The Federal Court of Appeal to the Rescue of Civil Law

The Honourable Justice Robert Décary*

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**ABSTRACT**

The Federal Court of Appeal, owing to its privileged position in matters pertaining to unemployment/employment insurance and to tax law in general, has made an important contribution toward the recognition of civil law as an integral part of federal law. Despite some slippages, it can no longer be doubted that civil law is the complementary law in federal law whenever the cause of action arises in Quebec.

**KEYWORDS:** CIVIL LAW • COMMON LAW • FEDERAL COURT OF APPEAL • HARMONIZATION • JURISPRUDENCE

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**INTRODUCTION**

It seems appropriate to mark the 25th anniversary of the Quebec office of the Canadian Tax Foundation by taking a few pages to highlight the extent to which the civil law has developed in federal law as a result of Federal Court of Appeal tax jurisprudence.

I believe I can say that if today civil law has equality of status in federal law, this court deserves much of the credit. Chance, of course, played a role in that the court applied federal tax law that by its very nature covers activities governed by both common law (outside Quebec) and civil law (in Quebec).

During the symposium celebrating the Federal Court’s 20th anniversary, held on June 26, 1991, Denis Lemieux addressed the contribution of the federal court to

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civil law. After examining the jurisprudence between 1970 and 1990, he remarked that “the Federal Court is truly a jurisdiction in which the civil law is present” and that “the civil law is not limited to civil actions, but extends to the majority of domains in which the Court has jurisdiction.” He congratulated the court on its “openness . . . in several cases to using civil law extensively in various areas of federal law.” He observed that “the rare occasions when civil law was rejected occurred in cases where federal law, inspired by common law, required consistency throughout Canada.” He concluded that “the most significant contribution of the Court to the civil law has been to continuously confront it to the common law; contact that has been stimulating for both legal systems and for federal law in general.” He then prophesized that “this interaction, with the support of litigators, should become common and be further reflected in the Court’s jurisprudence so that federal law may draw from both legal systems when it would contribute to ensure greater justice.”

For the sake of brevity, I will focus on specific decisions rendered by the Federal Court of Appeal since Lemieux made these comments.

I found it useful for the purposes of this article to categorize the decisions into two groups:

1. *unemployment insurance* (now employment insurance) cases (which were, if I may say, for many years the cash cow of the Federal Court of Appeal in Quebec), in which the court regularly defined the concepts of contract of employment and contract of enterprise; and
2. *tax statute or treaty cases*, in which the court had to address more sporadically all types of private-law concepts.

I considered only a small number of unemployment insurance decisions, since these were often rendered from the bench with very brief, sometimes awkward, reasons and are of no jurisprudential interest.

Two periods emerged, separated by the coincidence of two events in 2001: first, the decision of the Federal Court of Appeal in *Canada (Procureur Général) c. Constance St-Hilaire*,7 which established in the jurisprudence once and for all the place of civil law in federal law; and second, several months later, the statutory recognition of that place by the Federal Law-Civil Law Harmonization Act, No. 1.8 These two

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2 Ibid., at 142-43 (translation).

3 Ibid., at 143 (translation).

4 Ibid., at 144 (translation).

5 Ibid., at 145 (translation).

6 Ibid. (translation).

7 2001 FCA 63.

8 SC 2001, c. 4, as amended (herein referred to as “the Harmonization Act”).
events effectively put an end to the debate over the principle of this issue, although it continues to raise many difficulties. I did not include St-Hilaire in my summary since it was not, strictly speaking, a tax or unemployment insurance decision but a decision regarding the Public Service Superannuation Act.

By chance, many of the decisions to which I will refer were written by me. I trust that the reader will understand that I have chosen to focus on these judgments not for narcissistic reasons, but out of necessity. In fact, I did not realize before I wrote this article the degree to which I had been involved. That said, I have never concealed my feelings when it came to using the civil law or the French version of federal statutes. Indeed, that is another topic that might be interesting to explore: To what extent does the approach of civil-law judges influence the final meaning given to a federal statutory provision when interpreting federal statutes? In other words, can we argue that federal statutory interpretation is influenced not only by civil-law concepts, but also by the civil-law training and experiences of the interpreters themselves? In Grimard v. Canada, Létourneau JA describes the civil-law approach as “Cartesian and synthetic” and the common-law approach as “analytical.” Lemieux writes that his summary of civil-law decisions “does not do justice to the broader influence civil law judges may have had in federal law, even when the civil law was not directly in issue.”

UNEMPLOYMENT/EMPLOYMENT INSURANCE CASES

The issue in Sauvé v. MNR was whether a table dancer had a contract of employment or a contract for services for the purposes of the Unemployment Insurance Act. Chevalier DJ relied on the Supreme Court of Canada decision in ITO-Int’l Terminal Operators v. Miida Electronics, which acknowledged that “the Federal Court may apply provincial law incidentally necessary to resolve the issues,” and applied the provisions of the new Civil Code of Québec.

In Canada (Procureur Général) c. Charbonneau, rendered from the bench, I was of the opinion, with Marceau JA and Chevalier DJA concurring, that

[t]he tests laid down by this Court in Wiebe Door Services Ltd. v. M.N.R. [a common-law case] are not the ingredients of a magic formula. They are guidelines which it will generally be useful to consider, but not to the point of jeopardizing the ultimate objective of the exercise, which is to determine the overall relationship between the parties.

11 Supra note 1, at 142 (translation).
12 (October 17, 1995), FCA docket no. A-704-94.
The issue is always, once it has been determined whether there is a relationship of subordination between the parties such that there is a . . . contract of employment (art. 2085 of the Civil Code of Québec) or, whether there is such a degree of autonomy that there is a contract of enterprise or for services (art. 2098 of said Code).  

In Poulin v. Canada (Minister of National Revenue), Létourneau JA, with Richard CJ and Nadon JA concurring, cited the Harmonization Act and stated that the applicable law was the law in Quebec. He then proceeded to examine the tests developed by the Supreme Court in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., in turn endorsing some of my reasons in Wolf v. Canada, and some of the reasons of Desjardins JA. However, he recalled my comment in Wolf to the effect that “one ends up in the final analysis, in civil law as well as in common law, looking into the terms of the relevant agreements and circumstances to find the true contractual reality of the parties.”  

In Le Livreur Plus Inc. v. Canada (Minister of National Revenue), Létourneau JA, with Desjardins and Nadon JJA concurring, relied on Wolf, and then on Charbonneau, to find that “the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise.” He noted that the five tests established in Wiebe Door Services Ltd. v. MNR “are only points of reference,” but he examined them one by one before concluding that in this case there was a contract for services.  

In 9041-6868 Québec Inc. v. Canada (Minister of National Revenue), noting a certain slippage, I tried, with the help of Létourneau and Pelletier JJA, to get things back on track:  

With respect to the nature of the contract, the judge’s answer was correct, but, in my humble opinion, he arrived at it incorrectly. He did not say anything about the provisions of the Civil Code of Québec, and merely referred, at the end of his analysis of the evidence, to the common law rules stated in Wiebe Door Services Ltd. v. Canada (Minister of National Revenue), [1986] 3 FC 553 (FCA) and 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983. I would hasten to point out that this mistake is nothing new and can be explained by the vacillations in the case law, to which it is now time to put an end.  

When the Civil Code of Quebec came into force in 1994, followed by the enactment of the Federal Law-Civil Law Harmonization Act, No. 1, SC 2001, c. 4 by the Parliament

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15 Canada (Procureur Général) c. Charbonneau, 1996 CanLII 3971, at paragraph 3 (FCA) (translation).
16 2003 FCA 50.
17 2001 SCC 59.
18 2002 FCA 96.
19 Ibid., at paragraph 113, quoted in Poulin, supra note 16, at paragraph 27.
20 Le Livreur Plus Inc. v. Canada (Minister of National Revenue), 2004 FCA 68, at paragraph 18.
21 [1986] 3 FC 553 (CA).
of Canada and the addition of section 8.1 to the Interpretation Act . . . it restored the civil law of Quebec to its rightful place in federal law, a place that the courts had sometimes had a tendency to ignore. . . .

It is possible, and in most cases even probable, that where contracts are similar they would be characterized similarly, whether the civil law or common law rules are applied. The exercise, however, is not a matter of comparative law, and the ultimate objective is not to achieve a uniform result. On the contrary, the exercise, as was in fact intended by the Parliament of Canada, is one of ensuring that the approach taken by the court is the approach that applies in the applicable system, and the ultimate objective is to preserve the integrity of each legal system.22

In Combined Insurance Company of America v. Canada (National Revenue),23 Nadon JA, with Létourneau and Pelletier JJAs concurring, committed the mistake I took issue with in 9041-6868 Québec Inc. and did not even cite that case, with which the other two members of the panel had nonetheless concurred.

**TAX STATUTE OR TREATY CASES**

The issue in Vaillancourt v. Canada (Deputy Minister of National Revenue)24 was whether a co-ownership in Quebec was considered a “multi-unit residential building” within the meaning of an income tax regulation. The court unhesitatingly applied the Civil Code of Québec provisions.

In Belliard v. Colin, Paré & Associés,25 the court applied, without any explanation, the Civil Code of Québec provisions to a seizure under the Excise Tax Act.

Canada v. Mont-Sutton Inc.26 involved ski trails and depreciable property and was decided using an interpretation of the Income Tax Act,27 which did not require any recourse to civil-law or common-law concepts.

In Canada v. Construction Bérou,28 the question was whether the acquisition of trucks under a leasing contract constituted an acquisition of depreciable property within the meaning of the Income Tax Act. Noël JA, who wrote the main judgment later rejected by his two colleagues, was of the view that

when Parliament frames its statutes by reference to private law concepts without defining them or otherwise attaching to them any particular meaning, it in effect adopts the laws of the provinces. The question is one of intent: it must be determined in light of

22 9041-6868 Québec Inc. v. Canada (Minister of National Revenue), 2005 FCA 334, at paragraphs 2-3 and 6.
23 2007 FCA 60.
24 [1991] 3 FC 663 (CA).
25 1997 CanLII 5952 (FCA).
26 1999 CanLII 8196 (FCA).
27 RSC 1985, c. 1 (5th Supp.), as amended.
28 1999 CanLII 18807 (FCA).
the provisions at issue whether Parliament, in assigning fiscal consequences to property “acquired,” was referring to the concept of ownership as it exists under the laws of the provinces or, as the appellant contends, to a separate concept peculiar to the Act.29

Noël JA concluded that Parliament had not derogated from private law, in this case civil law, and that in the circumstances the parties had not intended to transfer ownership. He acknowledged that the intent of subsection 248(3) of the Income Tax Act was to give a broad meaning to the concept of beneficial ownership in Quebec by likening it on a non-exclusive basis to the various types of ownership known to the civil law,30 but he did not believe that subsection 248(3) applied in this case because ownership had not been transferred.

Conversely, Létourneau JA applied subsection 248(3):

[T]he attempt by Parliament to harmonize the two systems with a view to providing fair and equal treatment to all Canadian taxpayers cannot be doubted. Hence, the necessity for a judicial interpretation which allows for the implementation of this legislative intent.31

Desjardins JA agreed with Létourneau JA and stated with respect to subsection 248(3):

The federal Parliament accordingly devised, for tax purposes and for all of Canada, a common concept covering the ideas of “disposition” (“disposition de biens”) and “beneficial ownership” (“propriété effective”), both in civil and common law.32

She then interpreted the contract in question and concluded that the parties “acted in compliance with the civil law,” and furthermore, that they intended “to meet the requirements of s. 248(3) of the Act.”33

Brouillette v. Canada34 concerned an interpretation of subsection 73(5) of the Income Tax Act authorizing a capital gains tax deferral for shares transferred to a child. The Act did not define the word “transfer,” and the court, automatically and without hesitation, applied the civil law and concluded that the trust had operated to transfer the shares for the benefit of the child. I wrote, with Desjardins and Létourneau JJA concurring, that “Parliament is deemed to know the existing law. In 1987 it must have known, that at least in Quebec, a transfer of property to a minor child could be made by trust pursuant to art. 981a. of the Civil Code of Lower Canada.”35 I added

29 Ibid., at paragraph 14 of Nöel JA’s reasons.
30 Ibid., at paragraph 67.
31 Ibid., at paragraph 2 of Létourneau JA’s reasons.
32 Ibid., at paragraph 6 of Desjardins JA’s reasons.
33 Ibid., at paragraph 15.
34 1999 CanLII 8207 (FCA).
35 Ibid., at paragraph 20.
that “[t]he aim of the federal legislation was to enable parents to transfer their shares to their children. Such a transfer can only be made in accordance with provincial statutes.”

In *Marcoux v. Canada (Attorney General)*, the appellant argued that amounts claimed under subsection 224(1) of the Income Tax Act were exempt from seizure under the Code of Civil Procedure. Noël JA, with Létourneau JA and me concurring, referred to *St-Hilaire* (rendered several days earlier), recalled that Parliament was free to derogate from the civil law when it legislated on a subject that fell within its jurisdiction, and held that in this case Parliament had effectively chosen, in section 224, not to take civil law into account.

The issue in *Wolf*, was whether income earned by an engineer (Wolf) under his contract with Canadair was for “independent personal services” or “dependent personal services” for the purposes of the Canada–US tax convention. Desjardins JA examined at the outset the Civil Code of Québec provisions that distinguished a contract of employment from a contract for services. She held that as a result of the Privy Council’s decision in *Montreal v. Montreal Locomotive Works Ltd.*, “the distinction between a contract of employment and a contract for services under the Civil Code of Québec can be examined in light of the tests developed through the years both in the civil and in the common law.” She then applied the tests laid out by the Supreme Court in *Sagaz*, in common law, to the facts in the case and concluded that Wolf had provided “independent personal services.”

I concurred with the conclusion of Desjardins JA, but referred instead to *St-Hilaire* and the Harmonization Act, and essentially relied on the Quebec civil-law principles that had emerged from the jurisprudence and the doctrine. Noting that “one ends up in the final analysis, in civil law as well as in common law, looking into the terms of the relevant agreements and circumstances to find the true contractual reality of the parties,” I nevertheless distanced myself from *Sagaz*, finding it somewhat puzzling that control—the purpose of the exercise in civil law—was only one factor among others in the common-law approach.

Noël JA arrived at the same conclusion, primarily because “the characterization which the parties have placed on their relationship ought to be given great weight.” Although he claimed to have adopted “essentially the same” approach as that of his

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36 Ibid., at paragraph 27.
37 2001 FCA 92.
38 Ibid., at paragraph 13.
39 Supra note 18.
41 *Wolf*, supra note 18, at paragraph 49.
42 Ibid., at paragraph 112.
43 Ibid., at paragraph 113.
44 Ibid., at paragraph 122.
colleagues, for all practical purposes he used the common-law-inspired criteria proposed by Desjardins JA.

_Newcourt Financial Ltd. v. Canada_ dealt with a seizure relating to a tax debt and the interpretation of subsection 227(4) of the Income Tax Act. The court (Noël and Nadon JJA and me) automatically applied the relevant Civil Code of Québec provisions.

In _Hewlett Packard (Canada Ltd.) v. Canada_, Létourneau, Sexton, and Evans JJA interpreted the capital cost allowance provisions of the Income Tax Act. Although it was chiefly a common-law case, some of the vehicle exchanges were governed by Quebec law. Noël JA applied Quebec law to these exchanges and concluded that ownership had been transferred when the parties had intended that it transfer, a conclusion identical to his conclusion regarding exchanges governed by Ontario law. He added, however, in obiter, that

> even if the application of the Civil Code of Quebec gave rise to a result different from that obtained in the common law provinces, this Court has held that, for the sake of uniformity, the common law approach should prevail even in Quebec (Construction Bérou).  

In _Grimard v. Canada_, the court had to determine whether certain expenses were deductible as business expenses. Létourneau JA, with Blais and Trudel JJA concurring, confirmed his commitment to the principle set out in _St-Hilaire_ and in the Harmonization Act. He concluded that, for all practical purposes, there really was no antinomy between civil law and common law when deciding whether there was a contract for services.

The debate in _Canada v. Précost Car Inc._ centred on the interpretation of the terms « bénéficiaire effectif » and “beneficial owner” in the Canada-Netherlands tax treaty. Treating the issue as an exercise in comparative law, the Crown basically argued that the judge of the Tax Court of Canada had given the term “beneficial owner” the common-law meaning, ignoring the civil-law and international-law meanings. The court rejected the Crown’s submissions, satisfied that the judge had “[i]n his search for the meaning of these terms . . . closely examined their ordinary meaning, their technical meaning and the meaning they might have in common law, in Québec’s civil law, in Dutch law and in international law.”

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45 Ibid., at paragraph 123.
46 2004 FCA 91.
47 2004 FCA 240.
48 Ibid., at paragraph 62.
49 Supra note 10.
50 2009 FCA 57.
51 Ibid., at paragraph 8.
In *Bouchard v. Canada (Attorney General)*, the Minister of National Revenue retained, by way of setoff, retirement benefits under section 224.1 of the Income Tax Act. The appellant argued that the term “setoff” in that section incorporated the Quebec civil-law concepts of compensation into the federal statute. Noël JA, on behalf of Pelletier and Trudel JJA, held that in this case Parliament had not intended for civil law to be the suppletive law. He based his conclusion on the Harmonization Act, on *St-Hilaire*, and on *Marcoux*.

In *Canadian Broadcasting Corporation v. Montréal (City)*, the court had to interpret the Payments in Lieu of Taxes Act and decide whether to apply the Quebec doctrine of reception of a thing not due. Relying on *St-Hilaire* and the Harmonization Act, Létourneau JA, with Blais CJ and Pelletier JA concurring, held that “[s]ince the dispute arose in Quebec, the Civil Code of Québec applies.”

**WHERE THINGS STAND NOW**


It cannot be denied that, on the face of some decisions, there have been erroneous or misguided “uniformist” declarations. It is true, as Létourneau JA pointed out in *Grimard*, that federal Department of Justice prosecutors themselves contributed to this pussyfooting by arguing first one and then the other of the two approaches. It nevertheless remains that it is incumbent upon the court to take a firm stance, regardless of the one proposed by Department of Justice counsel in a given case.

I will not even attempt to reconcile all the decisions rendered. It would be an impossible task given that some of them ignore and contradict others. Some decisions are clearly wrong, such as *Combined Insurance*, where the court committed the mistake that it had harshly condemned two years earlier in *9041-6868 Québec Inc.*—a

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52 2009 FCA 321.
53 2012 FCA 184.
54 Ibid., at paragraph 46.
56 Ibid., at 23 (translation).
57 Supra note 10, at paragraph 20.
decision not even cited in *Combined Insurance*. However, in all fairness to the majority in *Construction Bérou*, at that time *St-Hilaire* had not yet been rendered and the Harmonization Act had not yet been enacted. Also, in all fairness to those judges who systematically applied the tests in *Wiebe Door* and *Sagaz*, as in *Wolf*, they believed, rightly or wrongly, that these criteria were incorporated into civil law and that consequently they were applying the civil law. And finally, in all fairness to those judges who referred to common-law criteria in their analysis and considered them merely as useful, non-determinative indicators, nothing prevents the two systems from using a number of common criteria. In most cases, the final outcome would have been the same whether civil law or common law applied; in short, the end result did not infringe the civil law—though this is at best small comfort.

That said, I believe that the decisions as a whole, despite some anomalies, establish that when the cause of action arises in Quebec, civil law is the supplementary law in federal law. This was the case for most judges, even before the issue was thoroughly canvassed in *St-Hilaire* and enacted in the Harmonization Act. It has since been the case for every judge who has addressed this issue. Curiously, the few cases (such as *Combined Insurance*) where the judges let themselves be seduced by the common law were cases where the issue had not been openly debated.

I am grateful to Allard and Jacquier for contributing, through their incisive article, to ensuring that the members of the Federal Court of Appeal now perform the same dance to the same tune. At a time when the civil-law guard is changing at the court (Desjardins and Létourneau JJ and I having retired—we who were in many ways responsible for both the interim confusion and the ultimate solution), my hope is that the summary and comments presented here will convince the succeeding generation, and Crown counsel, that the Federal Court of Appeal must continue to play a vital role in the preservation of civil law as supplementary law in federal law.