

# Uniform Enforcement of Tax Judgments 2007

## CIVIL SECTION

### APPLICATION OF THE UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT TO TAX JUDGMENTS

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**Charlottetown, Prince Edward Island, September, 2007**

[1] At the Annual Conference held in Edmonton in August 2006, I presented a report entitled *Interprovincial Enforcement of Tax Judgments*. After the ensuing discussions of jurisdictional representatives, it was resolved that the Working Group continue to examine the issues raised in the Report and the directions of the Conference, and prepare a draft Act amending the *Uniform Enforcement of Canadian Judgments and Decrees Act* (Uniform Act) and the commentaries, for consideration at the 2007 meeting.

#### **Definition of a Canadian judgment**

[2] As the Report stated last year, the Supreme Court of Canada decision in *Hunt* confirmed that the character of the Canadian constitutional scheme "calls for the courts in each province to give "full faith and credit" to the judgments of the courts of sister provinces"[2]. As a consequence, it is quite possible that the court of a province is already constitutionally bound to recognize a tax judgment of a court in another jurisdiction in Canada, moving away from the revenue rule which states that no country ever takes notice of the revenue laws of another.

[3] The Manitoba Queen's Bench delivered a judgment along those lines in *Weir v. Lohr*, (1967) 65 D.L.R. (2d) 717, Tritschler J. citing with approval the following extract from an article by Professor J.-G. Castel[3]:

"As between the Canadian provinces where tax laws are fairly well standardized there is no reason to invoke public policy as a bar to their recognition and enforcement."

[4] Furthermore, in his opinion, "*to apply the foreign State foreign tax, foreign revenue rule between sister Provinces of Canada is what Mr. Castel calls an excellent illustration of the evils of mechanical jurisprudence*".

[5] That being said, in view of the special treatment generally given to tax judgments, it is recommended that any existing doubt regarding the enforcement of Canadian tax judgments be removed by amending section 1 of the Uniform Act to specifically include such judgments. The amendment would remove existing uncertainty.

[6] Alternatively, modifications could be made only to the commentaries accompanying the Uniform Act. This solution would concur with the comments of those who believe the Uniform Act already covers tax judgments[4].

[7] Whatever the avenue, a difficulty persists in how to qualify a tax law, an expression that has no set definition in common law. The following criteria could be examined to determine if an amount is a tax or a fee:

"(1) it must be imposed under the authority of Parliament or a legislature, either directly or indirectly by an intermediary organization such as a municipality;

(2) it must be compulsory, thereby making a taxpayer liable to proceedings for failure to pay;

(3) it must be levied for a public purpose and all amounts collected must be paid into the federal or provincial treasury;

(4) it must not be a mere statutory levy scheme pursuing an objective other than that of raising revenue"[5].

[8] Only decrees and judgments under a law imposing a tax would be targeted by the proposed amendments to the Uniform Act and commentaries, and would include:

1. the *Municipal Act* of Ontario, 2001, S.O., c. 25;
2. the *School Act* of British Columbia [RSBC 1996], c. 412;
3. the *Financial Corporation Capital Tax Act* of New Brunswick, S.N.B. 1987, c. F-11.1;
4. the *Retail Sales Tax Act* of Manitoba, C.C.S.M. c. R130;
5. the *Tobacco Tax Act* of Yukon, R.S.Y., c. 219.

[9] As a further point, an amendment to the text of the Uniform Act and commentaries should expressly provide for the definition to include a certificate to be registered in the court in relation to an amount payable under a tax statute, and for the certificate to have the same effect as a judgment from the court. Such a certificate exists in section 223 of the *Income Tax Act*[6] which deals with amounts payable by a person under that Act or various other Acts[7].

[10] The effect of the proposed amendments would be to cover a broader spectrum than is currently the case under the tax judgment agreements with the Canadian government and the reciprocal enforcement provisions drafted into each province's or territory's income tax statute. All tax judgments would then become enforceable throughout Canada, including certificates for amounts payable, and the other provinces and territories in Canada would be able to have tax judgments given in their courts recognized and enforced in Québec (article 3162 of the *Civil Code*).

### **Temporal application**

[11] If the Conference accepts the recommendation in this Report to amend section 1 of the Uniform Act, it is important to examine the amendment's impact on the application of the Act. Section 11 sets out which judgments are covered:

11. This Act applies to

(a) a Canadian judgment made in a proceeding commenced after this Act comes into force, and

(b) a Canadian judgment made in a proceeding commenced before this Act comes into force and in which the party against whom enforcement is sought took part.

[12] While true in Canada that under the non-retroactivity principle applying to legislation in both civil law and common law jurisdictions, it ensues that statutes are presumed to be void of any retrospective effect. That presumption, however, is not a rule of law, being but a rule of interpretation for cases of doubt as to the statute's temporal operation. Canadian courts have always been respectful of the lawmaker's right to depart from the presumption (*Upper Canada College v. Smith*, (1921) 61 S.C.R. 413).

[13] As a result, in keeping with the constitutional principle of parliamentary supremacy, upheld on numerous occasions by the courts in Québec and elsewhere in Canada, an enactment may when deemed necessary be made retrospective if the following conditions are satisfied:

1. The retrospectivity of legislation must be clearly set out in the enactment, either explicitly or tacitly[8].

2. The retrospective enactment must be consistent with the Constitution. There is nothing in the Canadian Constitution that prohibits retrospective legislation other than in criminal and regulatory offence matters.[9] Canadian courts will not intervene unless the lawmaker has acted unconstitutionally by straying outside the subject-matter over the which the Constitution has assigned jurisdiction.

[14] In the case at hand, the provision in the Uniform Act that allows for operation to judgments issued before the effective date of the Act will in practical terms not have any real retrospective effect. The Uniform Act is a "procedural" Act which governs only how a right is to be exercised, not the substance of the right. Nor does it create or modify the claim in favour of the jurisdiction concerned; it can only govern the manner in which the claim is to be exercised[10].

[15] In that context, the Canadian case-law and jurisprudence many times over have recognized that a new "procedural" Act does not operate retrospectively, but rather has immediate effect and applies prospectively as regards the rights existing at the time it comes into force[11].

[16] As a further point, the amendment to the Uniform Act seeks only to clarify the Act and remove uncertainty over inter-jurisdictional enforcement of tax judgments in Canada; it confirms the full recognition principle set out in *Hunt*. One might add that from that perspective, the Act has no declaratory effect and therefore applies to all tax judgments enforceable at the time it comes into force.

[17] In the light of the above, we believe legality and fairness are in no manner restricted so as to preclude a provision calling for the immediate application of the legislative amendment to all tax judgments issued prior to the amendment becoming effective. On the contrary, the provision would confirm the case law and jurisprudential stance on the temporal application of so-called "procedural" statutes. As well, the provision would allow for more efficient administration of the Uniform Act, resulting in an increased cost benefit to the jurisdiction concerned and in turn, to the community as a whole[12].

[18] We might also mention that it would behoove the other provinces and territories to enact such a provision to further the balancing of public finances since taxpayers would be prevented from taking advantage of a situation where judgments issued in the other provinces and territories before the coming into force of the Act cannot be enforced. We are of the view it is paramount for enforceable tax judgments to be dealt with uniformly and equitably. One may remember that in 1995, the Standing Committee on Public Accounts opened the door to greater protection of public revenue, including by the use of retrospective legislation[13]. In the case of the Uniform Act, because the proposed amendment has no true "retrospective effect", simply an "immediate effect", the amendment in the circumstances would certainly be a legitimate one.

[19] We therefore strongly recommend section 11 of the Uniform Act be amended to provide that it applies to Canadian tax judgments issued

before the effective date of the Uniform Act, even though the party concerned by the enforcement measures did not take part in the proceedings.

[20] If the Conference decides to amend section 1 of the Act only, the proposed amendment should come into force on the date on which the Uniform Act comes into force in the jurisdiction since the proposed amendment aims at clarifying the Uniform Act without extending its scope. The commentaries for section 11 would not need to be modified.

[21] Also, if the Conference chooses to modify only the commentaries of section 1 of the Uniform Act, no modification would be necessary to the commentaries of section 11.

### **Recommendations**

[22] The definition of "Canadian judgment" in section 1 of the Uniform Act should be amended to provide that the Act applies to tax judgments, and to include a certificate registered in respect of an amount payable under a tax law that has the same effect as a judgment. If the second recommendation is not retained, the amendment should come into effect on the date on which the Uniform Act comes into force in the jurisdiction.

[23] Since the Uniform Act is procedural and of immediate application, section 11 of the Act should be amended to provide that the Uniform Act applies to tax judgments issued before its coming into force, even though the party concerned by the enforcement measures did not take part in the proceedings.

### ***The Uniform Enforcement of Canadian Judgments and Decrees Amendment Act***

**1.** The Uniform Enforcement of Canadian Judgments and Decrees Act is amended by this Act.

**2.** Section 1 is amended

(a) by replacing the definition "Canadian judgment" with the following:

**"Canadian judgment"** means

(a) a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than [enacting province or territory]

(i) that requires a person to pay money, including an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that is enforceable as a judgment of the superior court of unlimited trial jurisdiction in that province or territory,

(ii) under which a person is required to do or not do an act or thing, or

(iii) that declares rights, obligations or status in relation to a person or thing,

but does not include a judgment, decree or order that

(iv) is for maintenance or support, including an order enforceable under the [appropriate Act in the enacting province or territory],

(v) is for the payment of money as a penalty or fine for committing an offence,

(vi) relates to the care, control or welfare of a minor,

(vii) is made by a tribunal of a province or territory of Canada other than [enacting province or territory], whether or not it is enforceable as an order of the superior court of unlimited trial jurisdiction in that province or territory, to the extent that it provides for relief other than the payment of money, or

(viii) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person; or

(b) a Canadian tax judgment; (« jugement canadien »)

(b) by adding the following definition:

**"Canadian tax judgment"** means

(a) a judgment for the recovery of an amount of money payable under an Act imposing a tax made by a court of a province or territory of Canada other than [enacting province or territory], and

(b) a certificate of an amount payable under an Act imposing a tax that is registered in a court of a province or territory of Canada other than [enacting province or territory] and that is deemed under the law of that province or territory to be a judgment of that court; (« jugement canadien de nature fiscale »).

**Comment:** Section 1 is amended to specify that the expression "Canadian judgment" includes judgments under a tax law. To be considered a "tax law", the levy must be enforceable by law, imposed under the authority of the legislature, levied by a public body and intended for a public purpose (*Eurig Estate (Re)*, [1998] 2 S.C.R. 565, par. 15).

The amendment clarifies the scope of the Act to reflect the Supreme Court decision in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, which confirmed that the character of the Canadian constitutional scheme "calls for the courts in each province to give "full faith and credit" to the judgments of the courts of sister provinces". The revenue rule, which states that no country ever takes notice of the revenue laws of another, would consequently not be applicable as between courts of the Canadian provinces and territories. A further purpose is to remove an ambiguity by having the definition include a certificate of an amount payable under a tax law registered in a court of a province or territory.

Section 1 is also amended to clarify the presentation of judgments, decrees or orders included in the definition of "Canadian judgment" and those that are not.

**3.** Section 11 is amended by striking out "and" at the end of clause (a), adding "and" at the end of clause (b) and adding the following after clause (b):

(c) a Canadian tax judgment made before or after this Act comes into force.

**Comment:** Since the Uniform Act is a procedural enactment, it follows that the amendments should be given immediate application. Accordingly, the amendment to section 11 provides that the Uniform Act applies to Canadian tax judgments, whether or not they were issued before the



Uniform Act came into force, even though the party concerned by the enforcement measures did not take part in the proceedings.

Coming into force

**4.** This Act is deemed to have come into force on [insert the date on which the Uniform Enforcement of Canadian Judgments and Decrees Act came into force in enacting province or territory].

**Comment:** Since the amendments to the *Uniform Enforcement of Canadian Judgments and Decrees Act* aim to clarify the scope of the Act, they come into force on the date on which the Uniform Act comes into force in the jurisdiction.

## FOOTNOTES

[1] Vincent Pelletier is a lawyer with the Ministère de la Justice du Québec and Isabelle Paradis is a notary with Revenu Québec.

[2] *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, page 324.

[3] Castel, J.-G., *Foreign Tax Claims and Judgments in Canadian Courts*, 42 Can. Bar Rev. 277 (1964).

[4] It was also suggested during the discussions that Revenu Québec could undertake proceedings to enforce a judgment of a Québec court in a province that has enacted the Uniform Act. On this point, however, Revenu Québec prefers to await the outcome of the ULCC proposals on the interprovincial enforcement of tax judgments before any such proceedings are commenced.

[5] Lord, Sasseville, Bruneau, Friedlander, *Les principes de l'imposition au Canada*, 13<sup>e</sup> édition (2002) Wilson & Lafleur, p. 5, based on the Supreme Court decisions in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, and *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357.

[6] R.S.C. 1985, c.1 (5th Supp.).

[7] Each province and territory other than Alberta has a similar provision in its income tax statute. See the Annex to last year's report.

[8] See *Gustavson Drilling (1964) Ltd v. Minister of National Revenue*, [1977] 1 S.C.R. 271, and Peter W. Hogg, "Legislative History in Constitutional cases", in SHARPE, R.J. (dir.), *Charter Litigation*, Toronto, Butterworths, 1987, p.131.

[9] *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, recently confirmed in *Kingstreet Investments Ltd v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3.

[10] See *Roy v. Loranger*, (1899) 8 Q.B. 119, in which a statute dealing with the enforcement of judgments was termed a "procedural Act".

[11] *Gustavson Drilling (1964) Ltd v. Minister of National Revenue*, [1977] 1 S.C.R. 271 and *Upper Canada College v. Smith*, (1921) 61 S.C.R. 413; CÔTÉ, Pierre-André "Interprétation des lois", 3<sup>ième</sup> Édition, Montréal, Éditions Thémis, 1999, p.222 and CÔTÉ, P-A "L'application dans le temps des lois de pure procédure", (1989) 49 R. du B. 625.

[12] See Anne-Marie Gigantes, "La rétroactivité des lois fiscales au Canada", in Congrès 2007, Montréal, Fiscal and Financial Planning Association, CCH Publications.

[13] CANADA, House of Commons, Seventh Report of the Standing Committee on Public Accounts, Issue No. 25, February 25, 1995.