

## A Civil Law of Gift for All Canadians

by Blake Bromley and Kathryn Chan

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The charitable sector in Canada depends upon gifts from millions of Canadians to fund its important activities which benefit all Canadians. Parliament has recognized the significance of the charitable sector and the need to encourage Canadians to fund it through donations by providing valuable tax incentives to taxpayers who donate. These incentives are welcome and charities are completely dependant upon them for funding.

The problem is that the provisions governing charitable donations in the *Income Tax Act* (“ITA”) seem misconceived in that the most fundamental legal concept upon which they are founded is outside the legislative jurisdiction of the federal Government. No tax benefits are available to donors, whether they are individuals or corporations, unless there has been a “gift” of property to the registered charity. If property has transferred by contract or some other mechanism then no tax benefits are allowed. The issue as to whether property passes by way of gift is an issue which the *Constitution Act*, 1867 made a matter of exclusively provincial jurisdiction<sup>1</sup>. While the ITA can define “gift” for its own purposes, that definition does not change provincial law.

Respecting this constitutional principal is important if the federal government is to respect the *Quebec Act* of 1774<sup>2</sup> which confirmed that in the wake of the British conquest, French civil law would continue to govern private law matters in the province of Quebec. Given the importance of these statutes to the very fabric of Canada’s legal and social culture, it is troubling that the Canada Revenue Agency (“CRA”) effectively denies any recognition of the civil law concept of gift in spite of court decisions which say that civil law applies. There is not a *single Interpretation Bulletin, Information Circular, CRA Pamphlet, Information Guide or Registered Charity Newsletter* which explains the civil law of gift and says that it applies with regard to gifts in Quebec. While that is convenient to the authors of this submission who are common lawyers from Vancouver, it seems inconsistent with the rule of law to allow CRA to continue to ignore the *Constitution Act*. CRA avoids applying Quebec law to the definition of gift, despite the well-established principle that Parliament is deemed to know all of the common *and* civil law implicated by its statutory provisions.<sup>3</sup>

Decisions such as *R. v. Lagueux & Frères Inc.*<sup>4</sup> unequivocally affirm the primary role of the civil law in interpreting the ITA in Quebec. This principal was restated in a common law province when the

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<sup>1</sup> *The Constitution Act, 1867, Section 92 (13) - “property and civil rights in the Province”*

<sup>2</sup> *“An Act for making more effectual provision for the government of the province of Quebec in North America” (1774) 14 Geo. III, c. 83, s. 5.*

<sup>3</sup> *Brouillette v. Canada (1999) 99 D.T.C. 5728 (F.C.A.) at p. 5731*

<sup>4</sup> *R. v. Lagueux & Frères Inc. [1974] 2 F.C. 97 at 103 (F.C.T.D.)*

Supreme Court of British Columbia considered the “eligible amount of the gift” and the “amount of the advantage” (provisions introduced as draft amendments to subsection 248(1) of the *ITA* on December 20, 2002), and held:

The legal relationship between the parties, needless to say, arises out of their intentions and dealings as between themselves. The Income Tax Act does not define that relationship except for its own purposes. Its characterization of these transactions as a net exchange of advantages does not mean that is what they were as between the parties.<sup>5</sup>

Canada is a bijural country. CRA is the department principally responsible for administering how the word “gift” as used in the *ITA* is to be interpreted. When one reads the exclusively common law administrative policies set out in *IT110R3 Gifts and Official Donation Receipts*<sup>6</sup>, it seems that CRA is operating on the basis of an exclusively common law unijuralism in a bijural country. This policy seems particularly unjustifiable since the enactment in 2001 of the *Federal Law-Civil Law Harmonization Act, No. 1*<sup>7</sup> and s. 8.1 of the *Interpretation Act*<sup>8</sup>, which states:

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.

The legal concepts upon which the law of gift is based are very different in the common law and civil law. This submission does not provide the time or space necessary to provide an erudite comparative analysis of the legal concepts. Consequently, we are appending a paper written by Blake Bromley and Kathryn Chan “A Civil Law of Gift for All Canadians” specifically in support of this submission. This paper analyzes not only Canadian jurisprudence but also the Australian cases on the law of gift which the Canadian courts have adopted. It seeks not only to criticize CRA’s preference for *ad hoc* administrative policies over the rule of law but also to provide the starting point for a workable solution that will benefit donors and charities in Canada. We suggest a uniquely Canadian solution which respects that Canada is a bijural country.

The fundamental conceptual shift is to move the determination of tax incentives away from an undefined concept of “gift”, which must be determined according to provincial law, to a new definition of “charitable gift”, which is within the legislative jurisdiction of the federal Parliament. The definition we propose focuses not on the legal mechanism for passing property but on the consequences of the gift once property has passed. In doing so, it builds upon the insight of the Australian courts about the crucial role of *benefaction* in charitable gifts: “that ‘benefaction’ focuses upon the effect of the transaction upon the recipient whereas ‘gift’ focuses more on the nature of the transaction itself”.<sup>9</sup>

<sup>5</sup> *Richert v. Stewards' Charitable Foundation*, 2005 BCSC 211 at para. 17

<sup>6</sup> *IT 110R3 Dated: June 20, 1997*

<sup>7</sup> S.C. 2001, c. 4

<sup>8</sup> R.S.C. 1985, c. I-21

<sup>9</sup> *Leary v. Federal Commissioner of Taxation* (1980), 32 A.L.R. 221 at 241 per Deane J.

In our opinion, the concept of benefaction was not a component of the classic common law of gift in cases that did not involve tax benefits. However, the genius of the common law is that it evolves to adjust to different circumstances. The courts recognized the public policy imperative to enforce the principal that with regard to tax-assisted gifts a charity must obtain a benefit commensurate with the cost to the national treasury. Consequently, in his decision in *Leary* Chief Justice Bowen wrote:

In para 78(1)(a) the notion of benefaction appears to be an essential idea, particularly having regard to the nature of funds, authorities and institutions listed in the 45 sub-paragraphs. The purpose of para 78(1)(a) seems clear enough. It is to offer an allowable deduction for income tax purposes in order to encourage benefactions to the bodies specified, which clearly are considered to be bodies which it is in the public interest to assist.<sup>10</sup>

It is our proposal that benefaction should be the principle which forms the basis for determining the quantum of a “charitable gift”. It is our belief that benefaction is consistent with the civil law concept of a “remunerative gift”. Our proposal paper suggests many ways in which both donors and charities would be enriched by defining “charitable gift” in a way that respects bijurality and incorporates the best from both legal traditions. In our opinion, there is more to be adopted from civil law concepts than from the common law. The appended paper provides much more detail as to which civil law concepts should be incorporated into the *ITA* definition of “charitable gift”.

Some will argue that this proposal is too radical a solution. Presumably, they would have CRA continue to ignore the inconsistencies with the common law that are inherent in the proposed legislative amendments dealing with “advantage” and “eligible amount of the gift”. Continuing in denial on this issue will become more problematic if in the upcoming appeal of *Richert* the Court of Appeal of British Columbia reverses the decision of the trial judge and says property did not pass because the advantage was “consideration”. This may cause the court to order the charity to repay the donor, Alternately, if the court finds that this consideration results in a contract, the donor would no longer be able to claim the charitable donation tax credit because the payment is no longer a gift at common law. Chief Justice Bowen said as much in *Leary*:

Where the payment is made in pursuance of a contract but is not gratuitous, the person making the payment may fail to obtain the deduction under para 78(1)(a) in any event.”<sup>11</sup>

The Canadian law of gift in tax cases relies heavily on the Australian decisions in *McPhail*<sup>12</sup> and *Leary* which both dealt with the deductibility of gifts under section 78 (1) of the *Income Tax Assessment Act of Australia*. Just as in the comparable provisions in section 110.1 and 118.1 in the *ITA*, Australia required the transfer to be a “gift” prior to providing the donor with a tax benefit. Just as in Canada, there is no definition of gift in the tax statute in Australia and the definition is taken from the common law. However, unlike Canada, Australia is concerned that a fundraising event such as the one set out in the *Richert* fact pattern does not result in gifts at common law. In 2004, the *Economics Legislation Committee* of the Senate of Australia introduced amending tax legislation because Australia interpreted

<sup>10</sup> *Leary* at 224. In Canada, substitute “paragraphs 110.1 and 118.1” for “para 78(1)(a)” and “qualified donees” for “bodies specified”.

<sup>11</sup> *Leary* at pp. 222-3

<sup>12</sup> *Commissioner of Taxation of the Commonwealth v. McPhail* (1967-68) 41 AJLR 346

the common law of gift to exclude transfers to charity that are partially made for consideration and partly made as a gift. The result is that effective July 1, 2004 the *Taxation Laws Amendment (2004 Measures No. 1) Act 2004* in Australia changed the tax provision relied on in *McPhail* and *Leary* to replace the word “gift” with the word “contribution”. The stated reason was because “as the law currently stands, a contribution ceases to be regarded as a ‘gift’ if anything of material value is received in return for the contribution”<sup>13</sup>. One of the two distinct types of contributions eligible under this legislation is “a contribution made in return for attendance at a fundraising event”.

If Canada is going to rely on Australian jurisprudence to define the concept of gift, it must seriously consider the fact that Australia’s Parliament has subsequently removed the word “gift” from the statutory provisions at issue in those cases because of the Australian Tax Office’s view that contributions in the context of fundraising events do not meet the legal test of “gift”. We believe that Canada should not simply substitute the word “contribution” for “gift” but should develop an *ITA* concept of “charitable gift” which incorporates both common law and civil law principles and is a uniquely Canadian bijural solution to a serious problem faced by donors in the charitable sector today.

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<sup>13</sup> Chapter 2, s. 2.2