Federal Court of Appeal  Cour d'appel fédérale

Date: 20190717

Docket: A-154-18

Citation: 2019 FCA 208

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DANIEL RAPOSO

Respondent

Heard at Ottawa, Ontario, on May 2, 2019.

Judgment delivered at Ottawa, Ontario, on July 17, 2019.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This an appeal from a decision rendered by the Honourable Mr. Justice Paris of the Tax Court of Canada (TCC) on April 26, 2018. In that decision, indexed as 2018 TCC 81, the judge allowed the notice of appeal filed by Daniel Raposo (the respondent) against the notice of assessment issued by the Quebec Minister of Revenue (the Minister) on March 25, 2013, under

Part IX of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (ETA) for the period from January 1, 2009 to December 31, 2010.

[2] The judge rejected the Minister's position that, because the respondent was part of a group involved in drug trafficking, he was jointly and severally, or solidarily, liable with the other members for the payment of $40,200.00 in respect of the goods and services tax (GST) collectible on the sale of narcotics. That conclusion is at the heart of this appeal.

[3] For the reasons that follow, I conclude hat the appeal should be dismissed, with costs.

I. Facts and proceedings

[4] Between 2009 and 2010, the respondent was the subject of a police investigation into cocaine trafficking in the Outaouais region. The investigation targeted two groups of individuals, the Raposo and Goodwin clans, who allegedly supplied cocaine to a third group, the Lalonde clan, for distribution on the black market. In June 2010, that investigation led to the arrest of 23 people, including members of the Raposo clan. Ultimately, charges of conspiracy and possession of narcotics for the purpose of trafficking were brought against several individuals, including the respondent.

[5] After the charges were laid, the information obtained during the police investigation was forwarded to the Minister. On that basis, the Minister determined that the Raposo clan had made taxable supplies of cocaine for a total amount of $804,000 and failed to collect and remit

$40,200.00 of GST. That determination was based on sections 165 and 221 of the ETA. The relevant parts of those provisions read as follows:

165(1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.	165(1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5% sur la valeur de la contrepartie de la fourniture.
221(1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.	221(1) La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section II.

[6] The concept of "taxable supply", to which these provisions refer, is defined in subsection 123(1) of the ETA as "a supply that is made in the course of a commercial activity". The concept of "commercial activity" is defined in the same section as follows:

(a) a business carried on by the person …, except to the extent to which the business involves the making of exempt supplies by the person,	a) l'exploitation d'une entreprise […], sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;
b) an adventure or concern of the person in the nature of trade …, except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and	b) les projets à risque et les affaires de caractère commercial […], sauf dans la mesure où le projet ou l'affaire comporte la réalisation par la personne de fournitures exonérées;
(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply; (*activité commerciale*)	c) la réalisation de fournitures, sauf des fournitures exonérées, d'immeubles appartenant à la personne, y compris les actes qu'elle accomplit dans le cadre ou à l'occasion des fournitures. (*commercial activity*)

[7] On the basis that the respondent and the other members of the Raposo clan conspired and worked together to buy and sell narcotics and that they shared the profits from those activities, the appellant considered them jointly and severally liable for the payment of the GST collectible on the supplies made. An assessment was therefore issued against the respondent, dated March 25, 2013, for a total amount of $57,883.78, i.e. the amount of $40,200.00 assessed as a net tax to which penalties and interest were added (Appeal Book at page 390). Although the appellant initially based that joint and several liability on the second paragraph of article 1525 of the *Civil Code of Québec*, C.Q.L.R. c. CCQ-1991 (C.C.Q.), the appellant now bases that conclusion on paragraph 272.1 (5)(a) of the ETA, which provides that:

272.1(5) A partnership and each member or former member (each of which is referred to in this subsection as the "member") of the partnership (other than a member who is a limited partner and is not a general partner) are jointly and severally, or solidarily, liable for	272.1 (5) Une société de personnes et chacun de ses associés ou anciens associés (chacun étant appelé « associé » au présent paragraphe), à l'exception d'un associé qui en est un commanditaire et non un commandité, sont solidairement responsables de ce qui suit :
(a) the payment or remittance of all amounts that become payable or remittable by the partnership under this Part before or during the period during which the member is a member of the partnership or, where the member was a member of the partnership at the time the partnership was dissolved, after the dissolution of the partnership, except that	a) le paiement ou le versement des montants devenus à payer ou à verser par la société en vertu de la présente partie avant ou pendant la période au cours de laquelle l'associé en est un associé ou, si l'associé était un associé de la société au moment de la dissolution de celle-ci, après cette dissolution; toutefois :

[8] On January 7, 2014, the respondent pleaded guilty to the charges of conspiracy and drug trafficking. For those offences, he received a conditional sentence of two years less a day in jail. Despite his guilty plea, the respondent submits that his participation in the Raposo clan's activities was very limited, and that he did not receive a share of the profits of those activities.

[9] On June 19, 2015, the respondent filed a notice of appeal with the TCC concerning the notice of assessment for GST dated March 25, 2013. According to the respondent, the appellant erred in finding that the persons involved in the conspiracy and drug trafficking activities implicitly entered into a partnership contract since, according to article 1413 of the C.C.Q., a contract–including a partnership contract–whose object is prohibited by law or contrary to public order is null.

II. The Tax Court of Canada decision

[10] The judge held that, insofar as it involves an object contrary to public order, the alleged partnership contract binding the members of the Raposo clan is null under article 1413 of the C.C.Q. According to the judge, there could therefore be no partnership for the purposes of section 272.1 of the ETA because this contract was deemed never to have existed pursuant to article 1422 of the C.C.Q. For that reason, the judge determined that the respondent could not be held jointly and severally liable under that provision for the tax debt resulting from the Raposo clan's activities.

III. Issues

[11] This appeal raises the following two issues:

a) Did the judge err in finding that there could not be a partnership in this case for the purposes of the ETA given articles 1413, 1417 and 1422 of the C.C.Q.?

b) If the answer is affirmative, was there a partnership in this case, and was the respondent a partner, thereby resulting in joint and several liability under subsection 272.1(5) of the ETA?

IV. Standard of review

[12] When this Court hears an appeal from a Tax Court decision on a notice of appeal filed by a taxpayer against a notice of assessment issued by the Minister, the standard of review on questions of law is that of correctness, whereas the standard of review on questions of fact or mixed fact and law is that of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 37; *Mammone v. Canada*, 2019 FCA 45 at paragraph 36; *Cyr v. Canada*, 2019 FCA 14 at paragraph 3; and *Laplante v. Canada*, 2018 FCA 193 at paragraph 2, leave to appeal to SCC refused, 38454 (May 2, 2019)).

[13] In this case, the appellant submits that the trial judge erred in finding, on the basis of articles 1413 and 1422 of the C.C.Q., that there was no partnership because the purpose of the activities of the members of the Raposo clan was prohibited by law. That is, without a shadow of a doubt, a question of law whose appellate review does not require any deference on our part.

V. Analysis

A. *Did the judge err in finding that there could not be a partnership in this case for the purposes of the ETA given articles 1413, 1417 and 1422 of the C.C.Q.?*

[14] While acknowledging that the determination of the existence of a partnership within the meaning of section 272.1 of the ETA involves reference to provincial law, the appellant submits that the judge should nevertheless have limited his consideration to article 2186 of the C.C.Q., which defines a contract of partnership, and ignored the general provisions of the C.C.Q. relating

to contracts, including those providing that a contract whose object is prohibited by law or contrary to public order is null. Before assessing the merits of this issue, some comments are required on the respondent's allegations of breach of procedural fairness in this case.

(1) Procedural fairness

[15] The respondent essentially argues that the appellant changed the legal basis of the assessment issued against him once all the evidence and oral arguments had been presented, thus preventing him from mounting a proper defence.

[16] It is true that, at the hearing before the TCC, the appellant initially argued that the joint and several liability of the members of the Raposo clan arose from the second paragraph of article 1525 of the C.C.Q. According to that provision, "solidarity between debtors is presumed, however, where an obligation is contracted for the service or operation of an enterprise." Asked by the judge to explain the relationship between that provision and article 1413 of the C.C.Q., which provided that a contract whose object is prohibited by law or contrary to public order is null, the appellant chose to abandon this position and instead cited subsection 272.1(5) of the ETA in her written argument. Under that provision, a partnership and the members of the partnership are jointly and severally liable for the payment of all amounts that become payable by the corporation in respect of the GST.

[17] As a result, the respondent argues that he was unable to present rebuttal evidence and defend himself properly. He argues that the appeal should be dismissed on that basis alone. It seems to me that the respondent was quite right in not insisting on that argument at the hearing

before this Court. It is well established that individuals who believe that they have been wronged and denied the right to procedural fairness must raise an objection in this regard at the earliest possible opportunity. If this is not done, it will generally be considered that they have implicitly waived their right to raise the issue of procedural fairness (*Sharma v. Canada (Attorney General)*, 2018 FCA 48 at paragraph 11; *Chen v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 at paragraph 63).

[18] In this case, there is nothing in the record to suggest that the respondent had any objection to the appellant changing the theory of the case during the trial. However, it is clear from reading the reasons of the TCC judge that this change occurred before the decision was rendered, that the respondent was aware of it, and that he would have had ample opportunity to raise his concerns at that time.

[19] Furthermore, the respondent did not persuade me that he suffered any prejudice as a result of the appellant's change in position late in the proceedings. Far from demonstrating any prejudice, the respondent's submissions rather suggest that, as a result of this about face, the appellant did not provide any evidence of the existence of a partnership and that this new position must therefore be rejected. Consequently, I fail to see (and the respondent did not explain) how the change in legal argument might have affected the respondent's right to be heard and to defend himself.

[20] It is therefore appropriate to consider the submissions of the parties as to the merits of this ground of appeal.

(2) Key elements of the partnership contract

[21] The appellant readily acknowledges that provincial legislation constitutes a suppletive source of law for the purpose of determining what constitutes a partnership insofar as Parliament did not define that concept in the ETA. Nevertheless, the appellant argues that the judge should have limited his consideration to article 2186 of the C.C.Q., which defines a contract of partnership, and ignored the general provisions of the C.C.Q. relating to the object of the contract and its conditions of formation. In the appellant's view, by considering articles 1413, 1417 and 1422 of the C.C.Q., not only did the judge confuse compliance with the essential conditions provided for in provincial law with the consequences resulting from their application, but he also violated the principle of tax neutrality and fairness repeatedly recognized by the Supreme Court.

[22] For the reasons that follow, I am of the view that the appellant's argument does not seem to hold water.

[23] I can hardly see how it can be seriously argued that the TCC judge erred in interpreting the concept of "partnership" described in section 272.1 of the ETA, not only in the light of article 2186 of the C.C.Q., but also articles 1413, 1417 and 1422. In my opinion, the judge's interpretation was not only consistent with the case law on the subject, but is also the only one compatible with the principle of complementarity.

a) *Principle of complementarity*

[24] It is now well established in Canadian law that to interpret a concept of private law not defined in a federal statute, we must turn to the private law of the province where the federal law applies. This principle is now codified in section 8.1 of the *Interpretation Act*, R.S.C., 1985, c. I-21 following the adoption of the *Federal Law—Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 (*Harmonization Act, No. 1*). It is appropriate at this stage to reproduce the text of this provision, as well as the provision in section 8.2 of the same Act:

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.	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, s'il est nécessaire 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.
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.	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.

[25] These provisions must be read in conjunction with the preamble of *Harmonization Act, No. 1*, which is reproduced as an appendix to these reasons.

[26] However, it is important to note that the principle of complementarity has been repeatedly applied by federal courts well before these provisions came into force (see Jean-Maurice Brisson, "L'impact du Code civil du Québec sur le droit fédéral: une problématique", (1992) 52 R. du B. 345 at pages 352–353). This was the case in *Canada (Attorney General) v. St Hilaire*, [2001] 4 FC 289; 2001 FCA 63 [*St Hilaire*]. The principle of complementarity obviously applies with equal authority in the common law provinces (see, for example, *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915).
Justice Pierre Archambault of the TCC provided an interesting overview of the issue in his text entitled "Contract of Employment: Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law (2005)*, Montréal, A.P.F.F., 2005 [Archambault].

[27] The concept of "partnership" is not defined in subsection 272.1(5) of the ETA. In accordance with the principle of complementarity, we must therefore use the definition that provincial law provides to describe this private law concept. That is precisely what the Supreme Court did in three cases involving provisions of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA), which leaves the concept of partnership similarly undefined, even before section 8.1 of the *Interpretation Act* came into force (see *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 [*Continental Bank*]; *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367 [*Backman*]; *Spire Freezers Ltd. v. Canada*, 2001 SCC 11, [2001] 1 S.C.R. 391). More specifically, this is what the Supreme Court wrote at paragraph 17 of *Backman*:

> 17 The term "partnership" is not defined in the [ITA]. Partnership is a legal term derived from common law and *equity* as codified in various provincial and

> territorial partnership statutes. As a matter of statutory interpretation, it is presumed that Parliament intended that the term be given its legal meaning for the purposes of the [ITA] . . . We are of the view that, where a taxpayer seeks to deduct Canadian partnership losses through s. 96 of the [ITA], the taxpayer must satisfy the definition of partnership that exists under the relevant provincial or territorial law. . . . It follows that even in respect of foreign partnerships, for the purposes of [this provision], the essential elements of a partnership that exist under Canadian law must be present . . .

[28] This case therefore satisfies the condition, set out in section 8.1 of the *Interpretation Act*, that it is "necessary" to refer to provincial private law to apply a federal statute (see *St Hilaire* at paragraphs 43 and 65; see also David G. Duff, "Canadian Bijuralism and the Concept of an Acquisition of Property in the Federal Income Tax Act", (2009) 54:3 McGill L.J. 423, at pages 453–454). We must therefore turn to the C.C.Q.

b) *Contracts of partnership in civil law*

[29] In Quebec, a "contract of partnership" is defined in the following terms under article 2186 of the C.C.Q.:

2186. A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share among themselves any resulting pecuniary profits.	2186. Le contrat de société est celui par lequel les parties conviennent, dans un esprit de collaboration, d’exercer une activité, incluant celle d’exploiter une entreprise, d’y contribuer par la mise en commun de biens, de connaissances ou d’activités et de partager entre elles les bénéfices pécuniaires qui en résultent.
…	[…]

[30] Under that provision, therefore, there are three specific conditions upon which the existence of a contract of partnership is dependent: the spirit of cooperation, the contribution and

the sharing of profits. These requirements are essentially the same as those in the common law provinces (see *Continental Bank* at paragraph 22; *Backman* at paragraph 18).

[31] In the appellant's opinion, these are the only conditions that must be met to form a partnership, and there was no basis for the judge to go beyond these conditions and consider the other provisions of the C.C.Q. According to the appellant, [TRANSLATION] "[o]ther than the application of conditions for forming a partnership contract, it is not appropriate to make further reference to provincial law for the purpose of determining whether there is a partnership as regards the application of the ETA" (Appellant's Memorandum of fact and law at paragraph 35).

[32] The appellant did not cite any authority in support of that argument, and this seems significant to me. It appears to me that the position defended by the appellant not only is inconsistent with the principle of complementarity, which is enshrined in the *Interpretation Act*, but also reflects a profound misunderstanding of the C.C.Q. and its own particular spirit.

[33] Although article 2186 of the C.C.Q. sets out three specific conditions for the existence of a partnership contract, that provision does not establish an exhaustive list of conditions that a partnership contract must meet to be valid. In other words, the "essential ingredients" of a partnership under Quebec law, to reiterate the words used in *Backman*, are not limited to the three conditions listed in that article. Like any other contract, a partnership contract must also be in conformity with the general rules applicable to obligations. The first paragraph of article 1377 of the C.C.Q., which appears in Division I (General Provision) of Chapter II (Contracts), could not be clearer on this subject:

1377. The general rules set out in this chapter apply to all contracts, regardless of their nature.	1377. Les règles générales du présent chapitre s’appliquent à tout contrat, quelle qu’en soit la nature.

[34] This chapter also contains article 1385, whose second paragraph provides that it is the essence of a contract "that it have a cause and an object." It also contains article 1413, which provides that a "contract whose object is prohibited by law or contrary to public order is null." That provision must be read in the light of article 1417 of the C.C.Q., according to which a contract "is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest." This regime is completed by article 1422 of the C.C.Q., in which the Quebec legislature states that a "contract that is null is deemed never to have existed."

[35] Contrary to the appellant's arguments, I fail to see how these provisions could be considered to be related solely to the effects of the contract, particularly of a partnership contract, as opposed to the conditions of its formation. First, it should be noted that these provisions form an integral part of Division III of Chapter II (Contracts) of the C.C.Q., which bears on the formation of contracts. The principle that the object of the contract is a condition of its formation is recognized both in the comments of the Minister of Justice (Québec, Ministère de la Justice, *Commentaires du ministre de la Justice*, t. I, *Le Code civil du Québec - Un mouvement de société*, Québec : Publications du Québec, 1993, at page 840) and by the doctrine (Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les Obligations*, 7th ed., by P.-G. Jobin and Nathalie Vézina, Cowansville, Yvon Blais, 2013, at pages 436–440).

[36] Second, a contract is null if this condition of formation of contracts has not been respected, and this nullity is retroactive. As a result, the contract is stripped of all effects that it could have had. In other words, a contract whose object is contrary to public order is not only unenforceable, it is legally non-existent (see Serge Gaudet, "Inexistence, nullité et annulabilité du contrat : essai de synthèse", (1995) 40 R.D. McGill 291 at pages 349 and 356 [Gaudet]; Didier Lluelles and Benoît Moore, *Droit des obligations*, 3rd ed., Montréal, Thémis, 2018, pages 565–566, at paragraph 1054 [Lluelles and Moore]). In the light of the foregoing, it is difficult to see how the requirement of a lawful object, described in articles 1413 and 1422 of the C.C.Q., could not be considered an essential condition of any contract, including a partnership contract.

[37] In addition, it seems that the appellant's argument could lead to absurd consequences. Take, for example, a situation where the tax authorities would jointly and severally assess a taxpayer for the entire tax debt resulting from the commercial activities of a criminal organization to which the taxpayer belongs. In such a case, it follows that because his activities were illicit, the taxpayer would then have no remedy to claim the respective portion of the total debt from his co-debtors in a civil court. His co-debtors would thus benefit from this "piecemeal" application of the C.C.Q. rules. It is exactly this kind of absurd consequences that Parliament intended to avoid by adopting section 8.1 of the *Interpretation Act*.

[38] Furthermore, the approach the appellant advocates, in which the analysis must be limited to the terms of article 2186 of the C.C.Q., and the other provisions considered above must be ignored, does not seem to me to be consistent with the approach adopted by this Court in

St Hilaire. The controversy pertained to the meaning of the words "surviving spouse" and "succession" in the *Public Service Superannuation Act*, R.S.C., 1985, c. P-36. In that case, rather than relying solely on the C.C.Q.'s definition of the concept of succession, the Court also considered the provisions relating to unworthiness to inherit and the revocation of a will.

[39] In short, I am of the view that the appellant's argument does not stand up to scrutiny. The requirement of a lawful purpose, provided for by article 1413 of the C.C.Q., is a condition of a partnership contract that is just as essential as those listed in article 2186 of the C.C.Q. Incidentally, it should be noted that the appellant does not dispute, correctly in my view, the unlawfulness of the object pursued by the partnership contract of which she sought to establish the existence (see *Fortin v. Chrétien*, 2001 SCC 45, [2001] 2 S.C.R. 500, at paragraph 21; Gaudet at pages 349 and 356; Lluelles and Moore at pages 568–569).

[40] In closing, I would add that, in the light of sections 8.1 and 8.2 of the *Interpretation Act*, it does not matter that the same facts may give rise to different results in different provinces. Even if this were the case (an issue that I need not address and on which the parties have made no submissions), this would simply be attributable to the fact that we live in a federation, which also happens to be a bijural federation. As Justice Décary noted in *St Hilaire* (dissenting on another point), at paragraph 35:

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

> associate systematically all federal legislation with common law is to ignore the Constitution.

[41] It is now appropriate to turn to the alternative arguments raised by the appellant.

(3) Exception to the application of provincial law

[42] Relying on the very language of sections 8.1 and 8.2 of the *Interpretation Act*, the appellant submits that the principles of tax neutrality and fairness clearly displace articles 1413, 1417 and 1422 of the C.C.Q. in this case. For the reasons that follow, I do not find this contention any more compelling.

[43] As mentioned above, section 8.1 of the *Interpretation Act* recognizes the duality of Canadian legal traditions and expressly enshrines the principle of the complementarity of provincial private law in the interpretation of federal legislation. Section 8.2 facilitates the comprehension of bijural texts. It provides that in the event that a provision uses civil law or common law terminology, the civil law terminology will apply in Quebec and the common law terminology will apply in the other provinces. The appellant is correct in pointing out that both of these provisions explicitly give Parliament the option to make provincial law inapplicable (by using the words "unless otherwise provided by law"). However, the appellant has not persuaded me that this result can be achieved implicitly; in addition, the provisions of the C.C.Q. do not appear to me to be "inconsistent" with section 272.1 of the ETA, or, for that matter, with the principles of tax neutrality and fairness. My reasons are as follows.

[44] The word "law" (or "règle de droit" in the French version) could *a priori* give rise to a broad interpretation that might justify the setting aside of the principle of complementarity on the basis of jurisprudential precedents. However, such an approach would not be consistent with either the wording or the spirit of section 8.1 of the *Interpretation Act*.

[45] One need only consider the scheme of the Act to be so convinced. Subsection 3(1) of the *Interpretation Act* does not prescribe specific requirements for setting aside the rules, principles and definitions provided in that Act. All that is required is a "contrary intention" ("indication contraire") in an act or regulation for the general rules of the *Interpretation Act* not to apply. A contrary intention may be inferred from reading a legislative or regulatory text in its context, even if the wording does not explicitly state such an intention (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Markham, Ontario: LexisNexis Canada Inc., 2014), at paragraph 5.110 [*Sullivan*]).

[46] This lack of formalism must be contrasted with the language used by Parliament in sections 8.1 and 8.2 of the *Interpretation Act*. Indeed, it is no longer sufficient that a provision reveals a contrary intention for the principle of complementarity to be set aside. Rather, Parliament must use a "law" opposing the principle of complementarity. Given that Parliament does not legislate in vain, the use of these words must necessarily imply that a more stringent requirement must be met for provincial suppletive law to be displaced. That is what Professor Sullivan argues. According to her, these words may require "an express statement of intent" from Parliament when it wishes to set aside the use of provincial rules in a specific case (*Sullivan* at paragraph 5.110). Philippe Denault is also of the view that "such a provision should logically be

made expressly" (*Achieving Unity in the Interpretation of Federal Private Law: Legal Framework and Fragments of Judicial Discourse*, Montréal, Thémis, 2008, at pages 93–94), and similarly Professor Aline Grenon ("Le bijuridisme canadien à la croisée des chemins ? Réflexions sur l'incidence de l'article 8.1 de la Loi d'interprétation", (2011) 56:4 R.D. 775, at pages 786–787).

[47] Without going that far, the doctrine has also expressed the view that, although setting aside the principle of complementarity may not necessarily require an explicit legislative provision, it does at the very least require that it can be found to apply by "absolutely necessary implication" (see, before the entry into force of the *Harmonization Act, No. 1*, Roderick A. Macdonald, "Provincial Law and Federal Commercial Law: Is Atomic Slipper a New Beginning?" (1992) 7 B.F.L.R. 437 at page 447; David G. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation and Bijuralism" (2003) 51:1 Can. Tax J. 64 at page 118; Archambault at pages 2:16 to 2:20).

[48] The soundness of this position appear to me to be indisputable, not only given the wording of section 8.1 of the *Interpretation Act* (especially when contrasted with the wording of subsection 3(1) of the same Act) but also the constitutional foundation that underlies the principle of complementarity (see *St Hilaire* at paragraph 52). Once again, civil law and common law are equally authoritative in relation to property and civil rights in Canada; giving precedence to jurisprudential rules originating from common law for the application of a federal legislative provision in Quebec, without Parliament having clearly required it, would be inconsistent not

only with the principles set out in the preamble to the *Harmonization Act, No. 1* and section 8.1 of the *Interpretation Act*, but also with the principle of complementarity.

[49] At any rate, I am of the opinion, for the reasons stated in the next section, that the case law the appellant cites with respect to the principles of tax neutrality and fairness does not support her contention that article 1413 of the C.C.Q. should be disregarded.

(4) Principles of tax neutrality and fairness

[50] The appellant has made extensive reference to the case law that has consistently recognized the principle of tax neutrality, according to which profits from an illegal business are taxable in the same way as the profits from a lawful business. This principle has in fact been affirmed in many decisions for almost a century now, namely in *Minister of Finance v. Smith*, [1927] A.C. 193, [1926] 3 D.L.R. 709, *The King v. Carling Export Brewing & Malting Co. Ltd.*, [1930] S.C.R. 361 rev'd on other grounds [1931] A.C. 435, [1931] 2 D.L.R. 545 and, more recently, *Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122.

[51] The appellant cites *Continental Bank* and, more particularly, *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 [*British Columbia*], in support of her contention that public order must not be considered both [TRANSLATION] "in refusing to invalidate legal operations and in calculating the profit for tax purposes" (Appellant's memorandum of fact and law at paragraph 46). According to her, it is [TRANSLATION] "incorrect to argue that these principles must be applied only when determining profit or net tax[,] as the judge seems to infer" (*Ibid.*). However,

a careful reading of those decisions does not lead to the conclusion that the judge erred in this regard.

[52] With respect to the first of those two cases, *Continental Bank*, the appellant merely cites various passages establishing the general principle that public order considerations should not interfere with the analysis of a taxpayer's tax obligations, because they may introduce uncertainty into the affairs of individuals and businesses (see paragraphs 112 *et seq.*). However, the appellant fails to mention the most important consideration in the Court's opinion, which is that the transactions at issue did not violate the provisions of the applicable Act, the *Bank Act*, R.S.C. 1985, c. B-1, and that, in addition, the Act provided that no action of a bank is invalid by reason only that the action or transfer is contrary to this Act (at paragraph 119). I would also like to point out that, contrary to this case, the doctrine of illegality cited at the time was not codified in the *Partnerships Act*, R.S.O. 1980, c. 370. Moreover, that doctrine concerns only the effects of the contract (at paragraphs 64 *et seq.*). Lastly, that decision was made before section 8.1 of the *Interpretation Act* came into effect.

[53] The second case, *British Columbia*, holds that in interpreting an act like the ITA, attention must be paid to the fact that the Act is a very detailed, complex and comprehensive statute, and courts should be slow to embrace unexpressed notions of policy or principle in the guise of statutory interpretation (at paragraph 51). On that basis, the Supreme Court dismissed the argument that Parliament could not have intended the ITA to permit the deduction of fines as such a result would violate public policy (at paragraph 52). In the Court's opinion, reading such an implicit prohibition into the ITA would be inconsistent with the curial practice of allowing the

deduction of expenses incurred to earn illegal income (at paragraph 56). The Court wrote that the mere fact that the deduction of fines and penalties could "dilute" the impact of these sanctions did not introduce a sufficient degree of "disharmony so as to lead [it] to disregard the ordinary meaning of [the provision at issue] when that ordinary meaning is harmonious with the scheme and object of the [ITA]" (at paragraph 66).

[54] It is clear that this reasoning does not allow us to infer that article 1413 of the C.C.Q. must be set aside in the context of this case. For one, insofar as that provision relates to the very conditions of formation of partnership contracts, it operates, so to speak, upstream from the principle of tax neutrality. It does not affect the existence of the tax liability itself or how an income or expense is established. It pertains only to the validity of partnership contracts and, consequently, the joint and several character of the tax debt. As with the rules governing the capacity to contract, the conditions for forming partnerships are provincial. In the absence of explicit provisions to the contrary in federal legislation, these rules must apply. The principle of tax neutrality applies only for tax treatment purposes (see *Bernier v. Québec (Sous-ministre du Revenu)*, 2007 QCCA 1003 at paragraph 20, leave to appeal to SCC refused, 32269 (January 31, 2008)).

[55] Following the principle established in *British Columbia*, there is no doubt that words as broad as "taxable supply" and "commercial activity" found in subsection 123(1) and sections 165 and 221 of the ETA, must be interpreted without regard to considerations of lawfulness, public order or morality. That is the reason why income from prostitution or the sale of drugs is liable to tax (*British Columbia* at paragraph 56; *Québec (Sous-ministre du Revenu) v. Parent*,

2008 QCCA 1476 at paragraphs 45–47 [*Parent*] and *Armeni v. Agence du revenu du Québec*, 2014 QCCA 1746 [*Armeni*]). However, it is important to bear in mind that the issue in this case is not the taxable nature of the sale of drugs, but rather the joint and several character of the resulting debt.

[56] That is why there is absolutely no basis for the appellant's contention that the judge's interpretation of the case may exclude any illegal transactions from the application of tax legislation. For example, the appellant refers to a transfer of ownership that would be contrary to public order. Even if such an agreement of purchase and sale would be null in civil law, the transaction could nevertheless be subject to an assessment insofar as section 160 of the ITA and section 325 of the ETA speak in general terms of "transfer[ring] property . . . by any . . . means," and not of a "sale." By using such broad language, Parliament has ensured that all such activities, legal or not, are covered. It did not do the same in section 272.1 of the ETA.

[57] Another reason this case differs from the case law cited by the appellant, which is closely related to the first, is that the concept of "partnership" is not expressly defined in the ETA. In *British Columbia*, the Supreme Court decided that the provisions of taxation statutes should not be interpreted, on the basis of vague public policy considerations, so as to exclude illegal activities from their scope. However, one cannot infer from that case that the mere fact that the applicable provincial law expressly incorporates rules based on public policy means that it can be ignored. It is ultimately immaterial that the enactment of article 1413 of the C.C.Q. may have been motivated by considerations of public order. The appellant's insistence on this point only clouds the controversy. What is important in this case is that article 1413 of the C.C.Q.

establishes an essential condition of the partnership contract and that, "unless otherwise provided by law," sections 8.1 and 8.2 of the *Interpretation Act* require that it be given effect.

(5) Cases decided by lower courts

[58] Lastly, the appellant attempted to rely on a case decided by the Court of Québec, *Robitaille v. Québec (Sous-ministre du Revenu)*, 2010 QCCQ 9283 [*Robitaille*]. In that case, the judge held that supplies of drugs were taxable within the meaning of sections 16 and 422 of the *Act Respecting the Québec Sales Tax*, C.Q.L.R. c. T-0.1 [AQST]. After having reviewed the legislation and case law, the judge noted that the AQST "gives quite a broad definition to the concepts of 'taxable supply' and 'commercial activity'–which form the basis of the supplier's obligation to collect taxes–and makes no distinction as to the legality or illegality of a given activity" (at paragraph 76). According to the judge, it follows that when a person transfers "the possession of drugs to other persons for consideration and on a commercial basis, there is a taxable supply within the meaning of the AQST" (at paragraph 78). The same reasoning was also followed in certain cases of the Québec Court of Appeal (see *Parent* and *Armeni*) and the Tax Court of Canada (see *Boisvert v. The Queen*, 2016 TCC 195 at paragraphs 60–62, and *Desroches v. The Queen*, 2013 TCC 81 at paragraphs 50–54).

[59] In this respect, *Robitaille* is entirely consistent with the Supreme Court's doctrine and the principle that the illegality of a transaction has no impact on its tax status. What is more problematic, with all due respect, is that the Court of Québec referred to article 2186 of the C.C.Q. to determine whether the plaintiffs constituted a partnership for the purposes of the

AQST, without ever considering article 1413 of the C.C.Q. In so doing, the Court completely ignored the impact of the unlawful object on the validity of the partnership contract.

[60] Furthermore, it appears that the only other cases that have held that the members of a group could be held jointly and severally liable for the tax debts resulting from their illegal activities, i.e. *Clermont v. The Queen*, 2017 TCC 32 at paragraph 68, and *Pham v. Agence du revenu du Québec*, 2018 QCCQ 1331 at paragraphs 220–231, were based on the second paragraph of article 1525 of the C.C.Q, which provides that solidarity between debtors is presumed where an obligation is contracted for the service or operation of an enterprise. That is precisely the position that the appellant abandoned at trial, when asked to explain the applicability of article 1525 to the facts of this case and its relationship with article 1413 of the C.C.Q. Although the appellant did not explain her choice to base her argument on subsection 272.1(5) of the ETA rather than article 1525 of the C.C.Q. in support of the joint and several liability of the members of the Raposo clan, there is reason to believe that she was well aware that her initial position was inconsistent: how could she cite section 1525 of the C.C.Q. while challenging the applicability of article 1413?

[61] In closing, I note that in a recent case, *Dupuis v. Wallis*, 2018 QCCS 433, the Quebec Superior Court also held, in circumstances similar to the case at bar, that a partnership contract for the production and sale of drugs is absolutely null (at paragraphs 11–16).

(6) Final comments

[62] In short, I am of the view that for all of the foregoing reasons, the appellant's position must be rejected. Once again, it is not whether a tax debt may arise from illegal activities that is at issue, only the terms of such a debt. The appellant has not persuaded me that the TCC judge erred in refusing to hold the respondent jointly and severally liable, under subsection 272.1(5) of the ETA, for the tax debt resulting from the commercial activities of the Raposo clan.

[63] As previously discussed, I recognize that, in view of this conclusion, separate rules may govern similar situations based solely on the *locus* of the taxed activities. Yet that is one of the inherent characteristics of federalism, which is also enshrined in sections 8.1 and 8.2 of the *Interpretation Act*. As Justice Létourneau noted in *Grimard v. Canada*, 2009 FCA 47, at paragraph 24:

> . . . By enacting section 8.1 of the [*Interpretation Act*] . . . [Parliament] acknowledged the principle of complementarity of Quebec civil law to federal law when the conditions in section 8.1 are met. In so doing, it allowed for differences in the treatment of Canadian litigants under federal legislation.[Emphasis added.]
>
> (See, similarly, *French v. Canada*, 2016 FCA 64 at paragraph 43.)

[64] We should never lose sight of the fact that it is still open to Parliament to put an end to this disparity of treatment by providing its own definition of the private law concepts referred to in a federal statute, thereby precluding reference to provincial suppletive law. Given how often taxation statutes are amended, it must be presumed that Parliament is comfortable with the great variability in the application of these statutes from one province to another.

[65] Given this conclusion, I need not comment on the issue of whether there is a partnership in this case.

VI. Conclusion

[66] For all of these reasons, I would dismiss this appeal, with costs.

"Yves de Montigny"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Mary J. L. Gleason J.A."

Certified true translation,
François Brunet, revisor

APPENDIX

Harmonization Act, No. 1

Preamble	**Préambule**
	Attendu :
WHEREAS all Canadians are entitled to access to federal legislation in keeping with the common law and civil law traditions;	que tous les Canadiens doivent avoir accès à une législation fédérale conforme aux traditions de droit civil et de common law;
WHEREAS the civil law tradition of the Province of Quebec, which finds its principal expression in the *Civil Code of Québec*, reflects the unique character of Quebec society;	que la tradition de droit civil de la province de Québec, qui trouve sa principale expression dans le *Code civil du Québec*, témoigne du caractère unique de la société québécoise;
WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;	qu'une interaction harmonieuse de la législation fédérale et de la législation provinciale s'impose et passe par une interprétation de la législation fédérale qui soit compatible avec la tradition de droit civil ou de common law, selon le cas;
WHEREAS the full development of our two major legal traditions gives Canadians enhanced opportunities worldwide and facilitates exchanges with the vast majority of other countries;	que le plein épanouissement de nos deux grandes traditions juridiques offre aux Canadiens des possibilités accrues de par le monde et facilite les échanges avec la grande majorité des autres pays;
WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;	que, sauf règle de droit s'y opposant, le droit provincial en matière de propriété et de droits civils est le droit supplétif pour ce qui est de l'application de la législation fédérale dans les provinces;
WHEREAS the objective of the Government of Canada is to facilitate	que le gouvernement du Canada a pour objectif de faciliter l'accès à une

access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions;

législation fédérale qui tienne compte, dans ses versions française et anglaise, des traditions de droit civil et de common law;

AND WHEREAS the Government of Canada has established a harmonization program of federal legislation with the civil law of the Province of Quebec to ensure that each language version takes into account the common law and civil law traditions;

qu'en conséquence, le gouvernement du Canada a institué un programme d'harmonisation de la législation fédérale avec le droit civil de la province de Québec pour que chaque version linguistique tienne compte des traditions de droit civil et de common law,

…

[…]

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. DANIEL RAPOSO
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