

Federal Court



Cour fédérale

Date: 20090310

Docket: T-959-08

Citation: 2009 FC 249

Ottawa, Ontario, March 10, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

BERTRAND BOUCHARD

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] On the one hand, Mr. Bouchard is indebted to Her Majesty for tax arrears. On the other hand, he is receiving retirement benefits and an income supplement under the *Canada Pension Plan* and the *Old Age Security Act*.

[2] Until March 2008, he was receiving \$964.33 per month. At that point, the government decided to deduct 30% of the monthly amount and apply it to the tax arrears. As a result of that

decision, his monthly payments were reduced to \$675.74. The Minister used section 224.1 of the

Income Tax Act, which provides as follows:

224.1 Where a person is indebted to Her Majesty under this Act ... the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to the person by Her Majesty in right of Canada.

224.1 Lorsqu'une personne est endettée envers Sa Majesté, en vertu de la présente loi [...] le ministre peut exiger la retenue par voie de déduction ou de compensation d'un tel montant qu'il peut spécifier sur tout montant qui peut être ou qui peut devenir payable à cette personne par Sa Majesté du chef du Canada.

[3] This is an application for judicial review of that decision. Mr. Bouchard submits that, since he is a resident of Quebec and since Parliament incorporated by reference the Quebec civil law principles that apply to compensation rather than the common law doctrine of set-off, compensation does not apply in this case.

[4] The two Acts under which the Government of Canada is indebted to Mr. Bouchard specifically provide in sections 65 and 36, respectively, that amounts due are themselves exempt from seizure. Article 553 of the *Code of Civil Procedure of Québec* contains a similar provision.

[5] In addition, and this brings us to the crux of the argument, article 1676 of the *Civil Code of Québec* provides that “[Compensation] does not take place, however, if . . . the object of the debt is property which is exempt from seizure.” Thus, Quebec civil law does not allow compensation of property that is exempt from seizure by a third party when the other party is a debtor.

[6] The right to recover by way of compensation is purely a question of law. Accordingly, the appropriate standard of review is correctness. Although the *Income Tax Act* is the Department of

Revenue's enabling statute, the Department does not have more in-depth knowledge about compensation than the Court. Deference is therefore not owed (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 44).

JURISDICTION OF FEDERAL COURT

[7] The Federal Court is an additional court of law for the better administration of the laws of Canada pursuant to section 101 of *The Constitution Act, 1867*. The term "laws of Canada" means federal laws, not provincial.

[8] In any event, there are a number of ways in which a provincial law can be applied in the Federal Court. The provincial law in question must be relevant and related. For example, in *Kellogg Co. v. Kellogg*, [1941] S.C.R. 242, the predecessor of this Court, the Exchequer Court of Canada, had to refer to provincial employment law to determine the right of ownership of a patent (see generally, *ITO-International Terminal Operators Inc. v. Miida Electronics Ltd.*, [1986] 1 S.C.R. 752).

[9] Another way is incorporation by reference. An example of this method is the *Crown Liability and Proceedings Act*. Another, as described in the *Interpretation Act*, is the reference within a federal statute to a principle of civil or common law. Mr. Bouchard stressed this point in his submissions.

[10] Based on its power to legislate, Parliament adopted laws relating to taxation and other areas including bankruptcy and insolvency. Generally, activities that create taxable income or cause

insolvency relate to property and civil rights in a province. Consequently, in interpreting a federal statute, reference must be made to the underlying provincial laws.

[11] The *Interpretation Act* was amended in 2001 to prescribe the following:

<p>8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, <u>if</u> in interpreting an enactment <u>it is necessary</u> to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied</p>	<p>8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, <u>s'il est nécessaire</u> de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.</p>
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<p>8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.</p>	<p>8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.</p>
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[My emphasis.]

[Je souligne.]

[12] This leads us to the argument that compensation and set-off are not exactly the same thing.

For example, in *D.I.M.S. Construction Inc. (Trustee of) v. Quebec (Attorney General)*, 2005

SCC 52, [2005] 2 S.C.R. 564, the Court held that the concept of equitable set-off is inapplicable in bankruptcy in Quebec.

[13] Compensation is discussed in Book Five of the *Civil Code of Québec* entitled “Obligations”; more specifically in Chapter VIII—Extinction of Obligations, Title One—Obligations in general. Compensation is one of a number of ways in which an obligation can be extinguished; others include payment, prescription and confusion (article 1671).

[14] Articles 1672, 1673 and 1676 provide as follows:

1672. Where two persons are reciprocally debtor and creditor of each other, the debts for which they are liable are extinguished by compensation, up to the amount of the lesser debt.

Compensation may not be claimed from the State, but the State may claim it.

1673. Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.

A person may apply for judicial liquidation of a debt in order to set it up for compensation.

1676. Compensation is effected regardless of the cause of the obligation that has

1672. Lorsque deux personnes se trouvent réciproquement débitrices et créancières l'une de l'autre, les dettes auxquelles elles sont tenues s'éteignent par compensation jusqu'à concurrence de la moindre.

La compensation ne peut être invoquée contre l'État, mais celui-ci peut s'en prévaloir.

1673. La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une et l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fongibles de même espèce.

Une partie peut demander la liquidation judiciaire d'une dette afin de l'opposer en compensation.

1676. La compensation s'opère quelle que soit la cause de l'obligation d'où résulte la

given rise to the debt.

dette.

Compensation does not take place, however, if the claim results from an act performed with intention to harm or if the object of the debt is property which is exempt from seizure.

Elle n'a pas lieu, cependant, si la créance résulte d'un acte fait dans l'intention de nuire ou si la dette a pour objet un bien insaisissable.

[15] The issue is whether Parliament intended paragraph two of article 1676 to be available to a tax debtor.

[16] Mr. Bouchard relies heavily on the Federal Court of Appeal decision in *Mintzer v. Canada*, [1996] 2 F.C. 146. In that case, the tax debtor was an Ontario resident. The province of Ontario did not have the equivalent of paragraph two of article 1676. Therefore, the concept of set-off applied in that case. However, in *obiter* in the footnotes to its decision, the Court observed that the result could well be different in Quebec.

[17] It is important to consider the actual words that Parliament used in section 224.1, which states that

. . . the Minister may require the retention by way of deduction or set-off . . .

[...]le ministre peut exiger la retenue par voie de déduction ou de compensation[...]

For example, the word “deduction” does not give effect to the civil law concept of compensation or the common law concept of set-off, and the two concepts differ from each other. Since the reference is to set-off, at minimum, the two debts must be “liquid”. Surely, Parliament was referring to legal set-off, not judicial liquidation as provided in paragraph two of section 1673 of the Civil Code.

[18] Furthermore, set-off is effected by operation of law up to the amount of the lesser debt.

Section 224.1 of the *Income Tax Act* provides for an intervention by the Minister of Revenue and gives the Minister discretion to require less than 100% by way of set-off, i.e., 30% as in this case. It is therefore clear that Parliament did not intend to make all the compensation provisions of the *Civil Code of Québec* applicable in such circumstances.

[19] As stated countless times by the Supreme Court, the provisions of a statute are to be interpreted in a contextual and purposive way. The words must be considered in their context and in their grammatical and ordinary sense in harmony with the scheme of the statute, its object and the intention of Parliament (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, is only one of many examples).

[20] The *Income Tax Act* was designed to generate revenue. Section 224.1 creates the process of involuntary enforcement. I am convinced that Parliament did not intend to provide tax debtors with a way to avoid seizure in such circumstances. As stated in Baudoin and Jobin's *Les obligations*, 6th ed., (Cowansville, Quebec: Éditions Yvon Blais, 2005), at paragraph 1045: [TRANSLATION] "Quebec law has always recognized that legal compensation cannot operate with respect to support, which is exempt from seizure." At footnote 35, the authors refer to article 1190 (3) of the *Civil Code of Lower Canada*. Although this pre-Confederation right could have applied, in itself, in federal matters, it was abolished by *A First Act to harmonize federal law with the civil law*, S.C. 2001, c. 4. See also *Marcoux v. Canada (Attorney General)*, 2001 FCA 92, a case that discusses sections in direct proximity to section 224.1, i.e., sections 224 and 225.

[21] Mr. Bouchard also submits that the monies owed to him are not debts in the hands of Her Majesty but, rather, are in the nature of a trust or social obligation. However, the *Minzter* decision, above, defends the rule that the benefits payable to Mr. Bouchard are debts paid out of the Consolidated Revenue Fund.

[22] Although the application must be dismissed, the point raised was not easy to resolve, was sincerely argued and pursued, just as the Federal Court of Appeal suggested in *Mintzer*. In the circumstances, no costs are awarded.

[23] Mr. Bouchard submitted that he was unable to pay the amount due. This decision does not discuss Mr. Bouchard's right to submit a request for relief for taxpayers.

ORDER

FOR ALL THESE REASONS;

THE COURT ORDERS that this application for judicial review is dismissed without costs.

“Sean Harrington”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-959-08

STYLE OF CAUSE: Bertrand Bouchard v. Attorney General of Canada

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 13, 2009

**REASONS FOR ORDER
AND ORDER BY:** JUSTICE HARRINGTON

DATED: March 10, 2009

APPEARANCES:

Bertrand Bouchard	THE APPLICANT SELF-REPRESENTED
Ian Demers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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