***Construction Pépin & Fortin Inc.* c. *Fernand Breton (1975) Inc.*, 2014 QCCS 6405**

Much ink has been spilled in Quebec case law regarding the interpretation of the notion of « property serving public utility », at times leading to conflicting results. This recent ruling by the Quebec Superior Court, which is solely based on the interpretation of this notion, attempts to iron out the conflicting interpretations of the past and put forth a coherent conclusion.

FACTUAL BACKGROUND

Construction Pépin & Fortin Inc. ("CPF") was hired by the Bois-Francs School Board ("School Board") to complete the construction of a new vocational center ("Project") which would be connected to an existing high school.

CPF then retained Fernand Breton (1975) Inc. ("Breton") as a subcontractor for the plumbing and ventilation work to be completed for the Project.

Within the allotted legal time frame, Breton published a lien on the property in the amount of $268 500.65, plus interest, fees and disbursements.

Consequently, the School Board retained this same amount from the price of its contract with CPF.

THE PLAINTIFFS' POSITION

CPF and the School Board (collectively referred to as the Plaintiffs) argue that the lien is invalid because the property in question belongs to the School Board[i], a legal person established in the public interest that is appropriated to public utility, therefore rendering it exempt from seizure and alienability.

Moreover, the Plaintiffs submit that the Project serves public interest for the following reasons:

- It concerns a property belonging to the School Board, which is governed by the *Education Act;*
- The services offered by the School Board benefit citizens collectively[ii];
- The right to free education is guaranteed by the *Charter of Rights and Freedoms;*
- The Project is essential to the operations of the public administration;
- Students from both the vocational center and the high school attend the school;
- Students from different regions of Quebec attend the vocational center;
- Occasionally, it is used on weekends for other activities.

BRETON'S POSITION

Breton maintains that its lien is valid. It argues that there is an important distinction to be made between the fundamental right to education and the notion of public utility.

THE JUDGMENT

Prior to delving into the analysis carried out by the Court, it is important to examine the source of the debate. In the case at bar, the debate stems solely from section 916 of the *Civil Code of Quebec*, which states the following:

> *"**916.** Property is acquired by contract, succession, occupation, prescription, accession or any other mode provided by law.*
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> *No one may appropriate property of the State for himself by occupation, prescription or accession except property the State has acquired by succession, vacancy or confiscation, so long as it has not been mingled with its other property. Nor may anyone acquire for himself property of legal persons established in the public interest that is appropriated to public utility."*
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> (Emphasis added by the Tribunal)

Furthermore, in this particular instance, it is also pertinent to cite the previous version of this section, under the Civil Code of Lower Canada, which read as follows:

> *"**2220.** Roads, streets, wharfs, landing-places, squares, markets and other places of a like nature, possessed for the general use of the public, cannot be acquired by prescription, so long as their destination has not been changed otherwise than by tolerating the encroachment."*[iii]
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> (Emphasis added by the Tribunal)

Historically, the notion of "public utility", which is not defined by either version of the Civil Code, was interpreted by the Courts in a restrictive manner. The case law pertaining to this section, which was developed under the *Civil Code of Lower Canada*, required the Courts to consider the essential character of the property as a criterion in their analysis.

However, in 1999[iv], under the Honorable Justice Mailhot, J.C.A., the Quebec Court of Appeal ruled that a larger interpretation of the definition of "property that is appropriated to public utility" would be more just and would allow a better application of the legislator's intent. In the ruling of *Kalad'Art Inc.*, the Court states:

> *« [19] Quelle était l'intention du législateur lorsqu'il a édicté l'article 916 C.c.Q.? Les termes "affectés à l'utilité publique" contenus au libellé de l'article 916 C.c.Q. peuvent être interprétés de plusieurs façons.*

[20] Tout d'abord, il est possible de considérer que l'article 916 C.c.Q. reprend l'interprétation donnée à la version française de l'article 2220 C.c.B.-C. Est-ce que le critère du caractère essentiel du bien doit être repris dans l'interprétation de l'article 916 C.c.Q.? Un auteur soutient que ce critère est restrictif et que son emploi dénaturerait l'intention du législateur. L'opinion contraire a aussi été formulée, à savoir que le caractère essentiel du bien devrait être le critère-pivot de l'interprétation future de l'article 916 C.c.Q.. Il est d'autre part possible de considérer l'article 916 C.c.Q., à la lumière de la portée donnée à l'article 2220 C.c.B.-C. à partir de la version anglaise de cet article.

[21] Enfin, l'article 916 C.c.Q. peut être analysé comme reprenant les interprétations basées sur les deux versions de l'article 2220 C.c.B.-C. Ainsi, un bien sera considéré comme étant affecté à l'utilité publique s'il est destiné à l'usage public et général, s'il est essentiel au fonctionnement de la municipalité ou s'il est gratuitement à la disposition du public en général. L'utilité publique peut, selon certains auteurs, être soit directe ou indirecte. L'utilité publique est indirecte si le bien meuble ou immeuble n'est pas utilisé par la population mais est possédé par la municipalité dans l'intérêt général et pour une fin municipale.

[22] Il serait aussi possible, dans le cadre de l'interprétation des termes "affectés à l'utilité publique" utiliés (sic) à l'article 916 C.c.Q., d'employer la théorie de l'accessoire, calquant ainsi en quelque sorte, la solution adoptée en droit français où la notion de domaine public est perçue largement. Un auteur québécois préconise l'application de la théorie de l'accessoire en matière d'interprétation et de définition des biens "affectés à l'utilisé (sic) publique. »

In 2004, the same sentiment was reiterated by the Quebec Court of Appeal[v]. In this decision, the trial judge had adopted the notion of "public utility" as it was interpreted in Kalad'Art; consequently the trial decision was upheld by the Appellant Court. Furthermore, the Honorable Justice Rothman, J.C.A. wrote: "I believe a liberal interpretation was fully justified."

In the case at bar, the Superior Court also analyses *Commission scolaire de la Côte-du-Sud* v. *Construction Cloutier et Fils Inc.*[vi] and *Commission scolaire Saint-Jérôme* v. *Alco-Teck électrique Inc.*[vii] In these two cases, the justices looked to the French dictionary *Le Grand Robert* to find the meaning of the expression "public utility". Essentially, "public utility" is defined as an advantage to either be provided to the public or to a public service upon declaration of a public authority.

Furthermore, the Court takes into account the *Education Act.* As provided in section 272 of the *Act,* a school board can hypothecate or demolish its property, upon receiving

permission to do so from the Minister of Education. In addition, nothing in the law provides that the school board's property is exempt from seizure.

For these reasons, the Superior Court determined that a school is not considered to be "property serving public utility" because while it is a public institution, it is only used by the public in a limited way. Essentially, the school itself is an accessory; it is the vehicle we use to carry out our duty to provide the public with education.

APPEAL

The Plaintiffs have since filed an appeal before the Quebec Court of Appeal. No decision has been rendered yet.

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[i] *Education Act*, CQLR c I-13.3, Article 113
[ii] *Education Act*, CQLR c I-13.3, Article 207.1
[iii] Due to the discrepancies between the French and English versions of the section, the French version reads as follows: *« **2220.** Les Chemins, rues, quais, débarcadères, places, marches, et autres lieux de même nature, possédés pour l'usage général et public, ne peuvent s'acquérir par prescription, tant que la destination n'en a pas été changée autrement que par l'empiétement souffert. »*
[iv] *Bâtiments Kalad'Art Inc.* c. *Construction D.R.M. Inc.* (2000) R.J.Q. 72 (C.A.).
[v] *Maçonnerie Demers Inc.* c. *Agence métropolitaine de transport*, [2004] R.D.I. 288 (C.A.).
[vi] AZ-98021657, (C.S.).
[vii] AZ-97023097 (C.S.).