



# the link

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The Bijural Revision Services Unit (Taxation and Comparative Law) of the Legislative Services Branch of the Department of Justice is pleased to keep you posted on the most recent harmonization and bijuralism news.

## Legislation

### 3<sup>rd</sup> Harmonization Act Receives Royal Assent

**B**ill S-3, an *Act to harmonize federal law with the civil law of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law*, received Royal Assent on November 29, 2011 (SC 2011, c 21). The amendments included in Bill S-3 came into force on the date of royal assent.<sup>1</sup>

The current harmonization amendments affect twelve statutes, among them the *Canada Business Corporations Act*, the *Canada Cooperatives Act* and the *Expropriation Act*. They also provide for consequential and coordinating amendments affecting five other statutes. No taxation statutes are targeted. As with prior omnibus harmonization acts, the amendments in this 3<sup>rd</sup> harmonization act generally do not introduce substantive changes to legislation.

The measures in recently adopted Bill S-3 were previously included in Bill S-12, which died on the order paper with the dissolution of Parliament on March 26, 2011.

<sup>1</sup>Section 5 of the *Interpretation Act*, RSC 1985, c I-21, as amended.

## Jurisprudence

### Commercial Motivation Does Not Invalidate Common Law “gift”

**I**n our last issue, we discussed two cases which found that gifts had not been established in common law.<sup>2</sup> Much to the relief of many practitioners in the province of Ontario and elsewhere, one of those decisions has been overturned. On July 29, 2011, the Ontario Court of Appeal reversed the lower court ruling in *McNamee v. McNamee*.<sup>3</sup> The Court of Appeal held that the shares transferred from father to son were excluded from the calculation of net family property, having been acquired by way of gift from a third person after the date of the marriage.<sup>4</sup>

In so holding, the Court of Appeal identified three essential criteria for a valid gift: The donor's intention to make a gift without consideration or expectation of remuneration; the donee's acceptance of the gift; and a sufficient act of delivery.<sup>5</sup> On the matter of consideration, the Court of Appeal emphasized the contractual nature of “consideration,” and found that the donee did not provide consideration. Any benefit the donor might have derived from the implementation of an estate plan was deemed irrelevant to the analysis of

<sup>2</sup>“Common Law Meaning of ‘gift’ ” *The Link*, No. 36 (July 2011) 3-4.

<sup>3</sup>2011 ONCA 674, rev'g 2010 ONSC 674.

<sup>4</sup>See subsection 4(2) of the *Family Law Act*, RSO 1990, c F.3.

<sup>5</sup>*Supra* note 3, at para [24].





whether there was consideration.<sup>6</sup> On the matter of intention, the Court of Appeal found that an underlying commercial motivation or purpose did not detract from a donor's intention to make a gift.<sup>7</sup> Finally, on the matter of acceptance, the Ontario Court of Appeal found that there was acceptance, and that such acceptance was not vitiated by the donee's lack of knowledge of the terms and conditions attached to the gift.<sup>8</sup>

The Ontario Court of Appeal has ordered a new trial in the *McNamee* matter. In light of its decision that the shares were to be excluded from net family property, it became necessary to consider the plaintiff spouse's alternate claim: a declaration that she was entitled to a beneficial ownership interest in the shares, on the basis of unjust enrichment and constructive trust.<sup>9</sup>

## Case Update: SCC Grants Leave in Quebec Rectification Case

The Supreme Court of Canada (docket 34235) has granted the Agence du revenu du Québec's request for leave to appeal the Quebec Court of Appeal decision in *Quebec (Deputy Minister of Revenue) v. Services environnementaux AES inc.*<sup>10</sup> The decision appealed from confirmed that parties could validly rectify their agreement – with tools available under Quebec civil law – to avoid unintended tax consequences.<sup>11</sup>

By way of final note on this item, on December 15<sup>th</sup>, the Supreme Court of Canada granted leave to appeal from another recent decision of the Quebec Court of Appeal<sup>12</sup> that granted a taxpayer's request for rectification of a

contract (docket 34393). That appeal will be heard with the *Services environnementaux AES inc.* appeal.

## Case Update: SCC Reconsiders Leave Applications in *Antle*

In *Paul Antle v. The Queen and The Renée Marquis-Antle Spousal Trust v. The Queen*,<sup>13</sup> the Federal Court of Appeal held that no valid trust had been constituted in common law, and therefore upheld the Minister's assessments. Although one might have thought the matter closed with the Supreme Court of Canada's May 12<sup>th</sup>, 2011 dismissal of the taxpayers' applications for leave to appeal, it seems that we have not quite reached the end of the story. On July 13, 2011, the taxpayers presented motions for reconsideration of the applications for leave to appeal (dockets 33979 and 33987). Supplemental documentation, in the form of a memorandum of argument, was filed with the Court on August 5, 2011. On November 16, 2011, the parties were advised that the motions for reconsideration have been accepted for filing.

## Income Tax Act

### Extended

### Tax Group Meets

On September 14, 2011, the Bijural Revision Services Unit (Taxation and Comparative Law) hosted what has become an annual meeting of the Extended Tax Group. The meeting this year involved more than 40 participants, representing the Department of Justice Canada, the Canada Revenue Agency, the Department of Finance and the Agence du revenu du Québec. The meeting provides a forum for exchange among those who are routinely faced with bijural issues in their day-to-day activities.

**Marc Cuerrier**, Senior General Counsel at the Legislative Services Branch moderated the discussion which addressed the topics of the

<sup>6</sup>*Ibid* at paras [30-32].

<sup>7</sup>*Ibid* at para [37].

<sup>8</sup>*Ibid* at para [49-52].

<sup>9</sup>*Ibid* at para [54].

<sup>10</sup>2011 QCCA 394. An English translation of the judgment is available on The Courts of Québec website: <http://www.jugements.qc.ca/php/resultat.php?liste=57677799>.

<sup>11</sup>For further details see "Rectification Achieved Under the Rules of the Civil Code of Quebec" *The Link*, No. 36 (July 2011) 4.

<sup>12</sup>*Riopel c. Agence du revenu du Québec et Agence du revenu du Canada*, 2011 QCCA 954.

<sup>13</sup>2010 FCA 280.





concept of acquisition under the *Income Tax Act*,<sup>14</sup> the tax treatment of emphyteusis; trust residence and the civil law; and a review of recent jurisprudence.

## Publications

### Recent Articles Examine Bijuralism and the CCQ

Two articles published in recent months will be of interest to our readers: **Professor Aline Grenon**'s "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 McGill LJ 775; and **Edmund Coates**' "The English Voice of the Civil Code of Quebec: An Unfinished History" (2011) 70 R du B 45.

### Bijurilex Website Redesigned

We are pleased to announce the launch of our newly redesigned Bijurilex website. The new website features a more user friendly navigation menu, a more in-depth description of bijuralism as well as a compilation of reference materials on legislative bijuralism. You will continue to find prior issues of *The Link* on the site, and, as of 2009, the issues are also available in PDF format.

The purpose of Bijurilex remains to provide information about the implications and challenges of bijuralism as it relates to federal legislation. The website is also a place to share and promote knowledge of this subject.

Please visit us at [www.bijurilex.gc.ca](http://www.bijurilex.gc.ca) and tell us what you think.

## International

### Submissions on OECD "beneficial owner"

### Proposals Available Online

July 15<sup>th</sup>, 2011 was the deadline for submissions in the context of the public consultation launched last spring by the OECD Committee on Fiscal Affairs (CFA) on draft changes to the Commentary concerning the meaning of "beneficial owner."<sup>15</sup> Of the submissions received, thirty-nine have been made available on the OECD's website: [http://www.oecd.org/document/39/0,3746,en\\_2649\\_337\\_47\\_48391591\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/39/0,3746,en_2649_337_47_48391591_1_1_1_1.00.html).

<sup>14</sup> RSC 1985, c 1 (5<sup>th</sup> Supp), as amended.

<sup>15</sup> For further details see "The OECD and the TCC Consider the Meaning of 'beneficial owner'" *The Link*, No. 36 (July 2011) 1-2.

