



Deeming Provisions in Federal Legislative Texts What is the Measure of the Relationship with the Law of the Various Provinces?

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What is a deeming provision and what is it used for?

“ A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is.” (*R. v. Verrette*, [1978] 2 S.C.R. 838, p. 845)



Legal fictions in legislative texts

- There are many types of legal fictions: factual, terminological, conceptual.
- Generally speaking, legal fictions can be said to be lies that feed on existing legal rules for limited purposes.
- Legal fictions generally borrow legal effects from legal rules, when the legal situation would not be in conformity with such rules and therefore would not produce the desired effects without the fiction.



Deemed trusts as conceptual legal fictions

Two examples:

1. Deemed trust under subsection 227(4.1) of the *Income Tax Act*. The tax debtor or its secured creditor is **deemed to hold in trust** the prescribed amounts for the benefit of Her Majesty. Among other things, it confers on Her Majesty a **beneficial interest** that gives her additional rights in the context of tax debt collection measures.
2. Deemed trust under section 8 of the *Pension Benefits Standards Act, 1985*. The employer is **deemed to hold in trust** prescribed amounts for the benefit of persons entitled to benefits or refunds under the pension plan. The administrator of the plan acts as **trustee** for the employer and the persons entitled to benefits or refunds.



Restrictive interpretation of legal fictions

- The most common position is that a fiction applies only for the purposes of the law that creates it and, more importantly, that it is operative only to the extent established by the law that creates it.
- Where a fiction is used in order to establish an artificial construction capable of producing legal effects for a particular purpose, the fiction must be applied with reference to the functions specifically assigned to it.
- Fictions are interpreted restrictively according to the purpose for which it is used for and in the light of what is clearly established by the provision that creates the fiction.
- Determining the scope of the lie created by the fiction in the absence of a clear text is a matter for the application of the rules of interpretation.



Application of the modern rule of interpretation to deeming provisions

- When relying on a textual argument (e.g. where legal fictions are used), to state that a particular interpretation is “possible” is not enough. It must be demonstrated that the interpretation is reflected in the language of the statute and is consistent with the context and purpose of the statute.
- The words of an Act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
- In this context, account must be taken of the history and the overall legal framework in which the provisions are set, including the law of general application in matters of property and civil rights.
- The location of the provisions in the Act and their relationship to other provisions must also be considered in determining their scope.



Scope of the legal fiction

Essentially, the first question is: what are the limits of fiction?

With respect to Canadian bijuralism, a second question arises: what legal framework is the fiction based on; what private law legal rules does it draw its inspiration from?



Bijural interpretation rules: sections 8.1 and 8.2, *Interpretation Act*

- The common law and the civil law are equally authoritative and are both sources of law in relation to property and civil rights in Canada.
- If it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights in interpreting (or applying) an enactment, one must refer to the law applicable in that province, unless otherwise provided by law.
- Terms used in a federal enactment are to be understood in a way that is compatible with the legal system of the province of application, unless otherwise provided by law.



Bijural interpretation rules and legal fictions

- Bijural rules of interpretation do not provide clear conclusions as to the scope of the dissociation brought about by legal fictions.
- There is nothing to prevent fictions from being fed by both the civil law and common law and having a variable application. It will, however, remain limited to what is clearly expressed in the provision and what necessarily flows from it.
- In this regard, the suppletive contribution of provincial private law to complete the meaning of the fictions by referring to rights and remedies under provincial law is questionable in the absence of explicit terms in the federal legislative text.
- The immediate context and purpose of the provisions creating the fictions, as well as their legislative history, are essential in establishing their sources and evolution.



Scope of the legal fiction

1. Deemed trust under subsection 227(4.1) of the *Income Tax Act* uses, among other things, the fiction that the property factiously held in trust is **property beneficially owned** (*droit de bénéficiaire*) by Her Majesty. What legal effects does this have? What rights are attached to the various rights and remedies of beneficially owning property or of being a beneficiary of a trust?
2. Deemed trust under section 8 of the *Pension Benefits Standards Act, 1985*. In addition to the fiction of the deemed trust, what legal effect does the fiction of the plan administrator's status as **trustee** have? What are the duties of the plan administrator?



Conclusion

- Each legal fiction must be interpreted in its context.
- There is no clear answer as to the scope of the relationship between legal fictions in the federal legislative framework and the applicable private law rules that feed into them.
- As for the fiction of deemed trusts, the case law is not conclusive.



Interpretation Act, section 8.1

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.

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Interpretation Act, section 8.2

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.



Selected cases

Legal fictions and interpretation

- *R. v. Verrette*, [1978] 2 SCR 838.
- *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.
- *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260.
- *Sero v. Canada*, 2004 FCA 6.
- *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54
- *Survivance v. Canada*, 2006 FCA 129.
- *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49.
- *Canada (Judicial Council) v. Girouard*, 2019 FCA 148.



Selected cases

Deemed trusts and interpretation

- *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 SCR 1182.
- *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 SCR 411.
- *First Vancouver Finance v. M.N.R.*, 2002 SCC 49.
- *Caisse populaire Desjardins de l'est de Drummond v. Canada*, 2009 SCC 29.
- *Toronto-Dominion Bank v. Canada*, 2012 SCC 1 (agreeing with reasons of Noël J.A., 2010 FCA 174).
- *Toronto-Dominion Bank v. Canada*, 2020 FCA 80 (leave to appeal before the SCC, file 39238).



Selected cases

Deemed trusts and Quebec law

- *Québec v. Nolisair inc. (Syndic de)*, [1999] 1 SCR 759.
- *Québec (Sous-ministre du Revenu) v. De Courval*, 2009 QCCA 409.
- *Banque nationale du Canada v. Agence du revenu du Québec*, 2011 QCCA 1943.
- *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679.
- *Aveos Fleet Performance inc. / Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762.
- *Timminco Ltée (Arrangement relatif à)*, 2014 QCCS 174.
- *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2017 QCCS 4057.