



# the link

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

## Jurisprudence

### Taxpayers outside Quebec Cannot Rely on the Civil Code to Validate a Gift

In *French v The Queen*,<sup>1</sup> the Tax Court of Canada granted the Crown's motion to strike portions of a taxpayer's notice of appeal. In the targeted portions, the taxpayer relied on the civil law definition of gift even though there was no nexus to the Province of Quebec.

The taxpayer was one of a group of taxpayers who were denied tax credits for charitable gifts on the basis that no gift was established at common law, as the taxpayers received a benefit.<sup>2</sup> In contrast, Quebec civil law recognizes the possibility of remunerative gifts.<sup>3</sup>

In granting the Crown's motion to strike, Justice Miller agreed with the Crown's position that it was plain and obvious that the taxpayer's arguments could not succeed. Justice Miller's reasons affirm the principles underlying sections

<http://www.justice.gc.ca/eng/csj-sjc/harmonization/index.html>

8.1 and 8.2 of the *Interpretation Act*,<sup>4</sup> which dictate reliance on the applicable provincial law in matters of property and civil rights if federal legislation is silent.

The taxpayer raised a number of arguments intended to establish that reliance on the Civil Code was not hopeless. Particularly, the taxpayer asserted: 1) that he was raising a novel argument that should be tried, namely that it was appropriate to refer to the Civil Code if the common law is ambiguous; 2) that the law is in a state of evolution as are the implications of bijuralism; and 3) that recent legislative changes are clarifying in nature.<sup>5</sup>

The Court disagreed on all counts. Regarding the assertion that a novel argument was being raised,

*[13] ... The Appellant's position may be novel, but I find reliance on Québec laws to interpret common law, when the common law is clear, is not arguable. ... What is being sought is an interpretation of them [sections 8.1 and 8.2 of the Interpretation Act] and in the name, perhaps, of complementarity, an interpretation that flies in their face. I have read the articles by Professor Duff and Marc Guerrier, Sandra Hassan and Marie-Claude Gaudreault and conclude that complementarity does not mean uniformity, which is in effect what the Appellants seek. Professor Duff is clear that the new rules (sections 8.1 and 8.2 of the Interpretation Act) are to ensure that Québec law is not applied in the rest of Canada, and common law is not applied in Québec where private law concepts of the two legal systems are called into play, which is the very situation before me.*

The Court also found no ambiguity in the common law, stating

<sup>1</sup> 2015 TCC 35.

<sup>2</sup> See *The Queen v Friedberg*, 92 DTC 6031(FCA) for the common law definition of "gift."

<sup>3</sup> See Articles 1806 and 1810 of the *Civil Code of Québec* (the "Civil Code").

<sup>4</sup> RSC I-21, as amended (the "Interpretation Act").

<sup>5</sup> *Supra* note 1, para [11].





[17] ... *Simply because the common law system has no codified definition of gift that does not mean that the expression has not been clearly defined. ...*

[18] *There is no confusion. There is no ambiguity. There is no need to seek assistance from civil law jurisdictions, Québec or elsewhere, even if such a principle existed.*

...  
[22] *I find no basis upon which the Appellants can mount any argument that would extend the civil law definition of gift to the advantage of taxpayers in common law jurisdictions for purposes of the Charitable Donation Tax Credit. Their position with respect to this argument is hopeless.*

Finally, the Court rejected the argument that legislative amendments applicable to gifts made after December 20, 2002 were merely clarifying, citing the explanatory notes of the Department of Finance.

Recognizing the very high burden to be met by a party presenting a motion to strike, Justice Miller concluded his reasons with the following:

[26] *A decision to strike an argument is never taken lightly. It should, as the law directs, only be in cases where it would be inefficient and futile to allow a matter to proceed. It would indeed be a waste of the Court's, the Respondent's and the Appellant's time, and would raise false hopes. Had I perceived a glimmer of a legal basis upon which to build an argument, I would have dismissed the motion. I have not seen that glimmer.*

The decision has been appealed (A-102-15). On November 5, 2015 a motion presented by another group of taxpayers for leave to intervene in the appeal was dismissed.

## No Constructive or Implied Trusts under the Civil Code

In *Groupe Sutton-Royal Inc. (Syndic de)*, 2015 QCCA 1069,<sup>6</sup> the Quebec Court of Appeal referred to the principle of bijural interpretation set forth in section 8.1 of the *Interpretation Act* and the relationship of complementarity between provincial law and federal legislation in matters that relate to property and civil rights in a province.

<sup>6</sup> Confirming 2013 QCCS 5934. Note that the reasons of the Court of Appeal are in English.

The Court underlined the wide recognition of the bijural vocation of federal legislative enactments, notably in relation to the *Bankruptcy and Insolvency Act*<sup>7</sup> and used that principle in the interpretation of the concept of trust alluded to in the BIA.

In the context of the bankruptcy of a real estate agency, real estate brokers claimed that certain amounts of money deposited in a bank account by the agency constituted commissions to which they were entitled. They argued that these amounts belonged to them or, in the alternative, that these commissions were held in trust by the agency for their benefit. Neither the trustee in bankruptcy nor the trial judge accepted their claims.

The Court of Appeal confirmed the decision of the trial judge. The money deposited in the agency bank account did not belong to the brokers and the agency was not acting as their mandatary when it received and deposited the amounts at issue. Moreover, the brokers failed to demonstrate that the amounts at issue were not part of the property of the bankrupt under section 67 of the BIA. The Court held that the trial judge was correct to apply the rules on trust set out in the Civil Code when he interpreted paragraph 67(1)(a) of the BIA to support the conclusion that the amounts in the agency's account were not held in trust. The Court then stated that there is nothing unfair about Quebec law departing from the rules applicable to trusts in bankruptcy matters elsewhere in Canada.

A request for leave to appeal was filed at the Supreme Court of Canada on September 18, 2015.<sup>8</sup>

## Case Update — Rectification Decisions at the Supreme Court

On November 19, 2015, the Supreme Court of Canada granted leave to appeal (docket #36505) from *Attorney General of Canada v Le Groupe Jean Coutu (PJC) inc.*, 2015 QCCA 838.<sup>9</sup> The Quebec Court of Appeal allowed the

<sup>7</sup> RSC 1985, c B-3, as amended (the "BIA").

<sup>8</sup> Docket #36618, under the name *Lambros Demos v Demers Beaulne Inc.*





Crown's appeal and denied Groupe Jean Coutu's request for rectification, finding that "The observation of the judge of first instance that the parties were not seeking to rewrite the tax history of the transaction constitutes, in my respectful opinion, a manifest error."<sup>10</sup>

Also, on December 10<sup>th</sup>, the Supreme Court granted leave to appeal (docket 36606) in *Fairmont Hotels v Attorney General of Canada*, 2015 ONCA 441, a decision allowing rectification.<sup>11</sup> The Ontario Court of Appeal considered itself bound by *Juliar*.<sup>12</sup> Note that in *Services environnementaux AES inc.*,<sup>13</sup> the Supreme Court declined to revisit *Juliar*:

[55] *In oral argument, the intervener, the Attorney General of Canada, asked this Court to consider and reject a line of authority that has developed, he said, since the Ontario Court of Appeal's decision in Juliar. In his view, that line of authority has broadened the scope of application of the common law remedy of rectification in tax cases and is incompatible with the conditions for exercising the power of rectification as laid down by this Court in Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6, [2009] 1 S.C.R. 157, and Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 S.C.R. 678 (see also A. Swan and J. Adamski, Canadian Contract Law (3rd ed.*

<sup>9</sup> Reversing *Jean Coutu (PJC) inc. c. Jean Coutu Group (PJC) USA*, 2012 QCCS 6917. Note that the reasons of the Court of Appeal were delivered in English. The decision in *Groupe Jean Coutu* was rendered simultaneously with another decision refusing rectification: *Mac's Convenience Stores inc. v. AGC et al.*, 2015 QCCA 837. A request for leave to appeal the *Mac's* decision was filed at the Supreme Court on December 18, 2015. For a summary of the Superior Court's decision in *Mac's*, see "Provincial Superior Courts Confronted by Rectification Requests" *The Link* No. 39 (January 2013) 3.

<sup>10</sup> Par [37].

<sup>11</sup> Affirming 2014 ONSC 7302.

<sup>12</sup> (2000), 50 O.R. (3d) 728 (C.A.), leave to appeal to SCC refused. The binding nature of *Juliar* was recently invoked again, in the November 19, 2015 decision *Canada Life v. AG of Canada*, 2015 ONSC 281.

<sup>13</sup> *Agence du revenu du Québec v. Services environnementaux AES inc. et Agence du revenu du Québec v. Riopel*, 2013 SCC 65. For a summary of the AES decision, see "Rectification: Tax-driven Evolution in the Civil Law" *The Link* No. 42 (December 2014) 2-3.

2012), at pp. 768-70). The two appeals heard by this Court are governed by Quebec civil law and are not appropriate cases in which to reconsider the common law remedy of rectification. I will therefore refrain from criticizing, approving or commenting on the application of that remedy by the Canadian courts on the basis of *Juliar*.

The appeals are scheduled to be heard on May 18, 2016.

## Legislation

### Civil Code Amendments: Hypothecs, Animals and Technical Amendments

On January 1, 2016, new articles 2713.1 *et seq.* of the Civil Code will come into force.

The new rules will allow for movable hypothecs with delivery on certain "monetary claims," a concept defined at article 2713.1. The measures were adopted this spring,<sup>14</sup> in legislation that included other amendments to the Civil Code, notably amendments clarifying that a partnership may grant a hypothec on a universality of property (articles 2684 *et seq.*), and amending the rules governing hypothecs granted in favour of a hypothecary representative (article 2692).

The *Act to improve the legal situation of animals*<sup>15</sup> was assented to on December 4, 2015. It enacts the *Animal Welfare and Safety Act*, and also includes amendments to the Civil Code, including new article 898.1:

*Animals are not things. They are sentient beings and have biological needs.*

*In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals.*<sup>16</sup>

<sup>14</sup> SQ 2015, c 8 (former Bill 28).

<sup>15</sup> SQ 2015, c 35 (former Bill 54).

<sup>16</sup> We note a slight discrepancy with the French version (underlining added): "*Les animaux ne sont pas des biens. (...) Outre les dispositions des lois particulières qui les protègent, les dispositions du présent code et de toute autre loi relatives aux biens leur sont néanmoins applicables.*"





Finally, by Information Note published November 11, 2015, 331 articles of the English version of the Civil Code and 10 articles of the French version were corrected for purposes of terminological uniformity (quality of language, and minor corrections with a view to reconciling the French and English versions).<sup>17</sup> The changes took effect on November 1, 2015. An updated version of the Civil Code is available on the *Publications Québec* website. The November 1<sup>st</sup> changes can be identified by the mentions “I.N. 2015-11-01” in the English version and “N.I. 2015-11-01” in the French version.

## New Code of Civil Procedure in Force January 1, 2016

Quebec’s new *Code of Civil Procedure*<sup>18</sup> comes into force on January 1, 2016. The Preliminary Provision emphasizes that “This Code must be interpreted and applied as a whole and in the civil law tradition. ...”

# Publications

## Interests in Partnership Property and the Role of Intention in Assessing Employment Status

The recent article by **Ingrid Demchenko and Nandini Somayaji**, “The Taxation of Partnerships: Selected Issues” (2015) 63:3 *Canadian Tax Journal* 851-84 includes an interesting analysis of the ambiguous nature in common law of a partner’s interest in the assets of a partnership.<sup>19</sup>

**Tamara Larre**, in “The Role of Intention in Distinguishing Employees from Independent Contractors” (2014) 62:4 *Canadian Tax Journal* 927-70, considers the emerging role of intention in characterizing such legal relationships.

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<sup>17</sup> The Quebec Minister of Justice has authority to provide for the updating of laws and regulations included in the Compilation of Québec Laws and Regulations. See sections 2 and 3(2) of the *Act respecting the Compilation of Québec Laws and Regulations*, CQLR, c R-2.2.0.0.2.

<sup>18</sup> CQLR, c C-25.01.

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<sup>19</sup> Quebec civil law also struggles with this issue. Consider the doctrinal debate generated by the Quebec Court of Appeal’s decision in *Ferme CGR enr. s.e.n.c. (Syndic de)*, 2010 QCCA 719.

