Docket: 2014-1244(IT)G

BETWEEN:

GLEN FRENCH
AND ALL THOSE LISTED IN ATTACHED SCHEDULE "A",

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 27, 2014 at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	A. Christina Tari, Leonard Puterman
Counsel for the Respondent:	John Grant, Arnold H. Bornstein, Lindsay Beelen

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ORDER

In accordance with the attached Reasons it is hereby ordered that:

1. The following provisions in the Appeal of Glen French and all like provisions in the Appeals of those Appellants listed in Schedule A, notwithstanding paragraph numbers may differ, are hereby struck:

a. the references to the *Civil Code of Québec* and the *Interpretation Act* from paragraph 18;

b. paragraphs 23, 24, 25 and 26; and,

c. the phrase, "or alternatively, on the basis that the appellant was entitled to deduct the portion of the Tax Credits attributable to the portion of the Donations in excess of any benefit or remuneration

received by the Appellant for the Donations" on page 6 of the Amended Notice of Appeal;

2. The Respondent shall file the Reply within 30, 60 or 90 days of the final disposition of this Motion, as set out in Schedule A; the final disposition being the ultimate determination whether by this Court, the Federal Court of Appeal or the Supreme Court of Canada.

3. The Respondent is awarded costs in a lump sum of $2,500, inclusive of disbursements within 45 days of the final disposition of this Motion, as defined above.

Signed at Ottawa, Canada, this 11th day of February 2015.

"Campbell J. Miller"

C. Miller J.

SCHEDULE A

Ct.	Appellant	Court File No.	Reply Due
1	AGOZZINO, Giovanni	2014-2774(IT)G	30 Days
2	ARNOLD, Mark	2014-3347(IT)G	60 Days
3	BERNSTEIN, Harry	2014-3423(IT)G	90 Days
4	BERNSTEIN, Martin	2014-3422(IT)G	90 Days
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6	BERTOLACCI, Paolo	2014-3590(IT)G	60 Days
7	BRAGANZA, Christabel G.	2014-2879(IT)G	30 Days
8	BROWN, David	2014-3083(IT)G	30 Days
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14	COUTURE, Daniel	2014-1384(IT)G	30 Days
15	ELLIS, John K	2014-3498(IT)G	60 Days
16	FRENCH, Glen	2014-1244(IT)G	30 days
17	GAZDIK, Theodore	2014-1242(IT)G	30 Days
18	GOLDMAN, Barry	2014-3288(IT)G	60 Days
19	HAMILTON, Alan J.	2014-1375(IT)G	30 Days
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Citation: 2015 TCC 35
Date: 20150211
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Respondent.

REASONS FOR ORDER

C. Miller J.

[1] The Respondent brings this Motion under rule 53(1)(d) of *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") in connection with all of the Appellants, being Mr. Glen French and all those listed in attached Schedule "A". In referencing paragraph numbers of an Amended Notice of Appeal, I will be referring to the Amended Notice of Appeal of Mr. Glen French. The Respondent seeks:

> 1. an Order striking out the following passages from the Amended Notice of Appeal dated May 30, 2014, without leave to amend:
>
> a. the references to the *Civil Code of Québec* and the *Interpretation Act* from paragraph 18;
>
> b. paragraphs 23, 24, 25 and 26; and,
>
> c. the phrase, "or alternatively, on the basis that the appellant was entitled to deduct the portion of the Tax Credits attributable to the portion of the Donations in excess of any benefit or remuneration received by the Appellant for the Donations" on page 6 of the Amended Notice of Appeal;

2. an Order extending the time in which the respondent may file her Reply to the Amended Notice of Appeal to thirty days from the date of the final disposition of this motion;

3. costs of this motion; and

4. such other relief as counsel may request and this Court deems just.

[2] These Appeals all relate to the same issue, being the Appellants' entitlement to tax credits in connection with purported donations to Ideas Canada Foundation, a registered charity. Such entitlement to a similar donation made by Ms. Kossow to Ideas Canada Foundation was denied by the Tax Court of Canada, which decision was affirmed by the Federal Court of Appeal (*Kossow v R*, 2013 FCA 283) ("Kossow Appeal"). The Appellants have added arguments in their Appeals which were not made by Ms. Kossow, and they wish to be given an opportunity to make them. One of the arguments is what the Respondent wishes to have struck on the basis it is plain and obvious it has no chance of success.

[3] The portions of the Notices of Appeal which comprise the argument sought to be struck are references to the *Civil Code of Québec* and the *Interpretation Act* (the "*Act*") (sections 8.1 and 8.2) and the following paragraphs:

23. In the alternative, the Appellant should be entitled to a deduction for that portion of each of the Donations that exceeded the value of any benefit or remuneration obtained from each of the Donation (excluding the value of any tax advantage).

24. Under the civil law, Article 1810 of the *CCQ* expressly provides that "a remunerative gift … constitutes a gift … for the value in excess of that of the remuneration". Consequently, to the extent that the Loans or some aspect thereof may have constituted remuneration to the Appellant, the Donations less the remuneration constituted a "gift" in Québec through operation of sections 8.1 and 8.2 of the *Interpretation Act*.

25. Had the Appellant been resident of Québec during the Taxation Years, he would unquestionably be entitled under section 118.1 of the Act to a deduction of the portion of the Donations in excess of the remuneration.

26. Parliament did not intend for section 118.1 of the Act to produce radically different results for taxpayers in Québec that would not apply to taxpayers in the rest of Canada.

[4] None of the Appellants made the purported donations in Québec.

[5] The jurisprudence is clear that to strike pleadings under rule 53(1) of our *Rules* it must be plain and obvious the pleadings have no chance of success.

[6] Integral to this matter is reliance on section 8.1 and 8.2 of the *Interpretation Act* which read:

> 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.
>
> 8.2 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.

[7] In a nutshell, the Respondent's position is that because "gift" is not statutorily defined in the *Income Tax Act*, one must look to the law of property and civil rights of a province which would govern the concept of gift. With the introduction of sections 8.1 and 8.2 of the *Act* in 2001, by the passing of the *Harmonization Act*, it is clear, based on the principle of complementarity, "gift", as defined in Québec is to apply in Québec vis-à-vis section 118.1 of the *Income Tax Act* and "gift" as defined in common law jurisdictions is to apply in those jurisdictions vis-à-vis section 118.1 of the *Income Tax Act*. In effect, the Québec codified definition of gift cannot apply in the rest of Canada and *vice versa*.

[8] This recognizes the possibility that federal laws may yield different results in different jurisdictions. Even before the passing of sections 8.1 and 8.2 of the *Interpretation Act* the courts recognized this, as is evident from Justice Décary's comment in *St. Hilaire v Canada (AG)*, 2001 FCA 63:

> 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.

[9] I see no need to delve more deeply into the Respondent's argument: it is clear that sections 8.1 and 8.2 of the *Interpretation Act* are, in the Respondent's view, a complete answer.

[10] The Appellants' position is that the threshold is very high for the Respondent to be successful in striking pleadings. The Respondent must effectively show the Appellants' position is hopeless. The Appellants' counsel raises a number of points to suggest there is an argument that is by no means hopeless. I wish to explore the Appellants' argument in more detail, as at first blush, I find the Respondent's position unassailable.

[11] The Appellant first suggests that this is a novel argument, the argument being that the Tax Court of Canada can look to Québec law to assist in defining gift in common law jurisdictions, if it is not clearly defined. The Appellants suggest that this is particularly apropos where the area of law is in the state of evolution, such as is the case with the implications of bijurilism generally. The Appellants refer to cases prior to the enactment of sections 8.1 and 8.2 of the *Interpretation Act* (*R v Littler*, [1978] CTC 235 and *Gervais v R*, 85 DTC 5004) which indicate a willingness of courts to opt for equitable tax treatment across the country. The Appellants also reference academic commentary from Professor David Duff addressing this very issue. Finally, the Appellants suggest there is an argument that the legislative change by the Government effective December 20, 2002 was a clarification that Parliament always intended the Québec definition of remunerative gift to be applicable to section 118.1 of the *Income Tax Act*.

[12] I will first address the Appellants' contention that the courts should not slam the door on novel arguments. The Appellants raise the decision of *Dudley v British Columbia*, 2013 BCSC 1005, as an example of court willingness to embrace novel arguments. That case dealt with a declaration under section 24 of the Canadian Charter of Rights and Freedoms, sought by a mother on behalf of her deceased daughter. She relied on foreign and international human rights jurisprudence and

evolving jurisprudence with respect to section 24 of the Canadian Charter of Rights and Freedoms to allow courts to revisit precedents. The court described this as a novel but arguable claim and did not strike the pleading at issue.

[13] With respect, I am dealing with a different kettle of fish. The Appellants' position may be novel, but I find reliance on Québec laws to interpret common law, when the common law is clear, is not arguable. At the turn of the century, bijuralism was a significant federal project and indeed led to the Harmonization legislation enacting sections 8.1 and 8.2 of the *Interpretation Act*. No revisit of these provisions is being sought. What is being sought is an interpretation of them and in the name, perhaps, of complementarity, an interpretation that flies in their face. I have read the articles by Professor Duff and Marc Cuerrier, 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. Professor Duff is also explicit in suggesting that cases such as *Littler* and *Gervais*, cases relied upon by the Appellants, are "cases where courts have dissociated the meaning of gift in the *Income Tax Act* from the meaning under the Civil Law of Québec…and should not be followed."

[14] I have read nothing that the Appellants have provided to me that suggested, notwithstanding perhaps taxpayers' expectations, that a principle of bijuralism is uniformity. That is not its objective, and there has been nothing presented to me to suggest the evolution of bijuralism is headed in that direction. The Appellants' contention that Parliament did not intend section 118.1 of the Act to produce radically different results simply has no foundation in the law, notwithstanding it may be supportable by common sense. It is not an argument.

[15] The Appellants seek support in the preamble to the *Harmonization Act*: it reads:

> WHEREAS all Canadians are entitled to access to federal legislation in keeping with the common law and civil law traditions;

> 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;
>
> 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;
>
> 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;
>
> 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;
>
> WHEREAS the objective of the Government of Canada is to facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions;
>
> 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;

[16] Again, nothing in this preamble invites one, as an interpreter of federal legislation, to ignore common law in favour of civil law or *vice versa*: indeed, quite the opposite.

[17] The Appellant's argument is premised on a principle that when there is confusion in the common law one can look to civil law. I have been provided no authority to suggest that. In any event, this is based on the Appellants' perception that "gift", while clearly defined in civil law, is ambiguous in common law. Again, with respect, I disagree with that notion. Simply because the common law system has no codified definition of gift, that does not mean the expression has not been clearly defined. There is a plethora of common law jurisprudence which has very clearly established what is required for a common law gift, most succinctly put in *The Queen v Friedberg*, 92 DTC 6031 (FCA), which was adopted in the more recent case of *Maréchaux v R*, 2010 FCA 287:

> … a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor.

[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. Again, I see no argument to be made.

[19] The Appellants suggest that common law has acknowledged the concept of split receipting for a long time (see for example *Woolner v Canada*, [1997] T.C.J. No. 1395). I presume this is raised to convince me that the common law concept of gift is murky. Reliance on *Woolner* does not justify looking to Québec law, but goes more to the Appellants' view of the correctness of the *Maréchaux*, *Kossow* and *R v Berg*, 2014 FCA 25 decisions. Again, it certainly does not sway me that there is any confusion with respect to the common law meaning of "gift".

[20] The Appellants' counsel maintains there is an argument based on the principles of horizontal and vertical equity, citing the Supreme Court of Canada in *Symes v Canada*, [1993] 4 SCR 695, that:

> Taking up this last point, I note that in a tax system which is at least partly geared toward the preservation of vertical and horizontal equities ("[h]orizontal equity merely requires that 'equals' be treated equally, with the term 'equals' referring to equality of ability to pay" and "vertical equity merely requires that the incidence of the tax burden should be more heavily borne by the rich than the poor": V. Krishna, "Perspectives on Tax Policy" in Essays on Canadian Taxation …

[21] This concept, however, does not derive from bijuralism. It is inappropriately conflating principles to suggest horizontal equity means that Gatineau residents subject to Québec civil law are to be treated equally to Ottawa residents subject to common law, provided their ability to pay is equal. This argument simply sidesteps the bijural issue. It presupposes the circumstances are similar when they are not: they are governed by two different legal systems. That is the point.

[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.

[23] The federal law was amended effective December 20, 2002 by adding subsections 248(3) through (32) to the *Income Tax Act*, allowing a tax credit for certain "gifts" that would be invalid under private law solely because the taxpayer has received a benefit in return for making the gift. This reflects more clearly the Québec view of remunerative gift. It legislatively dissociates the common law meaning of gift from the federal legislation. In applying section 8.1 of the *Interpretation Act* under this new regime, reliance can now be placed on the term "unless otherwise provided by law," as it is now provided by law. Prior to December 22, 2002 it was not, confirming the futility of the Appellants' argument. As the Respondent pointed out, if Parliament wants to ensure uniformity of result, it can derogate from provincial private law, which is just what it has done with the 2002 amendments. It is not for this Court to impose uniformity, not even when based on taxpayers' not unreasonable expectations, where the laws of interpretation clearly mandate otherwise.

[24] The Appellants' final point is that these amendments clarify the existing law rather than amend the law. Again there is no argument. Even in the Department of Finance's own Explanatory Notes introducing the amendments it is recognized that a sale at less than fair market value could be treated in part as a gift in civil law, but not in common law. The amendments have clearly changed the law by identifying situations in which the charitable donation tax credit will be available, notwithstanding benefits received by the donor taxpayer.

[25] The Appellants suggest that the sheer volume of precedents and materials presented at the Motion can only lead to a conclusion there must be some argument, that the position is not hopeless. It is substance not quantity at issue. I indicated at the outset I found, at first blush, the Respondent's position unassailable. I remain of that view. I see no need to go into elaborate or extensive reasons, providing fuel to this aspect of the Appellant's argument.

[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 Appellants' 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.

[27] The Motion is granted and the pertinent portions of the amended Notices of Appeal are struck. I award costs in a lump sum of $2,500, inclusive of disbursements, payable within 45 days of the final disposition of this Motion. By final disposition of this Motion, I mean the ultimate determination whether by this Court, the Federal Court of Appeal or the Supreme Court of Canada. The Respondent shall file the Reply within 30, 60 or 90 days as set out in Schedule A attached to these Reasons, again, the time period to run from the final disposition of this Motion, as just defined.

[28] Before leaving this matter, I wish to address concerns I expressed to counsel at a conference call held on January 30, 2015. I am well aware that another group of appeals is proceeding with a similar issue and has also raised what I have referred to as the bijural issue. The Crown has not brought a similar motion in these other appeals due to the fresh step provisions, nor did the Appellants in the other appeals intervene in this Motion. That is regrettable, but it is not a reason for me not to give a decision on this Motion, well and fully argued before me. My role is as judge not as litigation strategist.

Signed at Ottawa, Canada, this 11th day of February 2015.

"Campbell J. Miller"

C. Miller J.

SCHEDULE A

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CITATION:	2015 TCC 35
COURT FILE NO.:	2014-1244(IT)G
STYLE OF CAUSE:	GLEN FRENCH AND ALL THOSE LISTED IN ATTACHED SCHEDULE "A" AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 27, 2014
REASONS FOR ORDER BY:	The Honourable Justice Campbell J. Miller
DATE OF ORDER:	February 11, 2015

APPEARANCES:

Counsel for the Appellant:	A. Christina Tari, Leonard Puterman
Counsel for the Respondent:	John Grant, Arnold H. Bornstein, Lindsay Beelen

COUNSEL OF RECORD:

For the Appellant:

Name:	A. Christina Tari, Leonard Puterman
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For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada