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THE IMPACT OF QUEBEC CIVIL LAW ON THE RECOGNITION OF MANDATOR-MANDATARY RELATIONSHIPS BY QUEBEC AND CANADIAN TAX AUTHORITIES

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INTRODUCTION

This article discusses the differences between the common law concept of "agency" and the Quebec civil law concept of "mandate," and suggests that each of them should be evaluated distinctively by Canadian tax authorities.

More specifically, this article asserts that the Quebec Revenue Agency (herein referred to as "**QRA**") and the Canada Revenue Agency (herein referred to as "**CRA**"), in determining whether a given relationship is to be characterized as a mandate, must not rely on the common law principles related to the concept of agency where those principles do not exist under Quebec civil law pertaining to the notion of mandate.

DISCUSSION

In general, the common law concept of agency refers to a relationship where one person (the principal) uses another person (the agent) to perform certain tasks on his or her behalf. Similar to agency, the Quebec civil law concept of mandate refers to a contract where a person (the mandator), confers power to another person (the mandatary) to represent his or her in carrying out a juridical act with a third person.[1, 2]

Agency/mandate relationships exist in both professional and non-professional environments. These relationships originate and are governed by the private law that is the *Civil Code of Québec* (herein referred to as "**CCQ**") in the Province of Quebec, and Canadian common law principles for the rest of Canada.

Despite being a private law concept, agency/mandate relationships are also relevant under tax legislation. Canadian and Quebec tax authorities have shown great interest in the relationships between principals and agents, as well as the ones between mandators and mandataries, since such relationships have various tax implications. In particular, in the context of the goods and services tax (herein referred to as "**GST**") and the Québec sales tax (herein referred to as "**QST**"), the CRA and the QRA must analyze the relations established between the parties, as it affects their respective obligations as well as the attribution of input tax credits and input tax refunds.

[1] CCQ, s. 2130.

[2] Canada Revenue Agency, *Policy Statement, P-182R — Agency*, July 2013.

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In order to facilitate such analyses, the CRA issued the Policy Statement P-182R[3] (herein referred to as the "**Statement**"), wherein it establishes certain criteria and indicators to assess whether a relationship between two parties may effectively be recognized as an agency or mandate relationship. In particular, the position taken by the CRA in the Statement was developed in the context of the application of the general rules of Part IX of the *Excise Tax Act*[4] (herein referred to as "**ETA**") and refers to the applicable law principles across Canada.

The QRA, in many of its interpretation letters,[5] sets out its own analysis of whether a relationship constitutes a mandate for the purposes of computing GST and QST and expressly refers to the CRA's Statement in doing so.

Although tax legislation refers to agency/mandate relationships, however, none of the tax laws define these concepts.[6] The absence of these definitions is not, in itself, problematic, since tax authorities can and must rely on the private law definitions. What is problematic, however, is when the CRA and the QRA rely on the wrong body of private law — non-civil principles — to determine whether a legal relationship taking place between two parties in Quebec constitutes a mandate for the purposes of the *Income Tax Act*[7] (herein referred to as "**ITA**") or the *Taxation Act*[8] (Québec), as the case may be, and other tax laws as a whole.

A. The Approach Developed by the CRA and Applied Both by the CRA and the QRA

The CRA uses a two-step approach to evaluate whether a relationship is one of agency/mandate. First, it focuses on three essential qualities. After concluding from the first step that a relationship of agency/mandate is established, the CRA proceeds to the second step, looking at whether the relationship has a fiduciary nature, as well as other indicators that an agency/mandate relationship has in fact been established.

1. The Three Essential Qualities of Agency/Mandate

i) Consent of Both the Principal and the Agent, or Both the Mandator and the Mandatary

The first essential criterion held by the CRA is consent of both the principal and the agent or, in the case of a mandate, the mandator and the mandatary. The CRA emphasizes that the intention of the parties and the behaviour of the persons concerned constitutes a determining factor in order to qualify the legal relationship between the parties.

ii) Authority of the Agent/Mandatary to Affect the Principal/Mandator's Legal Position

This second criterion makes it clear that an agent/mandatary who performs legal acts which are authorized or accepted by the principal/mandator must be acting in such a way as to influence the legal position of the latter. The CRA states, however, that the absence of explicit reference to such authority is not fatal if the other two essential qualifications lead to the conclusion that the agent/mandatary has such authority. Thus, in order to determine whether the second criterion is satisfied, one must ascertain whether the agent/mandatary can actually bind the principal/mandator to a contract concluded by the agent/mandatary and a third party.

iii) The Principal/Mandator's Control of the Agent/Mandatary's Actions

The CRA asserts that the principal/mandator exercises a degree of control over the agent/mandatary in an agency/mandate relationship. For example, this control criterion may be met where the agent/mandatary is obliged to obtain authorization from the principal/mandator in order to incur certain expenses in the performance of the contract.

2. Fiduciary Nature and Additional Indicators of Agency/Mandate Relationships

Additional indicators are used to help determine whether the essential qualities of agency/mandate are present among the parties to a transaction.[9] Such indicators are not cumulative and their applicability to factual situations can vary considerably from one case to another, based on the characteristics of the individual parties and the type of transactions covered by the mandate.

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[3] *Ibid.*

[4] RSC 1985, c. E-15.

[5] For example, see Revenu Québec, Lettre d'interprétation 16-0324284-001, September 8, 2016; Revenu Québec, Lettre d'interprétation 15-024131-001, February 24, 2015; Revenu Québec, Lettre d'interprétation 13-016879-001, March 11, 2013.

[6] Canada Revenue Agency, *Policy Statement, P-182R — Agency*, July 2013.

[7] RSC 1985, c. 1 (5th supplement).

[8] RSQ, c. I-3.

[9] Canada Revenue Agency, *Policy Statement, P-182R — Agency*, July 2013.

Fiduciary Nature of the Relationship

The CRA suggests that the relationship between a principal and his or her agent, or between a mandator and his or her mandatary, is of a fiduciary nature, meaning the latter must act in the former's best interest.

Other indicators discussed by the CRA include: assumption of risk, accounting practices, remuneration, best efforts, alteration of property acquired, use of property or service, liability under contract/liability for payment, and ownership of property. Each of these indicators is used to confirm whether the essential qualities in step one are found in the relationship being evaluated.

B. The Civil Law Notion of Mandate

The Quebec civil law notion of a mandate is described in the chapter on Mandates in the CCQ. Article 2130 of the CCQ lays out the two characteristics required in order to establish a relationship of mandate: (1) representation of the mandator, and (2) the carrying out of a juridical act by the mandatary.[10] In addition to these characteristics are the elements explicitly mentioned by the legislator, namely the acceptance of the mandatary, the intervention of a third party, the notion of power, and the disclosure of a common mandate, all within the framework of the same act.[11]

i) Acceptance of the Mandatary

It is essential for the mandatary to accept his or her function as such.[12] This acceptance can be explicit or tacit, and can also be inferred from the facts, his or her conduct, or even his or her silence.[13]

ii) Representation

Representation can be characterized by circumstances where "a person, the representative, performs an act in the name, in the place of and on behalf of another person, the represented person. [. . .] The effect of representation is to make the representative the creditor or debtor, as the case may be, of the third party with whom the representative has entered into a relationship" [unofficial translation].[14]

The concept of representation is at the very core of the mandate contract, since the purpose of this relationship is to enable the mandatary to act for and on behalf of the mandator. Thus, the power of representation implies that "the mandatary has the right and the power to create, modify or extinguish obligations for the mandator towards third parties".[15] Concretely, although it is the mandatary who is more active and who takes the steps necessary for the conclusion of juridical acts, it is nevertheless the mandator, with a rather passive role, who is bound by the actions of the latter.[16]

Representation allows for the distinction between a mandatary and a trustee, a manager, a liquidator, etc. These latter functions do not involve acting in the name of another individual to carry out their role. However, all functions operate to administer the property of another.[17]

Consequently, representation allows for the mandatary to engage the mandator, while simultaneously allowing the mandator to engage with third parties through the mandatary who acts as an intermediary between them.

iii) The Carrying Out of Juridical Acts With Third Parties

The execution of one or more juridical acts constitutes the very object of the mandate and it is for this purpose that the mandatary's representation of the mandator becomes meaningful. Moreover, in order for the relationship between the mandatary and the mandator to be useful, juridical acts must necessarily be concluded with third parties. Otherwise, the mandator would not require the mandatary as an intermediary.

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[10] Minister of Justice, *Commentary on the Civil Code of Québec*, book II, 1340.

[11] *Ibid*.

[12] CCQ, s. 2130.

[13] CCQ, s. 2132.

[14] Hubert Reid, "Représentation" in *Dictionnaire de droit québécois et canadien* (Wilson & Lafleur, 5th edition), 872.

[15] *Canaque International construction inc. v. James Richardson International (Quebec) Ltd.*, 2000 CanLII 3786 at para 19 (QC CA).

[16] Pierre-Basile Mignault, *Droit civil canadien*, vol. 8, (Montreal: Wilson & Lafleur, 1909), 4.

[17] Madeleine Cantin Cumyn, "L'administration des biens d'autrui dans le Code civil du Québec," *Revista Catalana de Dret Privat* 3 (2004): 17, 20.

iv) The Notion of Power

The concept of power is useful for understanding the mandate contract in that it is necessary for the mandator to have the power to conclude the legal act concluded by the mandatary on his or her behalf. When the mandator entrusts the sale of property to his or her mandatary, the mandator does not lose his or her power. There is no transfer of power in the sense that one party gives up power and the other party receives power; instead, the conferral of power is an extension of power that can be exercised by both the mandator and his or her mandatary.[18]

C. Comparison Between Agency and Mandate Relationships With Regards to the Criteria Developed by the CRA

i) Common Ground

The CRA's first criterion of consent is present in both the common law concept of agency and the civil law concept of mandate. The common law principles refer to the notion of consent, whereas the CCQ refers to the notion of acceptance. In the Statement, the CRA partly reproduces the wording of article 2130 of the CCQ, which provides that the mandate is formed by the mandatary's acceptance of his or her function.

The CRA's second criterion of authority to affect the legal position of the principal/mandator may be partially equated with the condition laid out in article 2130 of the CCQ, whereby the mandatary must represent the mandator in the performance of juridical acts with third parties.

ii) Distinct Elements

The CRA's third essential criterion of control by the mandator, as well as the additional indicators relating to fiduciary relationship, remuneration, and best efforts, to name a few, are elements that are exclusive to the common law notion of agency and should not fall under the Quebec civil law concept of mandate.

D. Consequences of the QRA and CRA's Application of the Statement to Interpret Mandate Relationships in Quebec

Referring to a mandate as agency is a misnomer, and treating the evaluation of a relationship between parties in Quebec as though it were governed by the common law rules of agency using non-civil criteria is somehow a misapplication of the law.

With respect to the applicability of private law concepts in interpreting the provision of Canadian laws, section 8.1 of the *Interpretation Act* states the following:

> **Duality of legal traditions and application of provincial law**
>
> **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, if in interpreting an enactment it is necessary 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.[19]

Section 8.1 of the *Interpretation Act* is applicable where a Canadian law refers to an existing common law of civil law concept that is not otherwise defined within that legislation. In such a situation, the concept must be interpreted in light of the applicable private law.

Thus, where the CRA and the QRA are required to determine if a relationship established under Quebec civil law may validly be recognized as a mandate for the purposes of the ITA, the ETA or the QST, their evaluation must be conducted with regards to the criteria developed by Quebec's legislature under the CCQ since neither of these acts define the concept of "mandate" or "agency".

As the Court of Quebec explained, tax law is based on private law and, unless otherwise specified, it must be interpreted in a way that gives effect to legal concepts originating from the applicable private law:

> [unofficial translation] Here is a perfect illustration of the omnipresence of the concept that tax law does not exist in a vacuum. Tax law is, in a way, superimposed on civil law or corporate law, which may be called common law or general law. Since tax law is based on this general law, it relies primarily on existing legal concepts.

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[18] Claude Fabien, "Les règles du mandat," *Extraits du répertoire de droit* (Montreal: Chambre des notaires du Québec, 1989), 69.

[19] RSC 1985, c. I-21.

> Of course, tax legislation can define any word, including the word normally having a legal meaning in general law, to make it a specific term in tax law. But when, as in our case, the legislator chooses to use the legal word simply, one sees her intention to rely on the already established meaning.[20]

As a result, since the CRA based itself on both common law and civil law principles in developing the Statement, it would be erroneous to apply indiscriminately all criteria provided for in the Statement to a relationship established under Quebec legislation since many principles do not fall within the requirements set out in the CCQ for the establishment of a mandator-mandatary relationship.

This approach is consistent with jurisprudence, since courts recognized repeatedly that legal relations developed between parties must be evaluated and characterized in connection with the law that applies to a particular relationship before any tax treatment can be applied to it.[21] In addition, relationships that are well founded in fact and in law cannot be otherwise qualified by tax authorities.[22]

The practical consequence of the QRA and CRA relying on the criteria developed in the Statement is that it leads to a mischaracterization of a contractual relationship, which may distort the intent of the parties and result in a different tax treatment that would not be justified. The same reasoning applies to the qualification of agency relationships outside of Quebec, as the recognition of those relationships by tax authorities should not depend on civil law requirements.

CONCLUSION

The legal notion of agency does not exist in Quebec civil law. Its closest relative is the mandate relationship. The concept of mandate is not only nominally different from agency; its character is also distinct. Applying agency criteria to interpret the scope of the concept of a mandate removes part of the essential character of a mandate, replacing it with the character of agency.

Unless the Quebec legislator formally decides to make the civil law concept of mandate conform to the common law concept of agency, Quebec tax authorities cannot rightfully look outside the scope of the civil law to inform their assessment of whether a mandate exists between parties that are subject to the Quebec civil law. When evaluating mandate relationships in Quebec, criteria and indicators found outside of Quebec civil law should be excluded from the analysis. The QRA and CRA should allow Quebec civil law to be autonomous, without needing to rely on common law principles that extend beyond their scope.

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SPLITTING, SPRINKLING, AND STRIPPING: THE LATEST ON THE SMALL BUSINESS PROPOSALS

Since the proposals affecting private corporations were announced, various industry groups have begun responding to the changes on behalf of their members. Some are choosing to raise their concerns directly as a single voice, others are encouraging members to independently contact their Member of Parliament.

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[20] *ARTV Inc. v. Quebec Revenue Agency*, 2016 QCCQ 8757 (confirmed by the Quebec Court of Appeal, 2016 QCCA 1853).

[21] *Dale v. Canada*, 97 DTC 5252; *Sussex Square Apartments Ltd. v. The Queen*, 99 DTC 443 (CCI), confirmed by *The Queen v. Sussex Square Apartments Ltd.*, 2000 DTC 6548 (CAF); *Attorney General of Canada v. Juliar*, 2000 DTC 6589 (CA Ont), request for leave to appeal dismissed.

[22] *Shell Canada Ltd. v. R*, 99 DTC 5669.