST on December 17, 1990. See also the changes to the definition of "financial service" under subsection 123(1) of the ETA made in the recent federal budget implementation legislation (SC 2010, c. 12, section 55). These changes are deemed to have come into force on December 17, 1990, subject to certain exceptions. Although the CRA's "Proposed Changes to the Definition of Financial Service," *GST/HST Notice* no. 250, June 2010, states that the changes would not affect any case subject to a final determination by the courts before December 14, 2009 (the announcement date of the changes), there is no reference to this result in the legislation. The court decisions that apparently led to these amendments are *Canadian Medical Protective Assn. v. R*, [2009] GSTC 65 (FCA); *Promotions D.N.D. Inc. v. R*, [2007] GSTC 79 (TCC); and *Costco Wholesale Canada Ltd. v. R*, [2009] GSTC 38 (TCC). See *GST Times*, Supplement to David M. Sherman, *Canada GST Service*, release no. 242C, January 2010 (Toronto: Carswell) (looseleaf).

65 Supra note 8, at paragraph 51. For example, one important statutory factor in the *Procter & Gamble* case appears to be the effect of section 18(8) of the RSTA, which deems an assessment to be valid and binding unless varied or vacated on objection or appeal. The Ontario Court of Appeal cited this provision in support of its conclusion that the rule 14 declaration did not confer any vested right to the refunds sought by P & G. Another statutory factor that may be relevant in some cases is the effect of any applicable legislation under the Interpretation Act, RSC 1985, c. I-21, which typically addresses the effect of the repeal of laws.

66 Sullivan, supra note 2, at 530.

67 In this regard, Sullivan states, ibid., at 539, "The presumption against interfering with vested rights is rebutted by any adequate indication that the legislature intended its legislation to have immediate and general application despite its prejudicial impact. This intention is sometimes stated expressly in the form of transitional provisions. These set out rules specifying the temporal application of the legislation being repealed or enacted by a particular Act. Such rules prevail over any contrary common law or Interpretation Act rules."

Language Sufficient To Interfere with Vested Rights

In *Western Minerals Ltd. v. Gaumont*,[68] the legislation in question was enacted following a judgment for the plaintiff at trial but before the hearing of the appeal. The plaintiff was the registered owner of the subsurface rights to the lands in question while the defendant was the registered owner of the surface rights. The plaintiff initially obtained a judgment in its favour at trial, awarding it the ownership of sand and gravel extracted from the land.[69] The defendant appealed, and subsequent to the hearing of the appeal, the retroactive legislation in question was enacted. The legislation referred explicitly to the trial judgment and declared that the owner of the surface of the land "is and shall be deemed to be and at all times to have been the owner" of and entitled to all sand and gravel recovered by surface operations.[70] The Alberta Court of Appeal held that the legislation applied retroactively to the parties and allowed the appeal, dismissing the plaintiff's action.[71] This was affirmed on further appeal to the Supreme Court of Canada. Locke J concluded that the language was a declaration of what the law has always been, and that this rebutted the presumption against retroactive construction of a statute.[72]

The amendments made to the New Brunswick LCA following *Kingstreet Investments*, which preclude reimbursement of the illegal tax, also appear to express a clear intention to affect vested rights, given that the amendments are stated to apply "notwithstanding any judgment obtained by any person for recovery of any of the money, whether the judgment is obtained before, on or after"[73] their enactment. Moreover, given that the Supreme Court of Canada had ruled that the litigant was entitled to "recover all user charges paid,"[74] it is arguable that such express language

68 [1953] 1 SCR 345.

69 (1951), 1 WWR (NS) 369 (Alta. SC).

70 The preamble of the Sand and Gravel Act, SA 1951, c. 77 stated, "Whereas in an action in the Supreme Court of Alberta between Western Minerals Limited and Western Leaseholds Limited, Plaintiffs, and Joseph Albert Gaumont, Defendant . . . it was adjudged that the plaintiffs who were the owners of minerals were entitled to sand and gravel and that the defendants who were the owners of the surface of land were not entitled to the said sand and gravel."

71 (1951), 3 WWR (NS) 434.

72 Supra note 68, at 365. *Canada v. Gibson*, supra note 56, referred to by the Ontario Court of Appeal in *Procter & Gamble*, is another example of explicit intent to affect vested rights. The Federal Court of Appeal held that subsection 222(10) of the ITA applied to a June 4, 2004 judgment and retroactively extended the limitation period for assessment by deeming the tax debt to have become payable on March 4, 2004. Subsection 222(10) provides as follows: "Notwithstanding any order or judgment made after March 3, 2004 that declares a tax debt not to be payable by a taxpayer, or that orders the Minister to reimburse to a taxpayer a tax debt collected by the Minister, because a limitation period that applied to the collection of the tax debt ended before royal assent to any measure giving effect to this section, the tax debt is deemed to have become payable on March 4, 2004."

73 Section 131.3(7) of the LCA.

74 Supra note 36, at paragraph 62.

would have been required if the intention was to interfere with the litigant's right to recovery. In contrast, the amendments to the EIA that followed the Supreme Court's decision in *Confédération des syndicats nationaux* were relatively generic. However, since the Supreme Court suspended its declaration of invalidity, no vested rights appear to have arisen, and an express intention to interfere with such rights was arguably unnecessary.

As the Ontario Court of Appeal noted in *Procter & Gamble*, while an explicit indication that retroactive legislation applies to prior court decisions is certainly sufficient to overcome the presumption against interference with vested rights, it is not always necessary. In *C.I. Mutual Funds*, the Tax Court of Canada accepted that the simple phrase "is deemed to take effect" (on a specified date) would have been sufficient in the circumstances to evidence the intention to interfere with vested rights.[75] The case involved amendments made to the definition of "financial services" under subsection 123(1) of the ETA, which explicitly identified certain investment management services as taxable supplies for the purposes of the goods and services tax (GST). The amendments were enacted after the taxpayer's appeal was commenced but were deemed to have come into force on December 17, 1990. The court cited Côté's suggestion that legislatures may in some instances be granted broad leeway in expressing an intention to affect vested rights:

> *The Courts are not particularly demanding with regard to expression of intent to affect vested rights.* On numerous occasions, they have simply noted that the wording of the statute seems to apply indiscriminately to all legal situations, whether constituted before or after the commencement of the statute. The literal method tends to assign to the legislator the intention to affect vested rights whenever the statute fails to distinguish between legal situations constituted before or after commencement of the new statute: since Parliament has failed to draw a distinction, the judge would have no right to do so either.[76]

With respect to the legislation at issue, the evidence indicated that the amendments were made in order to "clarify" the legislation and to reflect the government's intention to tax administrative and management services provided to mutual funds. They did not represent an intention to implement a new regime to tax previously exempt services. In the circumstances, the court was willing to infer that there was sufficient intention on Parliament's behalf to affect any right that may have accrued. The court specifically noted that the legislator need not refer specifically to pending actions in order for retroactive legislation to affect the rights of litigants. In any event, the court also concluded that the taxpayer had not acquired any vested rights

75 Supra note 50 (TCC), at paragraph 51. As noted above, the Federal Court of Appeal upheld the Tax Court's conclusions on these points (ibid. (FCA), at paragraph 10).

76 Supra note 50 (TCC), at paragraph 50, quoting from Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, QC: Y. Blais Éditions, 1991), 152 (emphasis added).

prior to the tabling of the retroactive legislation because the services at issue were taxable under the prior legislation.

Language Insufficient To Interfere with Vested Rights

On the other hand, there are instances where courts have declined to apply retroactive legislation that would interfere with the litigant's vested rights. One example is the Supreme Court of Canada's decision in *Canada Trustco*, referred to above. The court's brief comment that the GAAR amendments did not apply "after the parties argued their cases and the Tax Court judge rendered his decision on the basis of the GAAR as it read prior to the amendment"[77] is intriguing, although it was not the focus of the judgment. Given that the Supreme Court did not elaborate on the issue, it is somewhat difficult to discern exactly what the court meant—and, indeed, in *Procter & Gamble* the Ontario Court of Appeal downplayed the significance of the dictum. It may be noted, however, that the amendments to GAAR were enacted after the taxpayer had obtained a judgment in its favour from the Tax Court. To the extent that the trial judgment could be said to have given the taxpayer vested rights, clear legislative intent to interfere with those rights would have been required. Perhaps the Supreme Court declined to apply the amended provisions because, taking everything into consideration, the generic statement "applies with respect to transactions entered into after"[78] (the specified date) was not sufficiently clear.

Another example of an instance where the court has declined to apply a subsequent retroactive enactment to the appeal of a court decision is *Hornby Island Trust Committee v. Stormwell*.[79] The trial judge had concluded that the particular bylaw at issue was invalid. An enactment made before the appeal stated that an invalid bylaw is nonetheless "conclusively deemed to have been validly made at the time it was made."[80] On appeal, the British Columbia Court of Appeal declined to apply the enactment, in part on the basis that it did not clearly express the intention to deprive the litigants of the trial judgment.[81]

Impact on Litigant

Litigant Affected by Retroactive Legislation

Another aspect of the *Procter & Gamble* decision that is interesting to note is that the litigant was directly affected (if not targeted) by the retroactive legislation in issue. Similarly, it appears that the litigant in *Kingstreet Investments* was directly affected by

77 Supra note 23, at paragraph 7.

78 SC 2005, c. 19, section 52 (amending section 245 of the ITA).

79 *Hornby Island Trust*, supra note 19.

80 Municipal Amendment Act (No. 2) 1987, SBC 1987, c. 38, section 23.

81 *Hornby Island Trust*, supra note 19, per Lambert J (Hutcheon J concurring). MacDonald J's separate reasons for not applying the enactment focused on whether it was "retroactive" or "retrospective," a distinction that, as noted above, has been questioned.

the subsequent retroactive amendments to the LCA, at least on the face of the legislation.[82]

The targeting or singling out of a particular taxpayer or court decision under retroactive legislation does not appear to provide a basis for objection in and of itself.[83] In *Air Canada v. British Columbia*,[84] the Supreme Court of Canada concluded that retroactive amendments made by the government to the Gasoline Tax Act, 1948[85] in order to prevent the plaintiff airlines from claiming refunds of tax paid under the prior legislation (which had been held to be unconstitutional) were valid and effective. Commenting on this case in *Imperial Tobacco*, the Supreme Court noted that the amendments "were meant strictly to defeat three companies' claims"[86] for reimbursement of an ultra vires tax. Nonetheless, the amendments were upheld, despite the fact that they were, in addition to being retroactive, "for the benefit of the Crown, aimed at a particular industry with readily identifiable members and totally destructive of that industry's ability to pursue successfully their claims filed a year earlier."[87]

---

82 As noted earlier, section 131.3(7) of the LCA deems amounts collected under the prior legislation to have been collected and retained by the province, without compensation, on account of the new tax "notwithstanding any judgment obtained by any person for recovery of any of the money, whether the judgment is obtained before, on or after the enactment of this section." On the basis of the government's news release regarding the amendments (supra note 41), it appears that the government intended to reimburse the litigant: "The minister noted that Kingstreet Investments, at great expense to itself, presented the case to the courts, which identified the fee as an illegal indirect tax, and he said government would reimburse the appellant in line with the court decision." It is not entirely clear, however, whether this is a reference to costs (which the Supreme Court awarded to the litigant) or to some form of reimbursement for the illegal tax. To the extent that the reimbursement would be of the monies paid on account of the illegal tax, it appears that this matter would fall outside the legislation, given the "notwithstanding" clause in section 131.3(7).

83 There is some suggestion, however, that a higher standard for the expression of legislative intent may be required where the provisions single out a particular person. For example, the Ontario Superior Court of Justice stated in *Clitheroe v. Hydro One Inc.*, 2009 CanLII 33029, at paragraph 44: "[I]f a statute's provisions are clearly aimed at one person, the legislature's obligation to make the provisions specific and unambiguous must be scrupulously followed. As the Supreme Court said in *Wells*, 'the use of legislation to strip a specific individual of a legal right to compensation . . . is a harsh and extraordinary use of governmental authority which, because it should not be done lightly, requires specific and unambiguous language.'" One of the grounds raised by the plaintiff in the *Clitheroe* case was that the legislation eliminating her pension benefits infringed her right to liberty under section 7 of the Charter. Although the court dismissed the argument on the basis that the pension benefits were a purely economic right and not protected by section 7, the case provides an example of one potential limit on retroactive legislation. The decision in *Clitheroe* was appealed to the Ontario Court of Appeal on June 15, 2010; a decision has not yet been rendered as of the date of writing.

84 *Air Canada*, supra note 43.

85 RSBC 1960, c. 162.

86 Supra note 1, at paragraph 74.

87 Ibid.

Litigant Excluded from Retroactive Legislation

In other instances, the litigant has been spared from the effect of post-judgment retroactive legislation. For example, in *Eurig Estate (Re)*,[88] a well-known case, the successful litigant was expressly excluded from subsequent retroactive legislation. The case involved a provincial probate fee that was held by the Supreme Court of Canada to be ultra vires the province (Ontario) because it was in substance a tax imposed by the lieutenant governor in council without proper authority of the legislature.[89] In response, Ontario passed new legislation (the Estate Administration Act, 1998) that properly authorized the lieutenant governor in council to impose the probate fee and made the legislation retroactive by nearly 50 years (to 1950, when the probate fee was first imposed), effectively offsetting amounts collected on account of the old fee against the newly reimposed fee. However, the legislation expressly excluded the estate of the litigant, stating, "The estate of Donald Valentine Eurig, who died on or about October 14, 1993, is exempt from tax under this Act."[90]

In *Commission Scolaire des Chênes v. Canada*,[91] the successful litigants were also partially excluded from the effect of subsequent retroactive law. The taxpayers claimed input tax credits (ITCs) representing the difference between the GST that they paid to school bus providers and the rebates that they received as public sector bodies under section 259 of the ETA. They were denied by the minister of national revenue on the basis that they supplied exempt transportation services "to elementary or secondary school students" under section 5 of part III of schedule V of the ETA. The Tax Court dismissed the appeal,[92] but the Federal Court of Appeal concluded that the recipient of the supply was in the fact the province of Quebec, since, under a funding agreement, subsidies were paid by the provincial Ministry of Transportation and those subsidies constituted consideration for the supply. The supply did not, therefore, constitute an exempt supply of transportation services provided to students, and the taxpayers were eligible for ITCs. The Court of Appeal's judgment was rendered on October 17, 2001.

The Department of Finance subsequently amended the legislation to expand the exemption in section 5 of part III of schedule V of the ETA to include supplies of student transportation services to "a person other than another school authority."[93] The changes were given retroactive effect to December 17, 1990. Furthermore, the amendments permitted the minister to reassess under the amended provisions outside

88 [1998] 2 SCR 565.

89 The court concluded that the probate fee was in substance a tax. The tax was unconstitutional because the legislation authorizing the lieutenant governor in council to impose the fee did not constitute an express delegation of the province's taxing authority, in violation of section 53 of the constitution.

90 SO 1998, c. 34, schedule, section 7(2).

91 2001 FCA 264.

92 2000 CanLII 439 (TCC).

93 SC 2003, c. 15, section 64(1).

the normal four-year limitation period under section 298, despite any court decision rendered after December 21, 2001 (the announcement date of the amendments):

> [T]he Minister may reassess the net tax or an amount payable by the authority under section 230.1 of the Act . . . on or before the later of the day that is one year after the day on which this Act is assented to and the last day of the period otherwise allowed under section 298 of the Act for making the reassessment, despite that section and despite any decision of a court in respect of that reporting period of the authority that is rendered after December 21, 2001.[94]

Given that the court's decision in *Commission Scolaire des Chênes* was rendered prior to December 21, 2001, it appears that the litigants in that case were shielded from reassessment under the amended law, at least in respect of the reporting periods that were successfully appealed.[95]

Although the Department of Finance has issued guidelines outlining factors that it will consider in deciding whether to enact retroactive "clarifying amendments,"[96] including situations where litigation is in process, they are general in nature and do

94 Ibid., section 64(3).

95 See Canada, Department of Finance, "Proposed GST/HST Amendment Affecting School Authorities," *Release* no. 2001-126, December 21, 2001, which states, "To ensure consistent exempt treatment regardless of how these services may have been funded, the amendment is proposed to be effective from the date of introduction of the GST. However, the proposed amendment will not affect any case that has already been decided by the Federal Court." Other litigants who obtained a decision in their favour after December 21, 2001 were subject to assessment under the retroactive legislation, although it appears that relief was offered via remission order; see Certain School Authorities (GST/HST) Remission Order, PC 2007-1634 SI/2007-98 (2007) vol. 141, no. 23 *Canada Gazette Part II*, October 25, 2007. The 2007 budget announcing the remission order states that certain school authorities were reassessed "pursuant to a measure that was announced in 2001 and enacted in 2003, despite the fact that the Tax Court of Canada had rendered decisions in their favour after the measure was announced. The proposed remission addresses these exceptional circumstances." Canada, Department of Finance, 2007 Budget, Budget Plan, March 17, 2007, 435. It is interesting to compare this statement with the December 14, 2009 proposed amendments to the definition of "financial service" referred to above. The Department of Finance Backgrounder accompanying the December 14, 2009 news release, supra note 64, states, "[T]he proposed amendments would not affect any case that has been subject to a final determination by the courts before [December 14, 2009]." The court decisions that the amendments appear to address were all determined prior to that date. However, exclusion of the successful litigants in those decisions does not appear to be evident on the face of the Notice of Ways and Means Motion To Amend the Excise Tax Act tabled with the 2010 budget.

96 See Department of Finance, supra note 40, at 17-18. In summary, the guidelines are as follows:

> It may be appropriate to adopt retroactive clarifying changes where:
>
> a) the amendments reflect a long-standing well-known interpretation of the law by the Department of National Revenue;
>
> b) the amendments reflect a policy that is clear from the relevant provisions [and] that is well-known and understood by taxpayers;
>
> c) the amendments are intended to prevent a windfall benefit to certain taxpayers;

not appear to specifically address whether a particular litigant will be grandfathered or will be affected by the amendments.

CONCLUSIONS

The cases reviewed above indicate that the enactment of retroactive legislation to overturn a court judgment and adversely affect the litigant is to be recognized as a real and distinct possibility. There have been a number of examples in a variety of tax contexts, including instances such as *Procter & Gamble* where the legislation defeats the claim of the hitherto successful litigant. The cases also indicate that while it is a simple matter to recite the well-accepted presumptions against retroactivity and interference with vested rights, the application of these concepts to any given case is fraught with uncertainty. In this regard, additional guidance is needed from the courts in terms of when "vested rights" may be said to arise and when retroactive legislation will be applied to overturn such rights. The Supreme Court of Canada would have a good opportunity to provide such guidance should it grant P & G's leave to appeal. Taxpayers would also benefit from additional guidance from the federal and provincial governments as to the circumstances in which retroactive legislation will be drafted to affect the particular litigant in a court decision and the circumstances in which a litigant will be grandfathered.

---

d) the amendments are necessary to preserve the stability of the Government's revenue base; and

e) the amendments are corrections of ambiguous or deficient provisions that were not in accordance with the object of the Act.

Where litigation is underway, the following factors shall be taken into account for the purposes of determining whether clarifying changes should be recommended:

a) the relationship between the benefits of an immediate prospective reduction of risks to the tax base and the potential costs represented by the resulting increase in the risks with respect to cases under litigation;

b) the amount of tax revenue at risk in the objection and appeal process;

c) the stage of the judicial process that has been reached by a test case dealing with the issue to be dealt with by the change;

d) whether it is possible to make a declaratory amendment or to officially recognize the clarifying nature of the change.