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Résumé de l'article

Selon l'article 213 C.c.Q., les immeubles, les entreprises et les biens importants à caractère familial appartenant à un mineur ne peuvent être vendus qu'en cas de nécessité et avec une autorisation préalable du tribunal ou du conseil de tutelle. Quel est alors le statut juridique d'un contrat de vente d'un bien appartenant à un mineur faite par son tuteur en violation de cet article ? Cette question a été à l'origine d'un vigoureux débat, en France ainsi qu'au Québec, au cours du 19e siècle. Mignault le trancha en 1896 en déclarant un tel contrat entaché de nullité relative. Aujourd'hui, plus d'une centaine d'années plus tard, la position du législateur à l'égard de la protection des mineurs a beaucoup évolué, ce qui nécessite une réévaluation de la solution apportée par Mignault. Cet article soutient que la sanction de nullité relative va à l'encontre du libellé et des objectifs de l'article 213 C.c.Q. et qu'une approche alternative doit être adoptée.

Reopening the Langelier — Mignault Debate on Unauthorized Transactions Involving a Minor's Property

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ABSTRACT

Under section 213 C.C.Q., immovables, enterprises, and important pieces of family property belonging to a minor can only be sold in cases of necessity, and only then with prior authorization from the court or the tutorship council. What is the legal status, therefore, of a contract of sale of a minor's property made by his tutor in violation of this provision? This question inspired a vigorous debate in both France and Quebec throughout the nineteenth century. Mignault "settled" this debate in 1896 by declaring such a contract to be tainted with relative nullity. Now, over a century later, the law's attitude toward the protection of minors has changed

RÉSUMÉ

Selon l'article 213 C.c.Q., les immeubles, les entreprises et les biens importants à caractère familial appartenant à un mineur ne peuvent être vendus qu'en cas de nécessité et avec une autorisation préalable du tribunal ou du conseil de tutelle. Quel est alors le statut juridique d'un contrat de vente d'un bien appartenant à un mineur faite par son tuteur en violation de cet article? Cette question a été à l'origine d'un vigoureux débat, en France ainsi qu'au Québec, au cours du 19e siècle. Mignault le trancha en 1896 en déclarant un tel contrat entaché de nullité relative. Aujourd'hui, plus d'une centaine d'années plus tard, la position du législateur

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significantly, which makes it appropriate to revisit Mignault's thesis. This paper argues that the sanction of relative nullity is inconsistent with both the text and underlying policy objectives of the section, and that an alternative approach must be adopted.

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Key-words: *section 213 C.C.Q., nullity, minor, child, tutor, statutory, interpretation, public order*

Mots-Clés: *article 213 C.c.Q., nullité, mineur, enfant, tuteur, interprétation des lois, ordre public*

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INTRODUCTION

1. Pierre-Basile Mignault (1854–1945) remains one of Quebec's most prominent and influential jurists. His treatise on Québec Civil Law,[1] published over a century ago, is still regularly cited by the Supreme Court of Canada today.[2] However, Mignault lived and wrote in a time when Quebec was a largely patriarchal and agrarian society, where the father, as head of the family, made all decisions with regard to the administration of the family's property.[3]

2. Although the law at the time included some measures to protect minors, the administration of these measures lay primarily with the family and not with the State. One such measure, dating back to Roman times and currently codified by section 213(1) of the *Civil Code of Québec* (C.C.Q.), prohibited the sale of a minor's immovables without prior judicial authorization. However, the law has never provided strong enforcement measures to ensure compliance with this rule.

3. Mignault deduced that the unauthorized sale of a minor's immovables was tainted with relative nullity, a sanction that imposes upon the protected party (in this case, the minor) the burden of seeking redress.[4] That position, however, has become untenable today, in light of the public's interest in protecting the rights of minors in Quebec and in light of amendments made to the tutorship regime enacted during the 1994 re-codification. The sanction of absolute nullity, in contrast, would better protect minors and reflect the stated will of the Legislature. However, we argue that to best protect the interests of minors in Quebec, Quebec Civil Law should

1. Pierre-Basile MIGNAULT, *Le Droit civil canadien*, t. 2, Montréal, C. Théoret, 1896.

2. See *e.g. D.B.S.* v. *S.R.G.* ; *L.J.W.* v. *T.A.R.* ; *Henry* v. *Henry* ; *Hiemstra* v. *Hiemstra*, [2006] 2 S.C.R. 231, at para. 37.

3. See *e.g.* Jacques BOUCHER, "L'histoire de la condition juridique et sociale de la femme au Canada français", *in* Jacques BOUCHER, André MOREL, eds., *Le droit dans la vie familiale : livre du centenaire du Code civil*, t. 1, Montréal, Les Presses de l'Université de Montréal, 1970, at 155. See also Murray GREENWOOD, "Lower Canada (Quebec) : Transformation of Civil Law, from Higher Morality to Autonomous Will, 1774–1866", (1996) 23 *Man. L.J.* 132, at 174–181 ; Brian YOUNG, *The Politics of Codification : The Lower Canadian Civil Code of 1866*, Montréal, McGill Queen's University Press, 1994, at 141–158.

4. P.-B. MIGNAULT, *supra*, note 1, at 222–223.

forego the application of the nullity framework altogether in the context of unauthorized transactions by a tutor. The Legislature should consider re-drafting the strict language of section 213 C.C.Q. to allow for a broader consideration of the interests of the minor.

4. Part 1 of this paper will provide a brief introduction to the tutorship regime and will explore the development of the rule codified in section 213 C.C.Q. An account of the doctrinal debate between Mignault and his contemporary François Langelier (1838–1915) reveals that jurists have long disagreed on whether such abuses of power by tutors should entail absolute or relative nullity, and although Mignault's view won out in the doctrine, the jurisprudence has always been much more tentative. Part 2 will outline the reasons to reconsider Mignault's approach, with an emphasis on how the sanction of relative nullity has come to allow tutors to abuse their powers with impunity. Part 3 will explain why absolute nullity is a more appropriate sanction — at least while the child is still of minor age. Finally, Part 4 will discuss the advantages of an approach that is driven solely by the interests of the minor.

5. The purpose of this paper is to bring attention to the issue of the consequences of tutorial abuses of power. We observe that due to the near absence of jurisprudence on this issue, cases involving unauthorized transactions likely do not get taken to court or reported by the courts. Yet, almost every parent in Quebec acts as a tutor, as of right, to his or her child's property.[5] Although we presume that most tutors act in their charges' best interests when it comes to the management of their charges' patrimonies, we feel that in cases where tutors have failed to do so, the law should afford greater protection to minors by rethinking its approach to the resolution of unauthorized transactions.

6. This paper is not a comprehensive text on nullity or its historical origins in Quebec law.[6] Our focus is on positioning

5. See sections 192 and 197 C.C.Q. Note that although every parent acts as a tutor to his or her child's property, not every child has property that needs to be managed. Children may inherit property from family members, they may earn income from selected employment, or they may receive *inter vivos* gifts.

6. For a historical analysis on nullity, see Michelle CUMYN, *La validité du contrat suivant le droit strict ou l'équité : Étude historique et comparée des nullités*

section 213 C.C.Q. within the broader policy discussion on the protection of minors. Therefore, we accept for the purpose of our argument, the framework of nullity as outlined by the C.C.Q. That framework divides nullity into two categories : absolute and relative, based upon the nature of the protected interest.[7] The protection of individual interests falls under relative nullity and the protection of general interests falls under absolute nullity. A court will nullify a contract to protect a given interest, which has been compromised by a defect in the terms of the contract essential for the contract's formation.[8] Based upon this framework we invite the readers of this paper to consider whether the continuing acceptance of Mignault's position is justifiable under the modern framework of nullity.

1 OVERVIEW OF THE TUTORSHIP REGIME AND SECTION 213 C.C.Q.

7. In this part, we will provide a brief overview of the structure of the tutorship regime in Quebec. We will then discuss the role of the tutor as a simple administrator of the minor's assets and will describe the history and development of the rule codified by section 213 C.C.Q. This rule places additional restrictions on tutors' ability to alienate their charges' property. Tutors may alienate or hypothecate their charge's immovables, enterprises, or important pieces of family property (hereinafter "heritage property") only if the alienation is necessary and only if they obtain the proper authorization.[9]

1.1 THE CODAL FRAMEWORK

8. Tutorship is an institution established in the C.C.Q. that empowers a person, the "tutor", to manage the affairs of

contractuelles, Paris, L.G.D.J., 2002 ; see also Serge GAUDET, "Inexistence, nullité et annulabilité du contrat : essai de synthèse", (1995) 40 *McGill L.J.* 291.

7. Sections 1417–1421 C.C.Q.

8. Pierre-Gabriel JOBIN, Nathalie VÉZINA, eds., *Les obligations*, 6th ed., Cowansville, Éditions Yvon Blais, 2005, at para. 393.

9. For the purposes of readability, this paper discusses only the alienation of a minor's property (particularly by way of sale or gift). However, the same arguments can apply to hypothecation as well.

another who suffers from a lack of capacity. The regime applies generally to unemancipated minors — the focus of this paper — and with some modifications, to adults under protective supervision.[10] Tutorship entails two distinct responsibilities : the administration of the charge's patrimony and the exercise of his or her civil rights. Sections 185 and 187 C.C.Q. allow the division of these responsibilities among multiple tutors if appropriate.

9. Since parents typically serve as their children's tutors, tutorship of a minor is often perceived as an attribute of parental authority. However, section 192 C.C.Q. makes clear that tutorship is a separate and distinct institution;[11] a parent may thus be deprived of tutorship without necessarily being deprived of parental authority or the legal status of parent.[12]

10. The codal chapter on "Tutorship to Minors", which comprises sections 177 to 255 C.C.Q., outlines the powers and obligations of tutors and other key actors, including the tutorship council and the courts.[13] The tutorship regime also encompasses provisions on the capacity of minors (sections 155 to 166 C.C.Q.) and rules relating to the administration of the property of another (sections 1299 to 1370 C.C.Q.). The ensemble of these provisions constitutes a matter of public order, and therefore applies imperatively to all tutors.[14]

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10. Section 266 C.C.Q. Adults under protective supervision may be subject to *tutorship*, *curatorship*, or *advisorship* depending on the degree of incapacity. Section 258 C.C.Q. and following.

11. Édith DELEURY, Dominique GOUBAU, *Le droit des personnes physiques*, 3rd ed., Cowansville, Éditions Yvon Blais, 2002, at para. 519; Pierre DESROCHERS, "Papa, maman, où est mon argent? La protection des intérêts patrimoniaux du mineur", in SERVICE DE LA FORMATION PERMANENTE DU BARREAU DU QUÉBEC, 2005, ed., *Famille et protection*, Vol. 219, Cowansville, Éditions Yvon Blais, (DCL), at s. I-B.

12. *Droit de la famille—2118*, [1995] R.D.F. 39, EYB 1995-72300 (S.C.), at para. 3.

13. The tutorship council is a supervisory body charged with monitoring the administration of the minor's patrimony. According to both the C.C.Q., and Deleury and Goubau, the tutorship council can also grant authorization for certain transactions involving a minor's person or property and it can intervene on the minor's behalf by, for example, petitioning the court for the removal of the tutor. For a complete description of the composition of the tutorship council and further explanation as to their powers and obligations, see É. DELEURY, D. GOUBAU, *supra*, note 11, at paras. 604–629. See also sections 23, 87, 167–168, 175, 183–184, 196, 205, 209, 212–213, 215, 219–226, 231–234, 240, 242–243, 245–247, 250–251, 275–276, 288, 297, 436, 607, and 638 C.C.Q.

14. É. DELEURY, D. GOUBAU, *supra*, note 11, at para. 516.

1.2 ADMINISTRATION OF A MINOR'S ASSETS

11. Section 208 C.C.Q. explains that the tutor administers a minor's property as a "simple administrator"; consequently, the codal sections related to simple administration apply to tutorship insofar as they do not conflict with specific provisions in the tutorship regime. Simple administration is temporary and seeks primarily to preserve the beneficiary's property;[15] the tutor's primary responsibility is to preserve the minor's assets until the minor becomes old enough to manage them for him or herself. Full administrators, in contrast, are expected to manage assets in such a way as to meet specific growth objectives, and consequently have great discretion in selecting appropriate investments. Simple administrators can invest only in assets included in the list of "safe" investments under section 1304 C.C.Q. As such, they generally are prohibited from alienating or hypothecating property without authorization.[16]

12. Section 213 C.C.Q., however, includes a number of additional restrictions relating to the alienation and hypothecation of a minor's heritage property. The provision reads as follows :

> **213.** The tutor, before contracting a substantial loan in relation to the patrimony of the minor, offering property as security, alienating an important piece of family property, an immovable or an enterprise, or demanding the definitive partition of immovables held by the minor in undivided co-ownership, shall obtain the authorization of the tutorship council or, if the property or security is worth more than $25,000, of the court, which seeks the advice of the tutorship council.
>
> The tutorship council or the court does not allow the loan to be contracted, or property to be alienated by onerous title or offered as security, except where that is necessary to ensure the education and maintenance of the minor, to pay his debts or to maintain the property in good order or safeguard its value. The authorization then indicates the amount and terms

15. Madeleine CANTIN CUMYN, *Administration du bien d'autrui*, Cowansville, Éditions Yvon Blais, 2000, at paras. 193–210.

16. Section 1305 C.C.Q.

and conditions of the loan, the property that may be alienated or offered as security, and sets forth the conditions under which it may be done.

13. Section 213 C.C.Q. imposes two distinct requirements: one upon tutors and another upon the court or tutorship council. The first clause imposes an *authorization requirement* upon tutors. The tutor must not sell a heritage asset without proper authorization, which comes from the court or the tutorship council depending on the value of the heritage asset. The second clause imposes upon the court and the tutorship council *prohibitions on alienation*; the tutorship council or a court may grant authorization only if the alienation is necessary for the minor's education or maintenance, to pay down debts, or to safeguard the value of the asset. Otherwise, the asset must remain in the beneficiary's patrimony even if it is otherwise to the minor's advantage that it be sold.[17]

14. In *R. (R.), ès qualités, Re*, a father petitioned the court for permission to hypothecate his son's house to make additional investments for him. The father argued that the restrictions imposed by section 213(2) C.C.Q. unduly limited the financial returns on his son's assets. Justice Dufresne held that even though the father's intentions were beyond reproach and designed for his son's benefit, the clause was restrictive and bound the tutorship council and the courts as much as the tutor. Justice Dufresne's position on the rigidity of the necessity rules has been adopted (albeit with some reservations[18]) by subsequent case law[19] and approved by the doctrine as well.[20]

15. If the provisions of section 213 C.C.Q. are violated, sections 162 and 163 C.C.Q. provide that the minor personally may annul the contract (notwithstanding his or her general legal incapacity). Section 166 C.C.Q. further empowers the minor to confirm acts done without proper authorization, although only after attaining full age. Modern Quebec doctrine

17. *R. (R.), ès qualités, Re*, EYB 2005-87247, AZ-50301354 (S.C.); see also *A. et B.*, EYB 2007-114633 (S.C.).

18. See Michel BEAUCHAMP, "Commentaire sur la décision R. (R.), ès qualités, Re — Le tuteur et l'aliénation d'un bien appartenant à une personne inapte", *Repères*, August 2005, *Droit civil en ligne* (DCL), EYB 2005-381.

19. *D. (D.), Re*, EYB 2006-102505 (S.C.), at paras. 18–21.

20. P. DESROCHERS, *supra*, note 11, at 4.

has tended to interpret these provisions as implying that an unauthorized act by a tutor is *prima facie* valid and can only be annulled by the minor him or herself.[21] This was Mignault's position. However, this interpretation is not consistent with the history of the authorization requirement or with its underlying legislative objectives.

1.3 THE HISTORY OF SECTION 213 C.C.Q.

16. Both the authorization requirement and the prohibitions on alienation originate from Roman law. The authorization requirement finds its origins in the *Oratorio Severi* of 195 C.E. and the *Constitution of Constantine* of 351.[22] It was further refined in pre-Revolutionary France by the *Ordonnance of Orléans* of 1560.[23] In Quebec, the rule was eventually codified by section 297 of the *Civil Code of Lower Canada* (C.C.L.C.), which reproduced an analogous provision in section 457 of the *Code Napoléon*.[24]

17. The prohibitions on alienation also find their origins in the *Oratorio Severi*. The *Oratorio Severi* explicitly ordered prætors to forbid the sale of rural and suburban properties left by parents to their children.[25] The *Code Napoléon* eventually established that a minor's property can be sold only in cases of "absolute necessity or evident advantage", a standard reproduced word-for-word in section 298(1) C.C.L.C. as well as in the civil codes of Belgium[26] and Louisiana.[27] As evidenced by the Quebec Court of King's Bench Appellate Division decision in *Béliveau* c. *Chèvrefils*, this standard was, at least in the nineteenth century, interpreted very narrowly so

21. See *e.g.* P.-G. JOBIN and N. VÉZINA, *supra*, note 8, at para. 304 ; *Commentaires sur le Code civil du Québec (DCQ)*, June 2005, *Droit civil en ligne* (DCL) EYB 2005-853.

22. Philippe MEIER, *Le consentement des autorités de tutelle aux actes du mineur*, Fribourg, Éditions Universitaires Fribourg, 1994, at 5–6 ; *Bank of Montreal* v. *Simson*, (1861), 11 L.C.R. 377 (H.L.), at 379–380.

23. *Bank of Montreal* v. *Simson*, *id.*

24. Note that the C.C.L.C. and the *Code Napoléon* differed on who provided the authorization. Under the C.C.L.C., it came from the judge or prothonotary ; under the *Code Napoléon*, it came from the family council.

25. P. MEIER, *supra*, note 2, at 6.

26. *Code Napoléon* (Belgium 1804), section 457.

27. *Louisiana Civil Code* (1947), section 339.

as to make the sale of a minor's assets very difficult.[28] As Chief Justice Dorion remarked, "La loi veille d'un œil jaloux sur la conservation des biens, et surtout des immeubles, des mineurs. Il faut de très fortes raisons pour en autoriser l'aliénation [...]".[29]

18. Throughout the nineteenth century, jurists on both sides of the Atlantic faced the challenge of incorporating the authorization requirement and the prohibitions on alienation into the emerging framework on absolute and relative nullity. In Quebec, François Langelier argued that tutors simply lacked the legal capacity to make contracts that exceeded the scope of their authority. Consequently, a contract made by a tutor in violation of the authorization requirement was, essentially, not a contract at all and thus an inexistent act. As a result, the act was void *ab initio*.[30] Langelier thus affirmed the position adopted by the House of Lords in the seminal 1861 case of *Bank of Montreal* v. *Simson*, where a plaintiff sought to annul the sale executed by her tutor of shares left to her in her father's will. In that case, the Law Lords held that the contract of sale was not just voidable, but actually void.[31] In 1885, the Quebec Superior Court came to a similar conclusion in *Pichette* v. *O'Hagan*.[32]

19. Mignault, in contrast, deduced that the ability of the minor to annul the unauthorized sale of his or her heritage property implied *a contrario* that he or she could choose *not* to do so. Even though the tutor failed to get proper authorization, Mignault felt that the contract did not lack its essential elements, and instead was merely defective. Consequently, he concluded that the contract of sale would be valid on its face, but subject to a form of nullity invokable only by the minor — a limitation that suggests relative nullity.[33] Mignault

28. [1876] 2 Q.L.R. 191, 16 R.L. 164.

29. *Id.*, at 199.

30. François LANGELIER, *Cours de droit civil de la Province de Québec*, t. 1, Montréal, Wilson & Lafleur, 1905, at 481. Although Langelier does not say so, his logic would imply that the "right" of a minor to seek the nullity of the unauthorized contract constituted nothing more than an exceptional derogation from the incapacity of a minor.

31. *Bank of Montreal* v. *Simson*, *supra*, note 22, at 377.

32. (1885) M.L.R., 2 C.S. 384, at 385.

33. P.-B. MIGNAULT, *supra*, note 1, at 223.

believed this conclusion consistent with the principle that relative nullity aims to protect individual interests from exploitation, which is how he understood the objectives of the tutorship regime. As he explained, "[S]i le tuteur gère mal, vend sans autorisation des biens de son pupille, c'est le mineur seul et non la société qui est exposé à en souffrir."[34]

2 REASONS TO RECONSIDER MIGNAULT'S POSITION

20. The debate between Mignault and Langelier demonstrated that for a time the issue of unauthorized transactions involving a minor's property was contested. As the jurisprudence developed and as public policy changed, the grounds upon which Mignault relied to advance his argument began to erode. Furthermore, with the textual changes to section 213 C.C.Q. made during the 1994 re-codification, the prohibitions on alienation became even more restrictive. These changes indicate that the Legislature sought to ensure that a minor's heritage property remained in his or her patrimony unless its alienation or hypothecation was absolutely necessary.

2.1 RETICENCE BY THE JURISPRUDENCE

21. Mignault's logic eventually proved persuasive among Quebec legal scholars, who today concur that violations of the authorization requirement entail relative nullity.[35] Quebec judges, however, have proven much more reticent to adopt Mignault's interpretation. While they purport to accept Mignault's thesis that "relative nullity" remains the correct sanction for unauthorized transactions by tutors, they ultimately tend to decide actual cases on other grounds. In *Dépelteau* c. *Dame Bérard*, for example, the Court of Appeal held that a sale of a minor's house without authorization was "defective", but "rectified and ratified afterwards by the authorization of the family council homologated by this court."[36] This holding effectively treated the authorization requirement as a *condition*, the fulfillment of which concluded the contract. Justice

34. *Id.*, at 222.
35. P.-G. JOBIN, N. VÉZINA, *supra*, note 21.
36. (1922) 34 B.R. 515 (Qc. Crt. K. B., App. Div.), at 518.

Dorion, speaking in dissent, was even more explicit in characterizing compliance with certain provisions of the tutorship regime — such as the procurement of an independent appraisal — as "conditions" of the sale.[37] It bears note that treating the lack of judicial authorization as a correctable defect rather than a source of nullity resembles the approach taken in Germany and Switzerland.[38] This shows that the framework of nullity is not universally applied to unauthorized transactions involving a minor's property.

22. The perplexing case of *Aubé* c. *Forget* reveals even more clearly the discomfort of the judiciary with Mignault's thesis.[39] Although that case involved the unauthorized sale of a piece of land of an adult under curatorship, the reasoning and the analysis of the impugned provision[40] applied to minors under tutorship as well. Six years after the sale, the purchaser of the land, realizing that the precarity of his title prevented the resale of the property, sought to have the original contract resolved. Justice Lafleur quoted Mignault with approval and held that the contract was tainted with "relative" nullity. However, he went on to declare the contract null and void anyway on the grounds that the "modalités [...] relatives à la vente des biens des mineurs et d'autres incapables sont de stricte observation et le défaut de s'y conformer en justifie l'annulation" — a form of reasoning consistent with absolute nullity.[41]

2.2 Nature of the Interest

23. Relative nullity exists when the grounds of nullity are "necessary for the protection of an individual interest."[42] As discussed above, Mignault concluded that the tutorship regime aims to protect *individual minors*, and violations therefore affect the minor alone and not society at large.

37. *Id.*, at 519, No. 1.
38. P. Meier, *supra*, note 22, at 267–273.
39. *Aubé* c. *Forget*, [1967] C.S. 412, AZ-67021089 (S.C.).
40. Section 1341 C.P. (1965).
41. *Supra*, note 39, at 416.
42. Section 1419 C.C.Q.

However, the role and interest of the public in protecting minors from exploitation has radically changed since 1896.

24. The enshrinement of the rights of children to protection, security, and attention in the Quebec *Charter of Human Rights and Freedoms*,[43] a document of quasi-constitutional significance, attests that the protection of minors is now a matter of public, rather than purely private, concern.[44] Canada is also a signatory to several international treaties committing itself to safeguard the rights of minors.[45] As Justice L'Heureux-Dubé affirmed in *Baker* v. *Canada (Minister of Citizenship and Immigration)*: "Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society."[46] These political and social developments make clear that the exploitation of minors constitutes a matter of compelling public concern; it is not a private matter between the minor and his or her exploiter.

25. Under the purposive principle of statutory interpretation, courts should interpret laws in ways that furthers, rather than undermines, the underlying intent of the Legislature.[47] This principle finds a particularly strong expression in section 41 of the *Interpretation Act* :

> **41.** Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit.
>
> Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the

43. R.S.Q., c. C-12, s. 39.

44. The C.C.Q. re-affirms these rights. See section 32 C.C.Q.

45. See *e.g. Convention on the Rights of the Child*, Sept. 2, 1990, 1577 U.N.T.S. 3 ; see also *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 1 April 1997, 32 I.L.M. 1134, 1135, 1139 ; see also *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 14 September 2005, Doc. A/54/RES/263.

46. *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 67.

47. For a summary of the purposive approach to statutory interpretation, see Pierre-André CÔTÉ, *The Interpretation of Legislation in Canada*, 3rd ed., Toronto, Carswell, 2000, at 408–411 ; Ruth SULLIVAN, *Statutory Interpretation*, Toronto, Irwin Law, 2007, at 194–208.

carrying out of its provisions, according to their true intent, meaning and spirit.[48]

26. Section 213 C.C.Q. should, therefore, be interpreted in a manner that allows for the attainment of its objectives. However, the sanction of relative nullity creates situations of particular absurdity when dealing with infants, who obviously lack the ability to recognize tutorial abuses, much less seek remedies before the court. Scholars both in Quebec[49] and in Europe[50] have lamented at how the sanction of relative nullity allows tutors to flout the protections codified in section 213 C.C.Q. with impunity. Since relative nullity can in general only be invoked by the protected party,[51] only the minor can seek to annul an unlawful sale of his or her property by his or her tutors. For most minors, this renders the nullity completely ineffective, since very few minors have the monetary and emotional wherewithal to sue their tutors. Since the predominant rule which governs the operation of the tutorship regime is the primacy of the interests of the minor,[52] to ensure that section 213 C.C.Q. achieves this objective, a different sanction is necessary.

2.3 Revisions to the Wording of the C.C.Q.

27. During the re-codification of 1994, the Legislature made the prohibitions on alienation considerably more restrictive than they had been in Mignault's day. Under the former Code,

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48. *An Act Respecting the Implementation of the Reform of the Civil Code*, S.Q. 1992, c. 57, s. 602 ; *Interpretation Act*, R.S.Q., c. I-16, s. 41.

49. Michel Beauchamp, "Commentaire sur la décision Kypiranou c. Kypiranou — La responsabilité des tuteurs dans la gestion des biens d'un mineur", *Repères*, April 2004, *Droit civil en ligne* (DCL), EYB 2004-221, at 2–3.

50. Charles-Édouard de Frésart, "Tutelle et administration légale au quotidien", in Jehanne Sosson, ed., *Tutelle et administration légale*, Bruxelles, Larcier, 2005, 193, at 218.

51. Section 1420 C.C.Q. Note that the section also allows the counterparty to invoke the nullity if the counterparty is in good faith and has suffered a prejudice. This is a relatively new provision, and it remains to be seen how it will be applied. See generally Ministère de la Justice du Québec, *Commentaires du ministre de la Justice : Le Code civil du Québec*, t. 1, Québec, Les Publications du Québec, 1993, at 862 ; Jean Pineau and Serge Gaudet, *Théorie des obligations*, 4th ed., Montréal, Thémis, 2001, at 195 ; J.-G. Jobin, N. Vézina, *supra*, note 8, at para. 409.

52. *Supra*, note 43. See also sections 32–33 C.C.Q.

section 298 C.C.L.C. allowed tutors to alienate immovable property in cases of either "absolute necessity or evident advantage". In section 213 C.C.Q., however, the Quebec Legislature removed the term "evident advantage" and left only four specific situations of necessity.[53] This suggests that the Legislature intended to have a more rigorous regime than had previously existed.

28. The intention of the Quebec Legislature becomes even more evident when contrasted with other civilian jurisdictions, which generally scaled back, rather than bolstered, the prohibitions on alienation. In France, the legislature removed all pre-emptive restrictions on alienability in 1965, and Louisiana followed suit in 1966. Belgium made the same change in 2001 although its civil code retailed an exception for "souvenirs et autres objets de caractère personnel," which can only be sold in cases of "nécessité absolue."[54]

29. Mignault relied heavily on the wording of accompanying provisions in the C.C.L.C. to explain that the basis for the nullity is relative.[55] We suggest, however, that the analogous provisions in the C.C.Q. today are capable of supporting either relative or absolute nullity. Mignault argued that the right of a minor to seek the nullity of an unauthorized sale, established today in section 162 C.C.Q., implied *a contrario* that the contract was *prima facie* valid and subject to tacit confirmation. The specific provision reads as follows :

> **162.** An act performed by the tutor without the authorization of the court although the nature of the act requires it may be annulled on the application of the minor, without any requirement to prove that he has suffered damage.

30. This section, however, is located not in the chapter on the tutorship regime, but in the chapter on the capacity of persons. Read in context, the purpose of section 162 C.C.Q. is to create a special exception to the rule that a minor has no legal capacity. The section does not purport to confer validity

53. The situations are : (i) to ensure the education and maintenance of the minor, (ii) to pay his debts, or (iii) to maintain the property in good order or (iv) safeguard its value.

54. *Code civil belge*, section 410, par. 2, al. 4.

55. P.-B. MIGNAULT, *supra*, note 1, at 223.

on otherwise invalid contracts, and nowhere does it suggest that *only* a minor can invoke the nullity of a contract made by his or her tutor without proper authorization. The Minister's commentaries on this section confirm that it seeks to ensure that a minor receives the full protection of the tutorship regime, not to limit remedies available in cases of misconduct.[56] Section 162 C.C.Q. ensures that a minor has the proper capacity and standing to bring an action, even if the action claims absolute nullity.

31. Similarly, section 166 C.C.Q. does not establish that the ground for nullity is necessarily relative. The confirmation rule under section 166 C.C.Q. states :

> **166.** On attaining full age, a person may confirm an act he performed alone during minority for which he required to be represented. After accounts of tutorship are rendered, he may also confirm an act performed by his tutor without observance of all the formalities.

32. The section provides that a minor may confirm an unauthorized contract upon attaining full age, indicating that the contract may be relatively null. However, we can read the provision to mean that a minor may *not* confirm a contract while still under tutelage, and may do so *only* upon achieving full age. Under this interpretation of section 166 C.C.Q., since the unauthorized transaction cannot be confirmed while the minor remains under tutelage, the basis of nullity could be absolute.[57]

33. It is conceivable that once a minor attains full age, and can vindicate his or her own civil rights, the arguments in favour of relative nullity become more compelling. The tutor no longer manages the minor's (now major's) patrimony. In turn, as a fully-capacitated person, the minor can decide for him of herself whether or not to keep heritage property. However, while the minor remains under tutorship, absolute nullity provides a more appropriate sanction for contracts made

56. MINISTÈRE DE LA JUSTICE DU QUÉBEC, vol. 1, *supra*, note 51, at 116.

57. It may seem strange that the basis of nullity could in theory change; however, nothing in the C.C.Q. prevents this possibility. See discussion at para. 46, *infra*.

by tutors in violation of section 213 C.C.Q. for the policy reasons that we will describe in the next section.

3 ABSOLUTE NULLITY AS AN ALTERNATIVE SANCTION

34. Since section 213 C.C.Q. does not provide the specific form of nullity (relative or absolute), the courts may determine which form nullity taints an unauthorized transaction made by a tutor.[58] So far, we have explained that the text of section 213 C.C.Q. and its supporting provisions does not indicate determinatively which sanction applies. Furthermore, the ineffectiveness of the sanction also weakens the claim that relative nullity is the appropriate sanction. Michelle Cumyn explains that absolute nullity serves as a deterrent to parties planning to engage in unlawful transactions.[59] We can justify this sanction on two grounds. As we will discuss below, one of the purposes of the provision is to keep assets within the family, and therefore, section 213 C.C.Q. has a purpose beyond the protection of individual interests. In addition, the sanction of absolute nullity may be invoked by interested parties or the court of its motion, meaning that the minor need not sue his or her tutors personally in order to obtain redress.

3.1 THE PUBLIC ORDER NATURE OF THE PROVISION

35. The C.C.Q. constitutes a broad compendium of laws that regulate private relationships. Some of its rules constitute matters of "public order", binding upon all. Other provisions are "suppletive" and can be modified by mutual consent. The doctrine[60] and the jurisprudence[61] on tutorship explain that the tutorship regime constitutes a matter of public order,

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58. Courts will presume that the basis for nullity is relative (section 1421 C.C.Q), however, that presumption is rebuttable by, for example, ordinary modes of statutory interpretation. See MINISTÈRE DE LA JUSTICE DU QUÉBEC, *supra*, note 51, at 863 ; see also P.-G. JOBIN, N. VÉZINA, *supra*, note 8, at para. 398.

59. Michelle CUMYN, "Les sanctions des lois d'ordre public touchant à la justice contractuelle : leurs finalités, leur efficacité", (2007) 41 *R.J.T.* 1, at 37.

60. É. DELEURY, D. GOUBAU, *supra*, note 11, at para. 516.

61. See *e.g. Droit de la famille—3444*, [2000] R.J.Q. 2533 (C.A.), at 2538.

established for the protection of minors, and is not subject to revision by private agreement. As Mignault himself wrote :

> Le législateur a organisé la tutelle uniquement pour protéger le mineur. Il est sans doute d'ordre public que le mineur ainsi que les autres incapables, ne soient pas abandonnés à la merci de ceux qui voudraient exploiter leur inexpérience. Dans ce sens, il est vrai de dire que la tutelle est d'ordre public.[62]

36. We concur with the doctrine and the jurisprudence on this point. The proper functioning of this structure requires that all parties perform their duties properly and conscientiously. Since the tutorship regime aims to protect the interests of minors, this is a serious reason why its provisions constitute matters of public order. It does not make sense to characterize tutorship as a suppletive regime. First, the charge lacks legal capacity, and therefore cannot waive, forgive, or exempt his or her tutors from their obligations. Second, tutorship serves a protective function. The institution is designed to ensure that tutors act in accordance with certain minimum standards of care. If they do not, the tutors may be removed.[63]

37. The sanction for violating a rule of public order depends on its category. Rules of political-moral public order give rise to absolute nullity when violated. Political-moral public order provisions aim to protect fundamental social institutions such as the State, the human person, and the family.[64] In contrast, rules of social-economic public order can give rise either to absolute or relative nullity, depending on whether the rule is "directive" or "protective" in nature, respectively.[65] Social-economic public order provisions relate to the production and distribution of goods. They are characterized by detailed and precise regulation,[66] and "seek to prevent or mitigate the effects of social or economic imbalances in certain types of contractual activity."[67]

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62. P.-G. MIGNAULT, *supra*, note 1, at 222.
63. Section 251 C.C.Q.
64. J.-G. JOBIN, N. VÉZINA, *supra*, note 8, at para. 144.
65. *Ibid.*
66. *Id.*, note 8, at para. 145.
67. *Isidore Garon ltée* v. *Tremblay* ; *Fillion et Frères (1976) inc.* v. *Syndicat national des employés de garage du Québec inc.*, [2006] 1 S.C.R. 27, at para. 154.

38. While the tutorship regime as a whole is often described as a matter of protective public order,[68] section 213 C.C.Q. is more accurately understood as a political-moral public order provision, because the section aims primarily to protect the family as a social institution, not the economic interests of individual members of Quebec society. If section 213 C.C.Q. aimed simply to protect minors from economic exploitation then it would not require any prohibitions on alienation. A tutor would be able to sell a minor's heritage property whenever the tutor receives an attractive offer, as in France or Louisiana. However, section 213 C.C.Q. prohibits the sale of a minor's heritage property except in four specific situations of necessity. The law, therefore, recognizes that heritage property has a value beyond what can be measured with money; it carries a *pretium affectionis* that gives it moral as well as economic importance.[69] The section has a similar purpose to section 553(2) of the *Code of Civil Procedure* (C.C.P.), which exempts from seizure "family papers and portraits, medals and other decorations."

39. Alternatively, another way to consider unauthorized transactions of a minor's heritage property to be tainted with absolute nullity is if we consider such property to be outside of commerce — *hors commerce*. Section 2876 C.C.Q. provides that certain things can become *hors commerce*, and thus not transferable or susceptible of appropriation.[70] Transactions that purport to do so are tainted with absolute nullity for lack of an object.[71] While heritage property is not *hors commerce* by virtue of its nature,[72] we suggest that the authorization requirement and the prohibitions on alienation render it *hors commerce* by destination.[73] In this light, a minor's assets

68. See *e.g.* P. DESROCHERS, *supra*, note 11, at s. II-A.

69. *Bank of Montreal* v. *Simson*, *supra*, note 22, at paras. 381–382.

70. *Les Bâtiments Kalad'Art Inc.* c. *Construction D.R.M. Inc.*, [2000] R.J.Q. 72 (S.C.), at paras. 28–29.

71. *Prévost* c. *Fabrique de la Paroisse de l'Ange-Gardien*, EYB 1987-62821 (C.A.) (DCL), at para. 53.

72. Objects *hors commerce* by their nature, such as air, water, and human organs, are always barred from commercialisation, subject to extremely limited exceptions. See *e.g.* the prohibition under section 25 C.C.Q. against alienating body parts.

73. *Corporation municipale de Maricourt* c. *Corporation municipale de Ste-Christine de Bagot*, EYB 1994-57760 (C.A.) (DCL), at para. 19.

share a similar legal status to government buildings or consecrated Church property[74]; like those assets, heritage property is *hors commerce* and therefore not to be sold.

3.2 Increased Supervision of the Administration of the Minor's Patrimony

40. Under section 1418 C.C.Q. any interested party, including the court itself, can invoke the absolute nullity of a contract. Consequently, the sanction of absolute nullity provides far more opportunities for abuses of tutorial power to come before the courts in a timely manner. A sanction of relative nullity, by contrast, requires that the minor take some form of action for him or herself, which can prove particularly difficult if the minor is a young child. In the years it may take for a child to grow up and learn about the status of his or her patrimony, the heritage property may become irretrievable. The minor's ancestral home may be demolished or renovated, his business may be liquidated, or her trophies melted for scrap. If the acquirer of the minor's property makes improvements to it, the minor may have to reimburse these expenses.[75] If property is transferred further down the chain of title, it may be hard for a minor to get the property back when the minor turns eighteen, because the theory of *apparence* protects good faith purchasers for value.[76]

41. The institution of the tutor *ad hoc* offers a possible alternative to imposing a sanction of absolute nullity on unauthorized contracts made by tutors. Section 205 C.C.Q. allows for the appointment of a tutor *ad hoc* when the minor has a matter to "discuss judicially" with his or her tutor. Consequently, instead of invoking the absolute nullity of an unauthorized contract, an interested party can ask for the appointment of a tutor *ad hoc*, who can then invoke the relative nullity of the contract. This approach significantly adds to the time, cost, and complexity of the procedure; it turns a one step process into a four step process, since the appointment of a tutor *ad hoc* requires convocation of the tutorship

74. Section 2217(1) C.C.L.C.
75. Section 954 C.C.Q. and following.
76. M. Cantin Cumyn, *supra*, note 15, at paras. 845–350.

council, the adherence to the formalities under the C.C.P. and finally, the approval of the court.[77] Furthermore, the tutor *ad hoc* may even decide not to pursue the nullification of the impugned transaction.

42. If, in contrast, the unauthorized sale of a minor's heritage property is tainted with absolute nullity, any interested party can petition the court for redress. This provides better protection for the minor and thus ensures the fulfilment of the intention of the Legislature. Simply because absolute nullity confers standing to a broader class of applicants, a person who is not connected with the transaction or the parties will not have standing to affirm the nullity. The invocation of absolute nullity must be made by a person who has a "present and actual interest" in the matter at hand.[78] We suggest that the interested party presumably would have to be closely related to the minor or a guardian of the minor's interests, such as the Public Curator a or a member of the tutorship council. Second, the applicant would have to have knowledge of the unauthorized transaction in order to bring the application. Finally, the applicant will have to demonstrate a proper motive to ensure that the application is made in *bonam partem*.[79]

43. While section 213 C.C.Q. applies expressly to minors, section 287 C.C.Q. explains that "[t]he rules pertaining to the exercise of the civil rights of a minor apply, adapted as required, to a person of full age under tutorship." The selection of the protective custody regime for an incapacitated major will depend on the degree of incapacity.[80] Therefore, tutorship is appropriate where the incapacity is temporary, because the purpose of the tutorship regime is to conserve assets until the charge once again becomes capacitated. Although the policy justifications for ensuring adequate protection for the rights of children do not apply, absolute nullity is still an appropriate sanction in the adult context. As in the case of minors, absolute nullity allows for more interested parties to supervise the administration and intervene when necessary. Furthermore,

77. Section 235 C.C.Q., section 876.2 C.C.P.

78. Section 1418 C.C.Q.

79. Denis FERLAND, Benoît ÉMERY, *Précis de procédure civile du Québec*, 4th ed., Cowansville, Éditions Yvon Blais, 2003, vol. 1, at 81.

80. Section 259 C.C.Q.

since the incapacitated major ought to be able to determine what to do with his or her heritage property once capacity is restored, the courts should ensure the conservation of that property within the major's patrimony.

4 Beyond Nullity — Considering the Interests of the Minor

44. In contrast with the common law, where judges develop the law incrementally as they encounter different situations, the civilian tradition aspires to organize legal concepts in a coherent, generalized framework. In their quest for simplicity and comprehensiveness, however, civilian jurists sometimes define legal concepts and categories in ways that do not adequately reflect the complexities of a particular situation. The debate over the appropriate sanction for abuses of tutorial power illustrates the inadequacy of the established categories.

45. Absolute nullity, while more consistent with the wording and objectives of section 213 C.C.Q. also has its disadvantages. First, consider a situation where an acquirer (or a subsequent acquirer) of a minor's heritage property purports to invoke the "nullity" for reasons completely unrelated to the welfare of the minor. While a judge may simply elect not to resolve the contract notwithstanding the defect (section 1416 C.C.Q. provides that a contract tainted by nullity "may" be annulled, not that it must be), such a decision would seem to run counter to the purpose of "absolute nullity", which aims to protect the interests of society at large.

46. Second, by imposing a strict sanction of absolute nullity, the courts do not allow tutors to justify their actions as being in the best interests of the minor. Any interested person can challenge the tutor's decision and seek to annul the transaction, on the basis that the unauthorized transaction violates the rigid rules of section 213 C.C.Q. By allowing outsiders to the tutor-charge relationship to criticize the decision-making ability and the authority of the tutor in a public forum, it weakens the authority of the office of tutor, potentially damaging the tutor-charge relationship as well.

47. Furthermore, the rigid dichotomy of absolute versus relative nullity seems to inhibit the idea that the form of nullity can

change over time. Once tutorship ends and a minor becomes fully capacitated, the major policy and textual justifications for absolute nullity disappear and relative nullity becomes the more reasonable sanction. Section 166 C.C.Q., which empowers a minor to confirm an unauthorized contract "on attaining full age", would seem to support a changing form of nullity: absolute while the tutorship persists and relative afterwards. However, this outcome seems inconsistent with the principle that nullity flows from a defect in the contract's formation, not from present circumstances that can change over time.

48. While the difficulties involving absolute nullity can probably be overcome, it may be worthwhile to explore alternative approaches to breaches of section 213 C.C.Q. that do not involve nullity at all. For example, as in Germany and Switzerland, compliance with section 213 C.C.Q. can be construed as an implied condition of any sale of a minor's heritage property. Alternatively, the court can invoke its *parens patriæ* jurisdiction to review any improper sale of a minor's property. The court could annul the sale if it deems the sale to be contrary to the interests of the minor. This resembles the approach taken by Louisiana[81] and Canadian common law courts.[82] Although at least one author has suggested that the courts should take a purely "interests of the minor" based approach,[83] the precision of the text of section 213 C.C.Q. will make the adoption of that approach more difficult for the courts.

49. We believe that the Legislature should revise the rigid language of section 213 C.C.Q. to recognize that in some situations the hypothecation or alienation of a minor's heritage property may actually be in the minor's best interests. As Michel Beauchamp explains, the interests of the minor in *R. (R.), ès qualités, Re* would have been better served by the hypothecation of the immovable to increase the funds available for the father to invest.[84] Where the immovable, for example, does not have heritage value, or a *pretium affectionis*, the public policy purpose for the conservation of the immovable within the patrimony

81. Leonard OPPENHEIM, "The Basic Elements of Tutorship in Louisiana", (1970) 44 *Tul. L. Rev.* 452, at 495.

82. See *e.g. Singleton (Re)*, [2004] N.S.J. No. 498 (S.C.).

83. See M. BEAUCHAMP, *supra*, note 18.

84. *Ibid.*

disappears. The immovable becomes an investment like other (movable) property in the minor's patrimony.

50. In our view, the list of heritage property as well as the list of conditions of necessity ought to be considered as criteria for the evaluation of whether the court or the tutorship council should authorize the proposed transaction. If the provision did not include these criteria, and was modeled on the current rule in France or Louisiana, then the court may risk placing the minor's pecuniary interests ahead of the minor's non-pecuniary ones. We believe that because tutors are simple administrators with a duty to conserve the minor's assets, the tutors ought to be discouraged from using the heritage property transferred to the minor for investment.

CONCLUSION

51. At first glance it would appear that the unauthorized sale of a minor's heritage property should entail relative nullity. This view, established by Mignault back in 1896, is clearly inadequate and effectively renders section 213 C.C.Q. inoperative. We suggest that relative nullity is not the appropriate sanction for tutorial abuses, and that Mignault's position on this issue is out-of-date.

52. Although we prefer the sanction of absolute nullity, given the larger scope for standing and the recognition of the public interest nature of this problem, we recognize that even this solution will not always benefit the minor. Therefore, we hope that the courts, and ultimately the Legislature, will assess the feasibility of possible alternatives to nullity, and adopt an approach that best serves the needs of the minors of Quebec.

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