# Commercial Lending Law

## A JURISDICTION-BY-JURISDICTION GUIDE TO U.S. AND CANADIAN LAW SECOND EDITION

VOLUME 1

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# Canada: Quebec Commercial Lending Law

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# Canada: Quebec Commercial Lending Law

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## I. Introduction[1]

The Province of Quebec is a civil law jurisdiction where most principles of law applicable to private legal relationships, including those applicable to loan agreements, security documents and to various other nominate contracts, are codified in the Civil Code of Quebec.[2] Case law serves to interpret the intentions of lawmakers. Due to this distinctive feature of Quebec law, there exist some noticeable differences between the laws of commercial lending applicable in Quebec and those applicable in the rest of Canada and the United States that are common law jurisdictions.

Like the other chapters in this book, this chapter assumes that the reader has a working knowledge of private financing transactions. Since what follows is meant to be a simple overview of Quebec law as it applies to commercial lending and taking security in the Province of Quebec, local Quebec counsel's advice should be sought in connection with your transaction.

## II. Basic Legal Structure

### A. Constitution and Statutory law

The Constitution Act, 1867,[3] provides the matters that may be regulated and legislated in Canada at the provincial[4] and the federal[5] levels. Though matters such as banking and insolvency fall under federal jurisdiction, property and civil rights are provincial matters. As such, the Quebec legislature enacted the CCQ in accordance with the power given to it by the Constitution.

[1]The authors would like to thank their colleagues Marco P. Rodrigues, Jean Bernard Ricard, and Eve Tessier for their invaluable contribution regarding the research and drafting of this chapter.

[2]CQLR c C-1991, hereinafter CCQ.

[3]30 & 31 Vict., c. 3, hereinafter Constitution.

[4]Article 92 Constitution.

[5]Article 91 Constitution.

## B. Administrative Law

Statutes and regulations are enacted by the Quebec legislature, but only for matters that fall within its jurisdiction. Also, the Quebec legislature enacted an Act Respecting Administrative Justice,[6] which created an administrative court—the Administrative Tribunal of Quebec—to deal with any decision made, in respect of a citizen, in the exercise of an administrative or adjudicative function.[7]

## C. Courts

There are two courts of first instance in Quebec. The Court of Quebec deals with matters where the amount in dispute is less than $85,000,[8] while the Superior Court has jurisdiction in matters where the amount is at least $85,000. For the Court of Quebec, there is also the Small Claims Division, which deals with claims up to $15,000 made by natural persons or legal persons that employ no more than five people. For cases before that division, parties may not be represented by counsel unless the complexity of the case demands it. It is important to note that the power to grant an injunction lies with the Superior Court.

The Court of Appeal is the intermediate appellate court in Quebec, and sits in the cities of Quebec and Montréal. It may hear appeals from final judgments of the Superior Court and the Court of Quebec where the amount in dispute is $50,000 or more. Other final judgments of those courts may be appealed if granted leave to do so by a judge of the Court of Appeal.

The Supreme Court of Canada is the highest court in the country and has final jurisdiction in criminal, civil, and constitutional matters. Its decisions are always final and without appeal and appeals made before it must be authorized.

## D. Court Rules and Rules of Evidence

Quebec's court rules are provided in the Code of Civil Procedure[9] and the various rules of practice for the courts,[10] while the rules of evidence are provided in Book Seven of the CCQ.

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[6]CQLR c. J-3.

[7]Article 1 *An Act Respecting Administrative Justice.*

[8]Article 35 CQLR c. C-25.

[9]CQLR c. C-25, hereinafter CCP.

[10]Namely the Rules of the Court of Appeal in Civil Matters, CQLR c. C-25, r. 14, the rules of practice of the Superior Court of Quebec in Civil Matters, CQLR c. C-25, r. 11, and the Regulation of the Court of Quebec, CQLR c. C-25, r. 4. It may also be noted that specific rules apply in the legal districts of Montréal and Quebec, codified in the rules of Practice of the Superior Court of the District of Montréal in Civil Matters and Family Matters, CQLR c. C-25, r. 15 and the rules of Practice in Civil Matters of the Superior Court (District of Quebec), CQLR c. C-25, r. 12.

# III. Authority to Do Business and Taxation

## A. Required Qualification to Do Business; Trade Names

Foreign corporations that wish to carry on an activity in Quebec, which includes the operation of an enterprise, must file for extra-provincial registration at the Quebec Enterprise Register.[11] Under Quebec law, the operation of an enterprise includes providing a service, or producing, administering, or alienating property.[12] Legal persons that only possess a prior claim or a hypothec in Quebec are not required to be registered.[13] Extra-provincial registration applies to natural persons, legal persons, and partnerships not constituted in Quebec. Registration requires that the registrant who is not domiciled in Quebec or does not have an establishment in Quebec designate an attorney in Quebec[14] who will act as its representative for the purposes of the QLPE.[15] Extra-provincial registration must be completed within 60 days of the start of the activities[16].

Registrants in Quebec may not declare a name that does not comply with the Charter of the French language.[17] In addition, a registrant with a name in a language other than French must declare the French version of that name that will be used in Quebec in carrying on its business.[18]

For federal registration requirements, we refer the reader to the chapter on Ontario and other common law provinces in this book.

## B. Licensing Requirements and Regulation of Financing

As the regulation of lending activities and its associated licensing requirements fall under federal jurisdiction and are handled by the Bank Act[19] and its regulations, we refer the reader to the chapter on Ontario and other common law provinces in this book.

## C. Taxation

We refer the reader to the Ontario and other common law provinces chapter regarding this topic.

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[11]Article 21(5) of An Act Respecting the Legal Publicity of Enterprises, CQLR c. P-44.1, hereinafter QLPE.

[12]Article 1525 CCQ.

[13]Article 21(5) QLPE.

[14]Article 26 QLPE.

[15]Article 28 QLPE.

[16]Article 32 QLPE.

[17]Article 17(1) QLPE.

[18]Article 17 QLPE.

[19]S.C. 1991, c. 46.

# IV. Interest and Usury; Promissory Notes

## A. Compound Interest

The power to legislate interest in Canada falls under federal jurisdiction.[20] As such, we refer the reader to the Ontario and other common law provinces chapter regarding this topic.

## B. Usury

Under Quebec law, a court may pronounce the nullity of a contract for the loan of a sum of money, order the reduction of the obligations (including the obligation to pay interest) arising from such contract or revise the terms and conditions of the performance of the obligations to the extent that it finds that, having regard to the risk and to all the circumstances, one of the parties has suffered "lesion."[21] Lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the obligations of the parties.[22] To eliminate the risk of lesion, most lenders may require that the borrower seek independent legal advice before agreeing to the terms of the loan.

It is an offense under s. 347 of the Criminal Code[23] (Canada) to receive, or to agree to receive, a criminal rate of interest. A "criminal rate" is defined as an effective annual rate interest calculated in accordance with generally accepted actuarial principles that exceeds 60 percent per annum on the "credit advanced." The definition[24] of "interest" is broad enough to encompass "fees," including legal fees and commitment fees that are common in commercial agreements. This offense is punishable by indictment or summary conviction and carries a penalty of a jail term of a maximum of five years for an indictment, or a fine of up to $25,000 or imprisonment for up to six months or both for a summary conviction. It is not possible to plead, as a defense, that the borrower was willing to participate in the agreement.[25]

## C. Acceleration

As a general rule, a term is for the benefit of the debtor, unless it is apparent that it has been stipulated for the benefit of the creditor or of both parties.[26] Only the party that has the benefit of the term may renounce it.[27] In Quebec, for a loan bearing interest, the term is presumed to be for the benefit of both parties[28] and as such parties are free to provide for an acceleration clause in their

[20]Article 91 (19) Constitution.
[21]Article 2332 CCQ.
[22]Article 1406 CCQ.
[23]R.S.C., 1985, c. C-46.
[24]*Criminal Code*, R.S.C., 1985, c. C-46, s. 347 (2).
[25]R. v. McRobb (1984), 20 C.C.C. (3d) 493 (Ont. Co. Ct.).
[26]Article 1511 CCQ.
[27]*Ibid.*
[28]Option Consommateurs c. Banque de Montréal, 2012 QCCS 4106.

agreement. This acceleration may take place automatically upon the occurrence of an event of a default under the agreement,[29] or may require the creditor to actively demand acceleration,[30] depending on the wording of the clause itself. Also, a debtor loses the benefit of the term in the event that he becomes insolvent or declared bankrupt, or if he reduces the security given to the creditor without his consent.[31]

## D. Demand Notes

Any contractual obligation that is payable on demand is valid and enforceable under Quebec law. Though the contract itself will be regulated by the CCQ, the fact that it is payable on demand makes it subject to the provisions of the Bills of Exchange Act.[32] The only obligation of the creditor is to present the note for payment within a reasonable time of the endorsement.[33]

## E. Place of Payment

All payments have to be made to the creditor or to the person authorized to receive them.[34] If such payment is made to a third party, it is valid if the creditor ratifies it—and should the creditor not ratify it, it is only valid to the extent that it benefits the creditor.[35] All payments must be made at the place expressly or impliedly indicated by the parties, but should no place be indicated, then payment is made at the domicile of the debtor.[36] If a contract governed by Quebec law is silent as to where the payments have to be made, the courts may infer from the past conduct or intention of the parties that payments may be made in the province of Quebec.[37]

## F. Application of Payments

Under Quebec law, when the debtor owes several debts to a creditor, the debtor has the right to impute the payment to a specific debt.[38] This is tempered by the fact that the debtor may not impute payment on a debt that is not yet due without the consent of the creditor, unless the parties agreed that the payment made by the debtor was made by anticipation. The right to decide on which debt to

[29] *Gauthier c. Gauthier,* 2006 QCCQ 9942.

[30] *Jelinek-Harl c. Goulet,* 2003 CanLII 45160 (QC CQ).

[31] Article 1514 CCQ.

[32] R.S.C. 1985, c. B-4, article 22; [discussed in the Canada chapter]

[33] Article 180 Bills of Exchange Act, R.S.C., 1982, c. B-4. *See also* Fleury (Succession de) c. St-Pierre, 2002 CanLII 4459 (QC CS).

[34] Article 1557 CCQ.

[35] *Ibid.*

[36] Article 1566 CCQ. *See also* Fortier c. Roy, [1957] B.R. 664.

[37] *Almiria Caital Corp. c. Hygieia Holdings (Canada) Inc.,* J.E. 95-2049. *See also Surplec inc. c. Ainsworth inc.,* AZ-50081408.

[38] Article 1569 CCQ.

impute the payment belongs to the debtor and the creditor may only be granted this right if the debtor fails to indicate on which debt to impute the payment.[39] Pursuant to Article 1570 CCQ, in the case where a debtor owing debt that bears interest, the consent of the creditor is required if the debtor wishes to impute his payment to the capital in preference to the interest owed. In addition, any partial payment made by the debtor on the principal and interest is imputed first to the interest.[40] In this respect, the courts of Quebec have held that the parties to a contract of lending may decide on a different application of the debtor's payments, given that Article 1570 CCQ is not of public order.[41] Though the debtor normally has the benefit of the term of the contract,[42] a debtor party to a lending contract that bears interest may not make payments by anticipation without the consent of the creditor, as the benefit of the term for such a contract is to the benefit of both parties.[43]

## G. Prepayment

Debtors in Quebec may not, without first obtaining the consent of the lender, impute payment to a debt not yet due in preference to a debt that has become due, unless the parties have agreed in advance that payment may be made in anticipation.[44] As mentioned in Section C above, a term is for the benefit of the debtor unless it is apparent that it has been stipulated for the benefit of the creditor or both parties.[45] Given that for an interest-bearing loan the term is presumed to be for the benefit of both parties, the debtor may not reimburse in advance without the consent of the creditor.[46] As such, for lending agreements made in Quebec, it is good practice to provide whether prepayment is accepted or the conditions to be applied to such payment.

The Interest Act[47] (Canada) (discussed further in the Ontario and other common law provinces chapter) provides for an automatic right of prepayment[48] where principal or interest under a loan secured by hypothec on immovables[49] are payable for a period exceeding five years after the date of the loan.

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[39]*Dupuis c. Magog (Cité de)*, (C.S., 1980-01-22), J.E. 80-203.

[40]Article 1570(2) CCQ.

[41]*Banque Nationale du Canada c. Olivier*, (C.S., 2002-01-25), J.E. 2002-549, REJB 2002-29995; Constantineau c. Saulnier Millette, (C.S., 2001-04-17), SOQUIJ AZ-50187824.

[42]Article 1511 CCQ.

[43]*Locations Lutex Ltée c. Banque Royale du Canada*, (c.S. 1984-05-31). J.E. 84-733 and Turmal c. Compagnie Trust Nord-américain, (C.S. 1994-06-15), J.E. 94-1140.

[44]Article 1569 CCQ.

[45]Article 1511 CCQ.

[46]*Locations Lutex Ltée c. Banque royale du Canada*, J.E 84-733, appeal denied [1986] R.L. 42.

[47]R.S.C., 1985, c. I-15, s. 10.

[48]Corporations, joint-stock companies, partnerships, trusts settled for business or commercial purposes and unlimited liability corporations are excluded from such automatic prepayment rights.

[49]i.e., a mortgage loan.

# V. Types of Borrowers

Quebec law provides a number of legal forms for operating a business. The most frequent are corporations, the various forms of partnerships, and sole proprietorships.

## A. Corporations

In Quebec, there are three different acts applicable to legal entities. They are: (1) the Canada Business Corporations Act (CBCA);[50] (2) the Companies Act (QCA);[51] and (3) the Business Corporations Act (QBCQ).[52]

The CBCA applies nationally, and we refer the reader to the chapter on Canada in this book.

The QCA was directly inspired by English laws. First passed in 1864, it has often been amended, updating it to reflect the major trends in the North American corporate world. In 1980, the QCA was amended to add a Part 1A, which allowed a corporation to be created by articles of incorporation, rather than letters patent issued by the Lieutenant Governor in Council. This 1980 Quebec reform was the response to the federal reform of 1975, which had introduced to Canadian law the incorporation of legal entities by articles of incorporation, thereby following American practices.

In 2011, Quebec adopted the QBCA, then one of the most advanced laws in this field in North America.

Quebec lawmakers allowed the QCA to continue, but its application is generally limited to corporations created by a statute other than QCA and not-for-profit corporations, i.e., corporations without shares.

In Quebec, corporations are primarily governed by the laws that created them and the provisions of the CCQ.[53]

There is only one type of corporation directly created under the CCQ: the syndicate of co-owners of a condominium.[54] The syndicate of co-ownership is a legal entity despite the absence of capital shares.

Corporations created under Quebec law have all the appropriate powers[55] and may engage in any activity except those specifically reserved to the competence of the federal government (such as banking),[56] and their activities may be conducted in any jurisdiction outside Quebec where their existence and powers are recognized.[57]

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[50]An Act respecting Canadian business corporations R.S.C., 1985, c. C-44.

[51]Companies Act, CQLR c., C-38.

[52]Business Corporations Act, CQLR c. S-31.1.

[53]Article 300 CCQ.

[54]Article 1039 CCQ.

[55]Articles 301 and 303 CCQ.

[56]Article 91 Constitution.

[57]Article 1 of *An Act Respecting the Special Powers of Legal Persons*, CQLR c. P-16. *See also Bonanza Creek Gold Mining Co. Ltd.* v. *R.* (1916) 1 A.C. 566, 26 D.L.R. 273.

Quebec, like other Canadian jurisdictions, recognizes that legal entities constituted pursuant to foreign laws have the capacity to engage in activities in Quebec. The only constraints are related to their registration in Quebec under the QLPE.[58]

The main characteristics of a corporation incorporated pursuant to the QBCA are the following:

1. The corporation has its domicile at the place of its head office.[59] The concept of domicile is significant for financing because, in Quebec, the laws governing secured interests in intangible assets, such as receivables, are those applicable at the place of domicile of the grantor.[60] This concept of domicile associated with the head office is different from the concept of chief executive office or principal place of business used in other jurisdictions.
2. The corporation has a patrimony of its own,[61] distinct from that of its shareholders.[62] This patrimony is subject to division and appropriation. Accordingly, a corporation may dispose of its assets and charge them by way of hypothecs for the purpose of guaranteeing the performance of its obligations, whether direct or indirect.
3. The powers and the capacity of the corporation are unlimited within the limits imposed by the founders[63] at the time of its incorporation and the limits imposed by law in certain very specific situations. These include situations where the use of a legal entity is incompatible with the functions proposed, such as to serve as a juror in a criminal trial. There are some situations provided by law in which only an individual may act,[64] but except for such cases, the corporation may act and its powers are unlimited.
4. Constitution of a Quebec legal entity is simple and quick. The process must take the following elements into account:
    i. Conditions governing the name of the corporation, which may be a corporate name or registration number.[65] If a corporate name, such name may not be identical to or lead to confusion with another existing corporate name.[66] Moreover, the corporate name must be in French.[67] Since the name is a component of the patrimony of a corporation, the appropriate remedy may be sought

[58]Articles 21(5), 25 and 41 QLPE.

[59]Article 307 CCQ.

[60]Article 3105 CCQ.

[61]Article 302 and 309 CCQ.

[62]*Gélinas c. Normand*, (C.S., 2004-03-12), SOQUIJ AZ-50225293, J.E. 2004-860, REJB 2004-55182, [2004] Q.J. No. 2296 (Q.L.)

[63]Articles 313 and 334 CCQ.; Articles 5(9) and 113 QBCA.

[64]Article 179 CCQ. For example, tutorship is a personal office open only to a natural person.

[65]Article 305 CCQ; Articles 16 and 23 QBCA.

[66]Article 17(8) QLPE.; Articles 16(8) and 16(9) QBCA.

[67]Article 17 QLPE.; Article 16(1) QBCA.

against any entity that attempts to use the same name or a name that would lead to confusion.[68] To verify the availability of a corporate name, the competent authority, i.e., the Quebec Enterprise Registrar, makes verifications and issues a report on the availability of any proposed name.[69]

ii. A corporation has all powers except as restricted by its founders. Generally speaking, the powers of a corporation are not limited in its articles of incorporation, except in those specific cases where the law requires that its powers be limited[70] or when deemed appropriate to do so by the founders, who wish to ensure that the corporation is restricted to the practice of certain specific activities.

iii. The constitution of a corporation is initiated by one or more founders,[71] who may be individuals or legal entities.[72] The constitution of a corporation does not create liability for its founders.

iv. The articles of incorporation must indicate the number of directors. This number may be fixed or variable, within minimum and maximum limits.[73]

v. The articles may contain restrictions on the free circulation of shares.[74] Restrictions are required to avoid application of the general rules applicable to distribution of securities to the public.[75] In Quebec, issues of capital shares are governed by the Securities Act,[76] whose provisions include all the disclosure measures that must be applied when a corporation issues securities to the public.

To enable corporations to have ready access to funds by way of issuing shares, exceptions are provided to free share issues from the rules of disclosure intended to protect the public.

These exemptions are contained in Regulation 45-106 respecting prospectus and registration exemptions, issued pursuant to the Quebec Securities Act mentioned above. The restrictions that Quebec issuers must include in their articles of incorporation are: (1) restrictions on the transfer of shares; (2) a prohibition on making a public offering; (3) limitation of the number of shareholders to 50; and (4) issuing of shares to buyers in various categories of persons that are not public. Thus it is possible to issue shares to the founders, directors, controlling shareholders or persons related to them.[77]

[68]Articles 24, 25 and 461 QBCA.
[69]Article 8(3) QBCA
[70]Article 2, An Act respecting Quebec business investment companies, CQLR c. 5-29.1
[71]Article 3 QBCA.
[72]Article 4 QBCA.
[73]Article 5(8) QBCA.
[74]Article 5(7) QBCA.
[75]Article 2.4, Regulation 45-106 respecting prospectus and registration exemptions, CQLR c. v-1.1, r. 21.
[76]Securities Act, CQLR c. v-1.1.
[77]Article 2.4, Regulation 45-106 respecting prospectus and registration exemptions, CQLR c. v-1.1, r. 21.

vi. The documentation sent to the Enterprise Registrar must also provide the address of the head office and the names of the first director(s).[78]

vii. The articles must provide a description of the authorized share capital.[79] The capital must include shares that confer on their holders the right to vote, to receive dividends and, should the corporation be liquidated and dissolved, to share in the remainder of the corporation's assets.[80] These are the three basic rights of shareholders and they can be distributed among a number of categories of shares or united in the same category.[81]

Each shareholder has rights that are equal to those of all other shareholders, subject to the number of shares they hold. The only way to create inequalities between shareholders is to create different classes of shares.[82] Under the QBCA, it is possible to have several identical share classes with the only distinction being the designation of each class. This option of having several identical categories satisfies the needs of certain corporate reorganizations and avoids creating distinctions among several classes without any real meaning.

Although the QBCA does not use the terms common shares and preferred shares, it is generally admitted that the shares that confer on their holders the three basic rights are usually designated as common shares and that all the other classes of shares that, in fact, provide variations in three basic rights, are designated as preferred shares. The authorized share capital may provide several classes and each class may itself provide a series of shares.

Once constituted, the corporation involves three different groups of persons: directors, officers and shareholders.

The directors are elected by the shareholders for terms of one to three years.[83] Even if in practice, shareholders' agreements may govern how and by which shareholders the directors are chosen, Quebec law allows the election of directors by the cumulative voting method.[84] This procedure must be provided for in the articles and, technically, allows a minority shareholder the possibility of electing a representative on the Board of Directors. As a result, each shareholder has a number of votes equal to the number of voting shares

[78]Article 8 QBCA.
[79]Articles 5(3) to 5(6) QBCA.
[80]Article 47 QBCA.
[81]Article 48 QBCA.
[82]Article 49 QBCA.
[83]Article 110 QBCA.
[84]Article 111 QBCA.

owned multiplied by the number of directors to elect. It is then up to the shareholders to vote for one or more candidates in the proportions they wish.

The directors are the authorized agents of the corporation. Their duties are to manage the affairs of the corporation with diligence.[85] The sole interest of the corporation must be considered in their decision, and the directors may not commit their vote in advance.[86] The directors exercise a function that is personally theirs, and no delegation of such power can be made.[87] The decisions of the Board of Directors are made by a majority of the members present at a duly convened meeting where there is a quorum present.[88] The written resolutions, signed by all directors, are valid.[89] Since these resolutions are signed by all directors, the absence of dissidents justifies not holding a meeting of directors for discussing various points of view.

The QBCA provides for a number of situations that engage the personal liability of directors. These situations are mainly associated with the decisions by the directors authorizing the payment of money or other forms of the distribution of assets of the corporation in favor of the shareholders.[90] These situations generally occur with respect to the payment of dividends or the purchase or buyback of shares with the effect of diminishing the shareholders' capital. The law provides financing tests that prevent the directors from proceeding with transactions with the shareholders if the corporation cannot pay its liabilities and redeem the capital shares then outstanding.[91] These rules are intended to ensure preservation of the capital of the shareholders.

In addition to the situations provided for in the QBCA, there are many laws creating obligations for the directors whose violation engages their personal liability. In this regard, the most frequent are those related to obligations to pay the amounts owed by the corporation to fiscal authorities.[92] The same applies with respect to the environment; doing or failing to do certain actions that could incur harmful effects on the environment can engage the personal liability of the directors.

The QBCA provides a special form of defense for directors. It provides that a court may decide not to condemn a director if he has acted reasonably, honestly, and loyally and ought fairly to be excused.[93]

The officers are designated by the directors, who define the scope of the functions enabling them to implement the decisions of the directors.[94]

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[85]Article 119 QBCA.; Article 321, 2130 and 2138 CCQ.

[86]*Bergeron* c. *Ringuet*, [1958] B.R. 222, conf. par [1960] R.C.S. 672, 24 D.L.R. (2d) 449.

[87]Article 118 QBCA.; Articles 2140 and 2148 CCQ; *See also Leclerc* c. *Gaudreault*, J.E. 89-368 (C.S.), conf. J.E. 89-1598 (C.A.).

[88]Article 138 QBCA.

[89]Article 140 QBCA.

[90]Article 156 QBCA.

[91]Articles 95-97 QBCA.

[92]*Tax Administration Act*, R.S.Q., c. A-6.002, art. 24.0.1.

[93]Article 158 QBCA.

[94]Article 116 QBCA.

The final group of persons represents the shareholders, who may be individuals or legal entities. The shareholders may exercise their right to vote in their personal interest even if it is to the detriment of the corporation.[95]

It is possible to create a corporation and not issue shares for a period of 18 months after its constitution.[96] This possibility is intended to facilitate the creation of a corporate entity whose existence is limited in time, and it is often used for restructuring purposes.

The shareholders are not responsible for the debts of the corporation.[97] Their responsibility is limited to the contribution they promised to make at the time of the subscription to shares.[98] Shares may be issued in exchange for money, assets, or services.[99] It should be noted that the payment of the consideration may be made after the shares are issued.[100] It is not necessary, as it is for Canadian federal corporations, for the consideration for the issuance of shares to be paid up entirely when they are issued.[101]

The principle of limited liability of shareholders has been historically challenged in situations allowing the courts to lift the corporate veil.[102] The personal liability of shareholders may be engaged in cases of fraud or abuse of right or in situations contrary to public order.[103]

Contrary to Canadian federal law, which requires that at least 25 percent of the directors be Canadian residents,[104] the QBCA does not make any such requirements and the board of directors of a Quebec corporation may be composed entirely of people who are not Canadian residents.

As in a certain number of other jurisdictions, the QBCA recognizes a unanimous shareholders' agreement that enables all shareholders to withdraw some or all of the powers from the directors.[105]

Compared to other corporate legislation in Canada, the QBCA innovates by recognizing that a corporation may choose not to have a board of directors when all the powers have been withdrawn from the directors and entrusted to the shareholders.[106]

## B. Partnerships

Three types of partnerships exist in Quebec: general partnerships, limited partnerships, and undeclared partnerships.

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[95] *North-West Transportation c. Beatty*, (1884) 12 R.C.S. 598; (1887) 12 A.C. 589. *See also* Paul MARTEL, *La société par actions au Québec—Les aspects juridiques*, 2014, Éditions Wilson & Lafleur, Martel ltée, Montréal, par. 19-49.

[96] Article 163 QBCA.

[97] Article 224 QBCA.

[98] Article 315 CCQ.

[99] Article 54 QBCA.

[100] Article 53 QBCA.

[101] Article 25(3) CBCA.

[102] Article 317 CCQ.

[103] Article 317 CCQ.

[104] Article 105(3) CBCA.

[105] Article 213 QBCA.

[106] Article 217 QBCA.

There are no formal requirements for the creation of a partnership.[107] They may exist with or without a written contract.[108] An implicit agreement between the different partners may be sufficient.[109]

The essential elements required for a partnership to exist are: (1) a contribution from each partner, which may be in the form of money, goods, or services; (2) the sharing in the profits of the partnership;[110] (3) the intention of the partners to form a partnership (*affectio societatis*);[111] and finally, (4) the existence of an activity exercised by the partnership.[112]

Once created, a partnership is granted a number of attributes that enables it to operate its enterprise. Among the most important of these attributes are: (1) the recognition of a patrimony that is separate and distinct from the partners' patrimony,[113] (2) the capacity to contract obligations binding on itself or its assets; and (3) the capacity to bring an action or have one brought against it. It is because of these attributes that a partnership under Quebec law may borrow and grant a security interest in its assets for the purposes of guaranteeing its reimbursement.

Despite the attributes conferred on partnerships, Quebec law does not grant them a juridical personality. As a result, the partnership in Quebec is not a legal person.

As for the personal liability of the partners, they are jointly liable according to the applicable provisions of the CCQ, although in certain cases, the partners may be jointly and severally liable, thereby making each partner liable for all of the partnership's debts.[114]

## 1. General Partnership

General partnership is the most common form of partnership in Quebec. It must be known under a name that is common to the partners.[115]

Despite the fact that the partners may be jointly and severally liable for the debts of the partnership, the law provides a significant exception for general partnerships engaging in a professional activity governed by the Professional

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[107] *Labelle c. Bordeleau*, J.E. 92-961, EYB 1992-75373 (C.Q.).

[108] *9028-1544 Québec inc. c. Maynard*, [2007] J.Q. no. 3264, EYB 2007-118393 (C.S.).

[109] Article 2186 CCQ.

[110] Article 2201 and 2242 CCQ.

[111] *Bernier-Chabot* c. *Montminy*, 2009 QCCA 1300, EYB 2009-161120; REJB 2007-122533 (C.Q.); *See also Gauthier c. Guindon*, 2007 QCCS 6197, EYB 2007-128028 (appel rejeté sur demande, C.A., nº AZ-50505930, 16 juin 2008, EYB 2008-142019); *Lauzon (Thurso) Ressources forestières Inc. c. Electro mécanique Waters Inc.*, EYB 2007-119208 (C.A.); *Meloche c. Meloche-Wall*, [2007] J.Q. nº 5651, EYB 2007-120377 (C.A.).

[112] Article 1525 CCQ.

[113] *Ferme CGR enr.* s.e.n.c. (Syndic de), 2010 QCCA 719, EYB 2010-172527.; *See also Laval (Ville de) c. Polyclinique médicale Fabreville*, s.e.c., [2007] J.Q. no 2309, EYB 2007-117003 (C.A.).; *Côté Paquin, Avocats c. Côté*, REJB 2004-61160 (C.S.), appel rejeté sur demande, C.A. Montréal, no 500-09-014431-043, 4 juin 2004.

[114] Article 2121 CCQ.

[115] Article 2189 CCQ.

Code.[116] For example, lawyers, doctors, or dentists who practice in a general partnership may decide to practice their profession in the form of a limited liability partnership. This form of partnership enables professionals to practice without the risk of being liable for the professional faults of another partner.

## *2. Limited Partnership*

The limited partnership differs substantially from that of the general partnership. The CCQ provides that such a partnership must have two classes of partners: first, one or more general partners and, second, one or more limited partners.[117] The law grants the general partner(s) responsibility for managing the affairs of the partnership and the powers to make commitments on behalf of the partnership with third parties.[118] In exchange for the non-interference that is demanded from the limited partner(s), the law limits their liability to the contribution that they have agreed to make.[119] This limited liability is similar to the protection granted to a shareholder of a corporation, who cannot be liable for more than the consideration he has agreed to provide at the time of the subscription to shares. However, contrary to the protection of the shareholder, the liability of the limited partner may be extended to all the debts of the partnership for limited partners who do not limit themselves to a passive role and intervene actively in the management of the limited partnership.[120]

Taking into account the limited protection granted to a limited partner, one of the advantages that the corporation cannot offer is the tax treatment of the limited partner. According to the tax laws applicable in Quebec, a limited partnership is not a taxpayer. Accordingly, losses and income are divided directly among the partners and their tax treatment reflects the specific tax situation of each partner.

## *3. Undeclared Partnership*

The undeclared partnership generally results from a factual situation in which two or more legal entities or individuals act as if they are operating a specific enterprise or have the goal of carrying out a common project.[121] For example, different construction companies that submit a bid to carry out a project may be considered partners in an undeclared partnership. This form of civil partnership is not common in connection with the operation of significant commercial activities.

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[116]Article 187, Professional Code, CQLR c. C-26.
[117]Article 2236 CCQ.
[118]Article 2238 CCQ.
[119]Article 2246 CCQ.
[120]Article 2244 CCQ.
[121]Article 2250 CCQ.

## C. Limited Liability Companies

Quebec law does not contain provisions with respect to limited liability companies like those found in a number of US jurisdictions.

## D. Proprietorships and Individuals

Any individual who has reached the age of majority (i.e., 18 years old[122]) may exercise all the powers conferred on individuals, and their capacity to act is complete.[123] Such individuals may therefore own and dispose of their property at their convenience.

Any individual in Quebec may operate a business and has the capacity to make a commitment and charge its assets.[124] However, only the property used by an individual as part of the operation of his business may be charged by way of a hypothec while allowing this individual to retain possession of this property.[125] It is always possible for an individual to pledge his assets, such pledge necessarily involving dispossession of the asset in favor of the creditor.[126]

### *1. Marital Property Laws; Registered Domestic Partnerships*

Various matrimonial regimes apply in Quebec.

The first regime is community of property between spouses, which was the default legal regime until June 30, 1970.

Another regime is the community of acquests, which applies by default to spouses who, since July 1, 1970, marry without making a marriage contract in which they choose a different regime.[127] This regime creates two types of property that can belong to the spouses, i.e., the property belonging to each of them before their union[128] and their acquests, which is the property acquired by each spouse during their marriage.[129] Each spouse retains free disposal of his or her own property and his or her acquests.[130] It is only at the time of the dissolution of the marriage that one spouse may demand division of the acquired property. Such a request for division confers no right to the property but recognizes a claim that one spouse may have against the other.[131]

The third regime is the separation of property, in which each spouse is the owner of whatever property he or she owns at the time of the marriage as well as whatever he or she acquires afterwards.[132]

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[122]Article 153 CCQ.
[123]Articles 1 and 4 CCQ.
[124]Article 2681 CCQ.
[125]Article 2683 CCQ.
[126]Article 2702 CCQ.
[127]Article 432 CCQ.
[128]Article 450 CCQ.
[129]Article 449 CCQ.
[130]Article 461 CCQ.
[131]Article 475 CCQ.
[132]Article 485 CCQ.

When dealing with individuals, it is customary to verify whether they are married and if so, where and when they were married and whether they had signed a marriage contract. The answers to these questions make it possible to identify the provisions applicable to them and their potential impact on their capacity to dispose of their property.

In Quebec, there is no central register allowing the matrimonial status of an individual to be established.

Whether spouses are married under the regime of community of acquests or separation of property, the applicable law in Quebec has created the regime of family patrimony.[133] Lastly, it is required for both spouses to consent in order to dispose of certain property used by the family,[134] such as the family residence, and movable property serving for the use of the household.

Besides the matrimonial regimes applicable in Quebec, there are situations of de facto marriage. In Quebec, the status of de facto spouses has no impact on the ownership rights of a person or their capacity to dispose of their property.

## *2. Property Held in Joint Tenancy with Right of Survivorship*

Quebec law recognizes the possibility of there being co-owners of the same property, but the rules of co-ownership do not allow the surviving co-owner to automatically become owner of the undivided portion of a deceased co-owners property.

In fact, the only way to convey ownership of a property as the result of death is under the terms of a will,[135] or in its absence, according to the rules of testamentary devolution provided by law.[136]

We refer the reader to the section on joint tenancy in the Ontario and other common law provinces chapter of this book for a discussion on the topic, as clients with assets in the other Canadian provinces may be affected by this type of ownership.

## *3. Property Exempt from Claims of General Creditors*

The CCQ states that property that is not subject to seizure may not be hypothecated or charged,[137] while the CCP lists what property is considered exempt from seizure.[138]

Generally exempt is the property used in the daily life of a person, such as clothing, the items furnishing a home and necessary for what is considered a normal life in contrast with a life of indulgence. A worker's tools are also considered exempt from seizure. Accordingly, these items may not be used as collateral security for a creditor.

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[133]Article 414 CCQ.
[134]Article 401-406 CCQ.
[135]Article 613 CCQ.
[136]Article 653 *ff.* CCQ.
[137]Articles 2648 and 2668 CCQ.
[138]Article 694 CCP.

### *4. Age of Majority*

In general, the age of majority at which a person gains the full exercise of all his civil rights is 18.[139] There are some situations where the minor may be emancipated, either by application for emancipation[140] or through marriage.[141] Emancipation through marriage enables a minor to exercise his civil rights as if he was of full age.[142] A minor who has become emancipated through application does not have the full exercise of his civil rights and must be assisted by his tutor for acts beyond simple administration, but any act performed without this assistance may not be annulled nor the obligations reduced unless the minor suffers injury.[143] A minor may only enter into contracts alone to meet his ordinary and usual needs.[144] On the other hand, a minor who is 14 or over is deemed to be of full age for all acts pertaining to his employment or to the practice of his craft or profession[145] and as such, neither a minor nor his tutor may ask the court to annul the acts. Any act performed alone by a minor where the law does not allow him to act alone or through a representative is absolutely null.[146]

## E. Trusts and Estates

Quebec legislation governing the trust, in a form recognizable to common law lawyers, has existed in Quebec from at least 1834. Since 1994 Quebec's trust rules are governed by Articles 1260 to 1370 of the CCQ. The default rule is that a trustee has the powers of full administration,[147] which means he may alienate the trust assets or charge the assets with a real right.[148] If the settlor of a trust reduces the powers of the trustee so that he only has simple administration, the trustee has a limited ability to alienate trustee assets and may only charge them with a real right after obtaining court approval. Generally, when a trustee of a Quebec trust enters into a loan or other contract, the trustee will only engage his personal liability should he act outside the limits of his powers unless the beneficiary expressly or tacitly ratifies his actions.[149] Therefore if the lender wants to ensure that a trustee or settlor of a trust is personally liable for the loan, in addition to obtaining the liability of the trust, it is advisable to have that person execute an appropriate guaranty in his personal capacity. Unlike a common law trust, Art. 1275 CCQ requires that if the settlor

[139]Article 153 CCQ.
[140]Articles 167 and 168 CCQ.
[141]Articles 175 CCQ.
[142]Article 176 CCQ.
[143]Article 173 CCQ.
[144]Article 157 CCQ.
[145]Article 156 CCQ.
[146]Article 161 CCQ.
[147]Article 1278 CCQ.
[148]Article 1307 CCQ.
[149]Articles 1319 and 1320 CCQ.

or a beneficiary is also a trustee, he must act with a trustee who is neither the settlor nor a beneficiary. If such a 1275 trustee is not in office, all actions of the trustees are of absolute nullity.[150]

Generally, claims against a decedent's estate must be filed within three years of the date of death.[151] A liquidator (i.e., estate executor) has the obligation to contact the known creditors, prepare an inventory of the succession, as well as publish a notice in a newspaper and the Register of Personal and Movable Real Right that an inventory has been prepared.[152]

Under Quebec law, a liquidator has, by default, the powers of simple administration.[153] By having such powers the liquidator may not alienate the property contained in the estate, nor can it charge it with a charge (e.g., hypothec) or change the destination of such property unless expressly authorized to do so by the court. In consideration of the foregoing a testator will usually provide for, in his will, that the liquidator will have the powers of full administration with respect to the property, and thus allowing the liquidator to alienate or charge said property.

Lastly, in the case of an insolvent succession, the CCQ contains a detailed set of rules by which the assets of the succession are distributed to the creditors of the succession.[154]

# VI. Real Estate Lending

## A. Property Rights

The system of security interests and the rules of publication in Quebec require understanding the classification and nature of property.

The rules for classifying property mainly serve to distinguish movables (i.e., personal property) from immovables (i.e., real property).[155] Under Quebec law, property that is not immovable is movable.[156]

Generally, an immovable is property that cannot be moved. The ultimate immovable is land, whether developed or not. The ownership of an immovable extends to what is beneath and what is above it,[157] including the airspace, subject to the limitations imposed by law. Assets in the ground, such as minerals, are immovables as long as they have not been extracted. Once extracted and detached from the property, they become movables. As to the airspace, it

[150] *Financière Transcapitale inc. c. Fiducie succession Jean-Marc Allaire*, 2012 QCCS 5733 (CanLII).

[151] Article 2925 CCQ.

[152] Articles 794-796 CCQ.

[153] Article 802 CCQ.

[154] Articles 810-814 CCQ.

[155] Articles 900-906 CCQ.

[156] Articles 899 and 907 CCQ.

[157] Article 951 CCQ.; See also *St-Onge c. Baie-St-Paul (Corp. municipal de paroisse)*, J.E. 99-2068, REJB 1999-14620 (C.S.).

is considered immovable corporeal property but above a certain height, it becomes public property.[158]

Likewise considered immovable are assets that are initially movable but become integrated into an immovable. Thus a heating or air conditioning system will be considered immovable if it is incorporated in an immovable; it loses its individuality and if it assures the utility of the immovable.[159]

In contrast to an immovable, a movable is property that is movable by nature and may change place. This class includes specifically, but is not limited to, equipment, vehicles, and inventories.

Parallel to the distinction between movables and immovables is the distinction between corporeal (i.e., tangible) and incorporeal (i.e., intangible) property. Incorporeal movables are those that are so identified by law. Rights of ownership of a claim and intellectual property rights, for example, are incorporeal movable rights. The rights that allow the dismemberment of the right of immovable ownership are incorporeal immovable rights.[160]

The right of ownership is the most complete real right in that it confers to its holder the right to use, enjoy and dispose of the property.[161] A real right of ownership may be dismembered, and the CCQ recognizes various forms of dismemberment, each having different attributes.[162] With respect to property, the first is usufruct, which confers the right of use and enjoyment of the property owned by another for a certain time but leaves the owner the capacity to dispose of it.[163] Another form of dismemberment is the right of use, which allows its holder to use a property within the limits of his needs.[164] A real servitude (i.e., easement) is a right that is for the benefit of one property to the detriment of another. Thus a servitude of passage benefits a land-locked property, to the detriment of the property over which passage is allowed.[165] Finally, the CCQ recognizes emphyteusis, which confers on its grantee (the emphyteuta) the use, enjoyment, and even the right of disposal of a property for a period that does not exceed 100 years, subject to emphyteuta undertaking to make constructions, works, or plantations thereon that increase its value in a lasting manner and then returning same to the original owner.[166]

## B. Leases

A lease is a contract by which a person agrees, for a certain period of time, to leave the enjoyment of a property to another person, who agrees, in exchange, to pay a rent.[167] It is up to the owner and the lessee to allocate between them

[158]*Lacroix c. La Reine*, [1954] Cour d'Échiquier 70.

[159]Article 901 CCQ.

[160]*See also* Denys-Claude LAMONTAGNE, *Biens et propriété*, 7e édition, Éditions Yvon Blais, Cowansville, par. 48.

[161]Article 947 CCQ.

[162]Article 1119 CCQ.

[163]Article 1120 CCQ.

[164]Article 1172 CCQ.

[165]Article 1177 CCQ.

[166]Article 1195 CCQ.

[167]Article 1851 CCQ.

the extent of their respective obligations for the maintenance of the leased property and for any required minor and structural repairs. Failing explicit stipulations in the lease, the CCQ sets out the respective obligations of the lessee and the owner.

The owner must deliver a property in good state of repair and allow the lessee the peaceable enjoyment of the property during the term of the lease.[168] Moreover, the owner must guarantee the lessee that the leased property may be used for the purposes for which it has been leased and maintain it for such purposes throughout the lease.

As for repairs, they are at the expense of the owner, except for minor repairs, which are at the expense of the lessee, except if they result from the normal aging of the property.[169]

Unless the assignment of the lease or subletting has been prohibited in the main lease, a lessee has the right to sublet or assign his rights in the lease, and the owner may not refuse without a valid reason. Moreover, if the lease is assigned, the initial lessee is released from his obligations, unless the lease provides otherwise.[170]

With respect to residential leases, Quebec has legislation that assures tenants the right to maintain occupancy in the premises.[171] Except in specific situations, an owner cannot terminate a residential lease and may not evict one tenant in order to rent the apartment to another. Moreover, the capacity of owners to raise rents is regulated.

The protection of the rights of a tenant of a commercial property is a function of whether or not the lease is published in the land register. Alienation of a leased property does not automatically terminate a commercial lease.[172] However, if the lease is for a fixed term, the buyer of the property may terminate it if more than 12 months remain before its termination date.[173] Such right of early termination by the new owner would not arise if the tenant had published the lease in the relevant land register prior to the sale of the property.[174]

## C. Condominiums

Under Quebec law, there are two types of co-ownership properties—divided (e.g., condominiums) and undivided.

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[168]Article 1854 CCQ.

[169]Article 1864 CCQ.

[170]Articles 1870-1873 CCQ.

[171]Article 1936 *ff.* CCQ.

[172]Article 1886 CCQ.

[173]Article 1887 CCQ.

[174]The same applies to the hypothecary creditors (i.e., mortgagees) of the owner of the building who, because of the exercise of their recourse as secured creditors, cause the forced surrender of the property to a third party who agrees to pay the price. Such third party, who may also be a secured creditor, may not exercise an early lease termination option if the lease has been published at the time of the transfer of the property; Article 1852 CCQ.

Undivided co-ownership refers to the right of ownership that is parceled, such that several people share the ownership of the same property, each of them being privately vested with a share of the right of ownership.[175]

The undivided co-owners may organize their rights and obligations by agreement, failing that, each of them may exercise the rights of an owner with respect to the property,[176] i.e., use it and share the revenues that it generates. Each co-owner may sell or hypothecate his own share in the property. Unless otherwise agreed to, no co-owner may be required to remain in undivided co-ownership.[177] Thus any co-owner may force the sale of the property and the sharing of the proceeds of its disposal among the various co-owners, according to their respective interests.

Under divided co-ownership, like condominiums, the ownership of the property is divided into fractions belonging to one or several persons.[178] All divided co-owners form a legal entity (without share capital), whose purpose is to preserve the immovable, maintain its common portions and, generally do anything involving the common interest of the co-owners.

Such type of dismemberment of the right of ownership is common in the field of residential property. However, certain municipalities restrict or prohibit the conversion of existing properties into divided co-ownerships. Where it is permitted and the conversion involves residential apartments already occupied by tenants, the conversion process is also subject to the approval of the *Régie du logement* (Rental Board).

## D. Types of Real Property Security Instruments

In Quebec, the hypothec is the sole form of security that may be created over real property by the will of the parties. The validity and enforceability of an immovable hypothec is subject to a number of compulsory conditions.

The immovable hypothec must be created pursuant to a notarial deed *en minute*.[179] Notarization of a deed is a professional service under the exclusive jurisdiction of Quebec notaries who must be members of the Quebec Chamber of Notaries.

The immovable hypothec must create a charge whose amount (expressed in Canadian dollars) must be specified in the deed itself[180] and must secure valid obligations of the grantor of the hypothec or another debtor to the secured creditor. The obligations that may be secured by the hypothec are of many kinds; they may be present obligations or obligations that may only exist in the future. Finally, the hypothec must charge an immovable property that is located in Quebec and whose technical description complies with Quebec

[175]Article 1010 CCQ.
[176]Article 1016 CCQ.
[177]Article 1030 CCQ.
[178]Article 1038 CCQ.
[179]Article 2693 CCQ.
[180]Article 2689 CCQ.

law.[181] The hypothec may also charge a property that does not belong to the grantor but that the grantor may later own.

### 1. Deeds of Trust/Deed of Hypothec in Favor of a Representative

If an immovable hypothec secures obligations of a legal person, partnership, or trustee owing to a group of creditors (e.g., as part of a syndicated credit facility), additional measures are required.[182] The hypothec may be granted in favor of the "hypothecary representative" for all present and future creditors of those obligations. The representative may be one of the creditors or the only creditor of the obligations, or a third person. The hypothecary representative is appointed by the borrower, the grantor of the hypothec, or by one of the creditors. The representative acts as the secured party and has the power to exercise all the rights granted under the hypothec, including that of releasing the hypothec and consenting to cancellation of its registration. An immovable hypothec in favor of a hypothecary representative must, on pain of absolute nullity, be granted by notarial act *en minute*, regardless of the nature of the secured obligations.

### 2. Mortgages

Immovable hypothecs are subject to rules of form that are essential to their validity. An immovable hypothec must absolutely be in notarial form *en minute.*[183] The amount of the hypothec amount expressed in Canadian dollars must also be specified.[184] The amount of the hypothecary charge and that of the secured debt do not have to be identical. If the amounts actually owing to the secured party are greater than the amount of the charge, the excess will not be secured.

The immovable hypothec may secure any present and future obligations to the extent they are valid.

### 3. Real Estate Contracts

Certain contracts that deal with the ownership of an immovable are sometimes used to secure the performance of obligations. For example, the CCQ allows the unpaid seller to retain ownership of a sold property until full payment of the selling price is received.[185] The conditional sales agreement may thus become a security instrument in favor of the unpaid seller. Moreover, the claim of the unpaid seller may be assigned to a third party, who will ultimately have title retention.

With respect to immovables, there is also the resolutory condition that enables the title to revert to the unpaid seller of the property if certain events should occur, such as non-payment of amounts owing. In this case the contract

[181]Article 2694 CCQ.
[182]Article 2692 CCQ.
[183]Article 2693 CCQ.
[184]Article 2689 CCQ.
[185]Article 1745 CCQ.

is presumed to have never existed.[186] Accordingly, the charges that the buyer may have granted on such immovable are precarious, because they will disappear without compensation if the sale is canceled pursuant to the exercise of a resolutory clause.[187]

## E. Formalities of Deeds of Trust and Mortgages

In regard to immovable hypothecs, there are two levels of formalities. The first level concerns the formalities related to the validity of the deed itself, mainly that it be executed before a Quebec notary.

The second involves the formalities associated with its enforceability against third parties that require publication (i.e., perfection) of the deed at the applicable land register.[188] An immovable hypothec that has not been adequately published remains valid against the owner but may not be enforced against the other creditors of the owner.

## F. Assignment of Leases and Rents

The assignment of a right as security is a concept that has not existed in Quebec since 1994, the year of the last comprehensive reform of the Civil Code. Leases and rents are contractual rights and claims that may only be charged by way of a hypothec. To simplify the taking of security interests in an immovable that produces rents payable to its owner, the CCQ provides that an immovable hypothec may not only charge an immovable but also the rents that result from it as well as any insurance proceeds if there is a loss involving the building.[189]

It must be emphasized that even if the leases and rents may be charged by an immovable hypothec, the CCQ has not changed the nature of these assets, which remains intangible movable property. Accordingly, a prudent creditor who obtains a hypothec on leases and rents when the grantor is not domiciled in Quebec would be well advised to also take a valid security interest in the jurisdiction that governs the owner of the immovable. The rights in leases, besides the leases payable, are contractual rights that can be hypothecated. However, certain leases are not transferable, which limits the capacity or interest in hypothecating them.

## G. Recordation and Acknowledgments

### *1. Recordation*

Movable and immovable real rights are subject to publication. For immovable rights, the deeds for the acquisition of an immovable, the constitution of a real

[186]Article 1606 CCQ.
[187]Article 1743 CCQ.
[188]Article 2663 CCQ.
[189]Article 2695 CCQ.

right, a servitude or a hypothec, or the transmission of a real right, such as the sale of an immovable, are subject to publication.

In the case of movables, a hypothec encumbering a movable is eligible for publication, as is the case for leases of a movable for more than a period exceeding one year,[190] installment sales,[191] and leasings.[192] The right of ownership of a movable is not a right eligible for publication. Unlike the right of ownership of an immovable, there is no register for the right of ownership of a movable; hence the adage, "possession of a movable equals title."

The primary effect of the publicity of a real right is to make the right enforceable (or opposable) against third parties. The real rights eligible for publication rank according to their date of publication.[193] There are two registers in Quebec for the purposes of publication: (1) the land register for immovables; and (2) the register of personal and movable real rights for the purposes of the personal and movable real rights.

The applicable land register is in function of the physical situation of the immovable in question. The land register consists of as many sections, called land books, as there are registration divisions in Quebec.[194] Furthermore, the land book of a registration division is itself divided in sections, and each section consists of one land file. There is a land file for each immovable located in the registration division concerned.

In Quebec, each immovable must be linked to a distinct lot number on the cadastral plan. Accordingly, it is not possible to dispose of a portion of an immovable without obtaining a distinct lot number for that portion of the immovable.

With respect to the publication of movable rights, the nature of the property must be considered to adequately respect the rules of publicity.

With respect to corporeal property, the movable hypothec charging it is eligible for publication if such property is physically located in Quebec at the time the security interest is created.[195] Rules also exist for corporeal property located in Quebec but that may be moved to other jurisdictions (e.g., delivery trucks). Quebec rules of private international law recognize charges created in another jurisdiction in which the movable was located at the time the charge was created but later permanently moved to Quebec.[196]

With respect to incorporeal property (such as receivables or intellectual property), the rules of publication in respect of such assets are associated with the laws applicable to the domicile of the grantor at the time of the creation of

[190]Article 1852 CCQ.

[191]Article 1745 CCQ.

[192]Article 1842 CCQ. A leasing is an arrangement whereby the lessor acquires the subject property from a third party, at the request and in accordance with the instructions of the lessee.

[193]Articles 2941 and 2945 CCQ.

[194]Article 2972 CCQ.

[195]Article 3102 CCQ.

[196]Article 3106 CCQ.

the movable right eligible for publication.[197] With respect to a legal entity or a corporation, the domicile is located at the address of its head office.[198]

### *2. Torrens System*

There is nothing similar to the Torrens System in Quebec, which in other jurisdictions allows a public officer to confirm the validity of an immovable property title. In Quebec, the system in place means that the purchaser of an immovable or the creditor who is considering taking an immovable hypothec must conduct a title examination that may go back to the date of creation of the original cadaster, i.e., the time when the state granted the immovable to its first owner and took it out of the public domain.

### *3. Notary Acknowledgments*

As indicated above, certain deeds must be notarized for validity purposes (i.e., executed before a Quebec notary). The Quebec equivalent of a notary acknowledgment is the certification of any legal document by a commissioner of oath.

### *4. Recording Fees*

The fees associated with the publication of the deeds of movable and immovable hypothecs are a function of the fixed rates of $38 for a movable hypothec and $169 for an immovable hypothec. These rates are not related to the amount of the hypothecary charge.

## H. Priority Issues

### *1. Future Advances*

The nature of hypothecs allows creating a security interest to secure future obligations, even those that do not exist at the time the hypothec is created.[199] Accordingly, a lender may make new advances that would be secured by a previously granted hypothec. The description of the secured obligations must be set forth in the agreement creating the hypothec.

If the hypothec is specific as to the extent of the secured obligations (e.g., securing the performance of a single, specific obligation or a fully drawn term loan), future advances may not be secured by such hypothec.

It is also common for a creditor to demand that the hypothec serve as security for the performance of all present and future obligations of a debtor, whether the obligations are direct, such as a loan, or indirect, such as obligations resulting from a surety for the debts of a third party.

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[197] Article 3105 CCQ. The rule of domicile (*lex domicili*) does not apply to security over an incorporeal movable established by a title in bearer form or to a security published by the creditor's holding of the title.

[198] Article 307 CCQ, commonly referred to as registered office.

[199] Articles 2670 and 2688 CCQ.

## 2. Modification of Deeds of Trust and Mortgages

Hypothecary deeds are essentially contracts between a creditor and debtor. Accordingly, these contracts are likely to be modified, and it is important to determine whether conditions of form apply to the modifications and whether publication is required for their enforcement on third parties.

The immovable hypothec is a notarial deed in public form. This formal requirement is essential to its validity.[200] If the modification involves the increase of the amount of the hypothec or the addition of an immovable to the collateral, it must be in notarial form, and its enforceability against third parties would only exist from the time published in the land register. Other modifications of the hypothec may be made as a private writing and it is not necessary to proceed with their publication to be valid between the parties.

## 3. Purchase Money Priority

The concept of purchase money security interest does not exist in Quebec real estate lending. The only comparable mechanism under Quebec law is the hypothec granted by the purchaser of the immovable in its act of acquisition.[201] Such a form of security interest confers on its holder (i.e., the seller) a priority that ranks over all the other creditors of the purchaser. Such hypothec may only secure a balance of sale and no other obligations.

## 4. Priority of Options to Purchase

The option to purchase is essentially a promise made by the seller to sell a property to the purchaser if the latter indicates his intention to do so on the conditions pre-established between the seller and the potential purchaser to whom this option to purchase is conferred.[202] The promise is a unilateral contract emanating from the promisor and is a contract that produces personal rights that are not eligible for publication. Accordingly, the rights it confers may not be enforced against third parties.

If the option is written in such a way that its exercise is equivalent to a transfer of ownership and a sale, it would then be possible to publish the deed conveying ownership in the land register if all the publication conditions are respected.[203]

## 5. Priority of Rights of Reverter

The right to resolve a sale exists in Quebec law, and it allows a vendor to again become owner of the sold property in the event that an event foreseen by the

[200]Article 2693 CCQ.
[201]Article 2948 CCQ.
[202]Article 1397 CCQ.
[203]Articles 2938 and 3008 CCQ.

parties either occurs or fails to occur and results in resolution or cancellation of the sale. Thereafter the initial sale is presumed never to have existed.[204]

### 6. *Equitable Subrogation*

In Quebec, subrogation may be legal or conventional.[205] Subrogation takes place by sole operation of law in specific cases, in particular when a creditor pays another creditor whose claim is preferred to his because of a prior claim or a hypothec.[206] Subrogation takes place immediately upon payment of the claim, and the creditor to whom the payment has been made may not refuse the payment. Conventional subrogation intervenes between creditors outside the specific cases when legal subrogation is automatically available without having to be concerned about the consent of the creditor receiving the payment. Whether legal or conventional, subrogation results in a change of creditor, and the debtor faces a new creditor to whom it is now as obligated as it was to the creditor who received payment.[207]

The subrogation of a hypothecated claim may, in some respects, be compared to the assignment of a claim. Since there is a substitution of creditors, it is essential that the publication rules be respected for the rights of the new creditor to be enforceable against third parties. In the case of an immovable hypothecary claim, the subrogation must be published in the land register in which the immovable hypothec is published.[208]

### 7. *Subordination Agreements*

Subordination of a claim for the benefit of another claim arises when creditors decide among themselves to grant priority of payment to a claim that would not have such priority under the applicable law. This way of proceeding is common. Parties may also decide to grant claims a priority of payment that does not comply with the rank of the security interests that ensure their payment. In such cases, the creditors will also exchange the rank of their security interests so that the rank reflects the priority of payment. These cessions of rank must be published to be enforceable against third parties and may not be made to the detriment of a secured creditor whose security ranks in-between those of the assignor and the assignee.[209]

## I. Title Insurance

Title insurance is more and more common in Quebec real estate financing. It guarantees that the creditor who is the beneficiary of the insurance will not

[204]Article 1606 CCQ.
[205]Article 1652 CCQ.
[206]Article 1656 CCQ.
[207]Article 1656 CCQ.
[208]Article 3003 CCQ.
[209]Article 2956 CCQ.

suffer a loss because of a defect in the titles of ownership or because of a hypothec that might rank ahead of the creditor's.[210] The disadvantage of title insurance is that the process must be repeated for each new hypothec affecting the same property. In the more traditional Quebec system, the legal counsel prepares a report on title that is intended for the owner and its creditor, and thereafter, it is sufficient to update such report and readdress it to the new creditors concerned. Title insurance short-circuits this process because it quickly confers protection to the secured creditor, often at lower cost than that required to prepare a report on title.

## J. Prepayment

Prepayment of an obligation is not a right granted to all debtors. Lenders who benefit from a term generally do not allow partial or total payment before the end of the term without a penalty. Furthermore, because of Section 10 of the Interest Act,[211] an individual who has granted an immovable hypothec may, if the term of his debt is more than five years, reimburse the total amount of his debt by paying in addition a penalty of three months of interest.

## K. Due on Sale or Encumbrance Clauses

A debtor retains the right to dispose of his immovable even if it is hypothecated. Likewise, he retains the right to grant an additional immovable hypothec on the same immovable, but in favor of a creditor whose rank will be subsequent to that already in place. In both cases, these are situations that are of a nature to impair the first creditor, who may deem it not to his advantage to have a new owner of the immovable or to have to deal with another hypothecary creditor in case of liquidation of the assets of their common debtor.

For these reasons, it is very common that loan agreements and immovable hypothec deeds contain restrictions on the sale of the hypothecated immovable and the creation of new hypothecs without the prior consent of the first-ranking hypothecary creditor.

## L. Transfer of the Mortgaged Property; Assumption Agreements

It is possible to transfer an immovable and have the purchaser assume the debt that is secured by a hypothec charging the transferred immovable.[212] The purchaser may not need to grant a fresh hypothec to finance the purchase, so long as the lender is satisfied that the assignee is financially able to assume and

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[210]Article 2497 CCQ.; *See also Caisse populaire des deux Rives c. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 RCS 995, 1990 CanLII 91 (CSC).; *Banque nationale de Grèce (Canada) c. Katsikonouris*, [1990] 2 RCS 1029, 1990 CanLII 92 (CSC).

[211]Interest Act, R.S.C., 1985, c. I-15.

[212]Article 1723 CCQ.

discharge the initial debt. The hypothec existing at the time of the sale continues to secure the debts assumed by the purchaser at the time of the sale, but it would not secure any additional obligations of the purchaser to the lender nor charge any other property of the purchaser that did not form part of the sale.

Thus, in the case of the sale of a rental property that generates rents, the sale results in the transfer of ownership of the building but also of the rents it generates.[213] The hypothec previously granted by the seller may not necessarily cover the rents payable under new leases entered into by the new owner.

## M. Transfer of Deeds of Trust and Mortgages

The hypothec is an accessory to an obligation that it secures and has no autonomous existence.[214] It is not possible to transfer the accessory without transferring the principal. Accordingly, the transfer of a hypothec is always aligned with the transfer of a secured claim (or by subrogation), such transfer bringing the accessory with it.

The rules linked to the assignment of a claim[215] provide that the transfer be published in the land register. Moreover, the grantor must be formally notified of the transfer or consent to it.

## N. Cancellation of Deeds of Trust and Mortgages

When the obligations secured are indefeasibly paid or performed, the secured creditor must proceed to cancel the hypothec. The cancellation may be total or partial and is ultimately intended to release the immovable from the hypothec.[216] This cancellation must be published in the appropriate land register. The release of the hypothec must be signed by the creditor.

## O. Default and Foreclosure Remedies

### *1. Foreclosure of Mortgages and Deeds of Trust*

In the case of the occurrence of a default event foreseen by the creditor and the debtor, the creditor may undertake to exercise the hypothecary remedies provided by law. There are only four different remedies that the creditor may choose to exercise.[217] These remedies are not mutually exclusive and the creditor retains the right to change remedies at any time. These remedies are taking possession for purposes of administration, taking in payment, the sale by the creditor, and the sale by judicial authority.

However, in all cases, exercise of the hypothecary remedies requires sending a prior notice to the debtor for the purpose of allowing him to remedy the

[213]Article 2743-2745 CCQ.
[214]Article 2661 CCQ.
[215]Article 1641 CCQ.
[216]Article 3057 CCQ.
[217]Article 2748 CCQ.

default.[218] Such notices are for ten days, 20 days, or 60 days, depending on whether the remedies are pursuant to a movable hypothec or an immovable hypothec.[219] Certain defaults, such as bankruptcy, may not be remedied, but despite this situation, the creditor must wait for the expiration of such "cool off" period to proceed with enforcement.

### *2. Forfeiture of Real Estate Contracts*

In the case of the sale of an immovable with reservation of the right of ownership, the occurrence of a case of default has consequences that are not related to the right of ownership of the immovable. In fact, in such a sale, the seller has remained owner of the building and if the contracts with the buyer terminate, it has no impact on the right of ownership.

In the case of the sale of an immovable that contains a resolutory clause, its exercise requires court intervention to order resolution of the sale and cancellation of all deeds with respect to this immovable entered into by the defaulting purchaser.[220]

### *3. Deeds in Lieu of Foreclosure*

A deed in lieu of foreclosure implies the debtor agreeing to voluntarily sign over the deed of transfer of its property to its secured creditor. This usually avoids long and expensive realization process.

Such procedure is permitted as long as it is not intended to bypass the rules governing the rights and obligations of hypothecary creditors. Moreover, a clause by which the creditor with a view of securing an obligation reserves the right to become the owner of the property is deemed not written.[221]

## P. Environmental Indemnities

Pursuant to the provisions of the environmental protection laws applicable in Quebec, any owner of an immovable becomes personally responsible for the environmental condition of the property and may have to undertake work to remedy the situation. This responsibility persists even if there is a transfer of the immovable, such that all persons who were the owner of the same immovable have liability that is not extinguished if the environmental problem existed at the time of their period of ownership. Likewise, if the owner is a legal entity, the law allows seeking the statutory liability of the directors and, in certain cases, lifting the corporate veil and seeking the liability of the shareholders of the owner.[222]

[218]Article 2749 and 2757 CCQ.
[219]Article 2758 CCQ.
[220]Article 1749 CCQ.
[221]Article 1801 CCQ.
[222]Article 317 CCQ.

Such liabilities may be serious and thus, before obtaining an immovable hypothec, the secured party will typically require an environmental report. Similarly, despite the fact that a hypothecary creditor may choose to take the immovable in payment of the debt, certain creditors will refuse to exercise such remedy so to avoid environmental liabilities. As such, lenders often demand indemnity and compensation from the debtor if a problematic environmental situation occurs.

## Q. Mechanic's and Material Supplier's Liens

The CCQ confers a priority rank to certain claims over others. This is the case with construction claims or builders' liens charging the buildings in favor of builders, sub-contractors, workers and suppliers of materials, architects, and engineers. The construction creditors will have the right to be paid before all others, even before the hypothecary creditor, but only up to the amount of the additional value given to the immovable by their work.[223]

Except for workers who are not required to do so, all those who benefit from such protection must serve a notice describing the charged immovable and indicating the amount to the owner of the immovable and publish such notice in the land register within 30 days after termination of the work and take action within the six months that follow.[224]

## R. Collection of Property Tax and Insurance Impounds by Lenders

Unpaid property taxes benefit from statutory priority and their payment takes priority over the reimbursement of the hypothecary creditor.

In Quebec residential mortgage finance, it is common for the lender to require the debtor to add the amounts necessary for the payment of the taxes to the mortgage payments in order to establish a reserve allowing payment by the lender of the taxes when due. Similarly, the lender may require upfront payment of the insurance premiums or otherwise require proof of insurance on an annual basis.

# VII. Personal Property Lending and Equipment Leasing

## A. UCC Article 9 (State Variations and Case Law)

Unlike the Personal Property Security Act (PPSA) applicable in the rest of the Canadian provinces that actually refers the concept of "security interest" as understood under UCC Article 9, the CCQ refers to the notion of "hypothec" under Quebec law.[225]

[223]Article 2728 CCQ.
[224]Article 2727 CCQ.
[225]See CCQ, Book Six under Title Three.

A Quebec law security agreement (deed of hypothec) can provide for movable property (i.e., personal property) collateral to secure present and future advances or any other obligations.[226] A hypothec confers on the secured party the right to follow the property into whomsoever's hands it may come, to take possession of it, to take it in payment, and to sell it or to cause it to be sold and thus to have a preference upon the proceeds of the sale, according to the rank as determined by the CCQ.[227]

A hypothec may be granted with or without delivery[228] and can include the debtor's after-acquired property[229] as collateral except in some cases for a grantor who is an individual[230] not carrying on an enterprise.

All hypothecs, regardless of the type of property, must be granted up to a charge amount[231] expressed in Canadian dollars[232] bearing a nominal rate of interest per annum.[233] Once the hypothec agreement has been signed (and not before), a financing statement called an RH form must be filed at the register of personal and movable real rights (RPMRR).[234] By way of exception to the general rule, a hypothec with delivery (also called "pledge") need not be in writing to be valid and is published by physical dispossession of the pledged property.[235]

Where the collateral consists of securities or security entitlements, though a proper registration at the RPMRR would perfect a hypothec in such type of collateral, a hypothec in favor of a secured party having control of such collateral will take priority over a hypothec perfected only by registration.[236] Control in various types of securities is accomplished as follows:[237]

(1) Control in respect of a hypothec over certificated shares is obtained by delivering the original share certificates endorsed in blank or accompanied with a blank undated stock power certificate, or by registering it in the name of the secured party at the time of the original issue or registration of hypothec by the issuer.
(2) Control in respect of a hypothec over uncertificated shares is obtained by way of an agreement from the issuing company whose shares are pledged that it will comply with the instructions of the secured party without further consent by the pledgor/share owner.

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[226]Article 2687 CCQ.
[227]Article 2660 CCQ.
[228]Article 2665 CCQ.
[229]Article 2670 CCQ.
[230]Article 2683 CCQ.
[231]Article 2689 CCQ.
[232]*Trans-America Trade Exchange Inc. c. Haltrecht,* J.E. 2000-582 (C.A.).
[233]Cliche (Syndic de), C.S. Richelieu, J.E. 2003-648 (C.S.)
[234]*See* Regulation respecting the register of personal and movable real rights, CQLR c. CCQ, r. 8.
[235]Articles 2702 *ff.* CCQ.
[236]Articles 2714.1 *ff.* CCQ.
[237]Articles 55 *ff.* An Act Respecting the Transfer of Securities and the Establishment of Security Entitlements, CQLR c. T-11.002.

(3) Control in respect of a hypothec over book-based securities or security entitlements held in a securities account with a securities intermediary is obtained by way of an agreement from the securities intermediary that it will comply with the instructions of the secured party without further consent by the pledgor/account owner, or by the secured party becoming the entitlement holder.

If a hypothec secures obligations of a legal person, partnership or trustee owing to a group of creditors (e.g., as part of a syndicated credit facility), additional measures are required.[238] The hypothec must be granted in favor of the hypothecary representative for all present and future creditors of those obligations. The representative may be one of the creditors or the only creditor of the obligations, or a third person. The hypothecary representative is appointed by the borrower, the grantor of the hypothec or by one of the creditors. The representative acts as the secured party and has the power to exercise all the rights granted under the hypothec, including that of releasing the hypothec and consenting to cancellation of its registration. Except in the case of pledges, a hypothec in favor of a hypothecary representative must, on pain of absolute nullity, be granted by notarial act *en minute*, regardless of the nature of the secured obligations.

Finally, starting in 2016, Quebec will become the first Canadian province to implement new rules allowing for the grant of a hypothec with delivery on a monetary claim (i.e., cash collateral).[239] This new regime is based on UCC Article 9 regarding security on deposit accounts. A creditor wanting to obtain control of a bank or security deposit where the deposit is owing by a third party must enter into a control agreement with the latter (similar to deposit account control agreement currently used in the United States).

## B. Priority Versus Secret Liens (Statutory and Common Law)

Ranking of a hypothec is generally determined by the time and date of its publication (i.e., perfection) by either registration or delivery.[240] One exception to such rule is the case of a hypothec over life insurance proceeds[241] and right to a premium overpayment refund[242] whose rank is determined by the date of notification to the insurer.

A movable hypothec with delivery (or pledge) is published by physical dispossession of the pledged collateral.[243] A movable hypothec without delivery is published by registration in the RPMRR.[244] Where the collateral includes

[238]Article 2692 CCQ.

[239]*See* An Act mainly to implement certain provisions of the Budget Speech of 4 June 2014 and return to a balanced budget in 2015-2016, SQ (2015, chapter) 8, s. 361.

[240]Articles 2941, 2945 *ff.* CCQ.

[241]Article 2461 CCQ.

[242]Article 2479.1 CCQ.

[243]Article 2703 CCQ.

[244]Article 2970 CCQ.

securities or security entitlements, a secured party holding control thereof will supersede the rank of all other hypothecs published by registration.[245] Starting in 2016, control of a monetary claim (cash collateral) obtained by a creditor will rank ahead of any other movable hypothec encumbering that claim, from the time that control is obtained, regardless of when that other hypothec is perfected.[246]

Secured parties may cede their rank (i.e., subordinate) in favor of one another and the cession of rank must be registered in the RPMRR for proper perfection.[247]

Prior claims[248] (such as legal costs, rights of unpaid vendors, rights of retention of the property, claims of the state for amounts due under fiscal laws, etc.) as well as deemed trusts[249] in favor of the state under certain statutes rank before any hypothec.

## C. Equipment Leasing

The CCQ provides for two types of lease arrangement relied upon for commercial equipment leasing: (1) a two-party arrangement (which is similar to a conventional lease between a lessor and lessee familiar to the common law practitioners); and (2) a three-party arrangement (called credit-bail or leasing contract). Unlike the common law jurisdictions, there is no distinction under Quebec law between a true lease and a financing lease.

In a credit-bail arrangement, the lessor acquires the equipment from a third party (e.g., the dealer or manufacturer) at the request and in accordance with the instructions of the lessee,[250] and the lessor typically benefits from an option to purchase the equipment at the end of the term.[251] Unlike the two-party arrangement, the third-party seller is directly bound toward the lessee by the legal and conventional warranties inherent in the contract of sale.[252] Also, the lessee assumes all maintenance and repair expenses as well as the risks of loss of the equipment (even by superior force (i.e., Act of God), from the time of possession).[253]

The right of ownership of the lessor in respect of leased equipment is perfected by registration at the RPMRR within 15 days of the execution of the contract.[254] Failure to file or late filings may have an adverse effect on the rights of the lessor.[255] Where the parties have provided for a master lease arrangement, Quebec law allows for a one-time global filing for a period of

[245]Article 2714.2 CCQ.
[246]Article 2713.8 CCQ (not in force before January 1, 2016).
[247]Article 2956 CCQ.
[248]Articles 2650 ff. CCQ.
[249]Discussed in the Ontario and other common law provinces chapter.
[250]Article 1842 CCQ.
[251]Article 1850 CCQ.
[252]Article 1845 CCQ.
[253]Article 1846 CCQ.
[254]Articles 1847 and 1852 CCQ.
[255]Ouellet (Trustee of), [2004] 3 S.C.R. 348.

up to ten years in respect of a universality composed of equipment that is of the same kind and leased in the ordinary course of business of the parties.[256]

# VIII. Guaranties and Suretyship

## A. Waivers of Suretyship Defenses

Unlike certain common law jurisdictions that distinguish between a guarantor and a surety, Quebec practitioners use such terms interchangeably. Under Quebec law, a guarantor that has obligated itself on a solidary[257] basis with the primary obligor would become tantamount to the common law surety.

### *1. Defenses That Cannot Be Waived*

Under Quebec law, the guarantor cannot renounce in advance to its right to be provided with information or to the benefit of subrogation.[258] Given that both such rights are of public order, the guarantor may always raise any violation thereof as a defense in any action for performance of the guaranty.

The first defense relating to the duty to inform is based on the duty of the obligee to act in good faith as confirmed by the Supreme Court of Canada.[259] At the request of the guarantor, the obligee must provide it with any useful information respecting the content and the terms and conditions of the primary obligation and the progress made in its performance.[260] The obligee's duty to inform the guarantor has been often limited by case law to situations where the guarantor is in a vulnerable position as regards information, from which damages may result.[261]

With respect to the second right, if the guarantor can no longer be usefully subrogated to the rights of the obligee as a result of the latter's actions, the guarantor may be discharged to the extent of the damages suffered.[262] Subrogation is discussed below.

### *2. Defenses That May Be Waived*

Guaranties governed by Quebec law may provide for the waiver of defenses based on the benefit of discussion, the benefit of division and other defenses

[256]Article 2961.1 CCQ.

[257]A "solidary" obligation is similar to a joint and several obligation under common law. Like the common law suretyship, "solidarity" between the guarantor and the primary obligor allows the obligee to proceed against the guarantor at once without making any demand of the primary obligor.

[258]Article 2355 CCQ.

[259]*Bank of Montréal c. Bail Ltée,* [1992] 2 S.C.R. 554; the court confirmed the general theory of the obligation to inform, based on the duty of good faith in the realm of contracts.

[260]Article 2345 CCQ; the principle is also inspired from the decision of the Supreme Court of Canada in *National Bank c. Soucisse et al.,* [1981] 2 S.C.R. 339.

[261]*Trust La Laurentienne du Canada Inc. c. Losier,* EYB 2001-22029 (C.A.).

[262]Article 2365 CCQ.

of the primary obligor that are not purely personal to it.[263] They include the death of the guarantor,[264] the nullity of the guaranty contract (e.g., defect of consent), the breach by the obligee of its duty to inform the guarantor, the loss of the guarantor's benefit of subrogation, the breach by the obligee of its duty to act in good faith,[265] the compensation (set-off) of the obligations of the guarantor with the obligations of the obligee to the primary obligor and guarantor's right to terminate a guaranty attached to the performance of special duties upon cessation of such duties.[266]

## B. Guaranties

A guaranty may be contracted only for a valid obligation, but not for an amount in excess of the underlying obligation or under more onerous conditions.[267] Also, the guarantor is bound to fulfill the underlying obligation only if the primary obligor fails to perform it.[268] Moreover, unless the guarantor expressly renounced thereto in advance or bound itself with the primary obligor on a solidary basis, it may invoke the "benefit of discussion," thus compelling the enforcing obligee to demand payment from and exhaust its recourses against the primary obligor before seeking performance under the guaranty for any shortfall.[269] Due to all of the foregoing, the obligation of the guarantor is typically referred to as being secondary, or "accessory" and "subsidiary" to the underlying (or "principal") obligation.

In case of several guarantors guarantying the same underlying obligation of the same primary obligor, each guarantor is liable for the entire underlying obligation but may invoke the "benefit of division." The benefit of division contemplates the right of a guarantor, sued for performance of the entire underlying obligation, to compel the obligee to divide and reduce its claim to the pro rata share of such guarantor. The benefit of division is not available if the guarantor renounced it expressly in advance or is otherwise obligated toward the obligee on a solidary basis with the primary obligor.[270]

Unlike the other Canadian jurisdictions where an exchange of sufficient consideration is essential in order to create an enforceable guaranty, consideration (as understood in most common law jurisdictions) is not required for a guaranty to be binding under Quebec law. From a civil law perspective, instead of an exchange by the parties of valuable rights, a concurrence of wills is

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[263]For a more detailed description of defenses of the guarantor, *see* POUDRIER-LEBEL, Louise, *La libération de la caution*, Service de la formation permanente du Barreau du Quebec, *Développements récents en droit commercial (1996): La réforme du Code civil, rétrospective, deux ans plus tard*, Cowansville (Qc), Yvon Blais, 1996.

[264]Article 2361 CCQ.

[265]Articles 6, 7 and 1375 CCQ.

[266]Article 2363 CCQ.

[267]Articles 2340, 2341 CCQ.

[268]Article 2346 CCQ; *see also* the Comments of the Minister of Justice for such Article.

[269]Articles 2347, 2352 CCQ.

[270]Articles 2349, 2352 CCQ.

required to form a valid bilateral contract.[271] In the Province of Quebec, the element of contract law that offers some similarity with consideration is the *cause* of the contract.[272] The cause of a contract of guaranty is the lawful reason that motivates the guarantor to enter into such contract and it need not be expressed.[273] For instance, in the case of a guaranty entered into as part of a financing, the guarantor's motivating factor would likely be the direct or indirect benefit drawn from the extension of credit by the lender to the borrower.

A guaranty must be expressly made through a written or verbal contract, and it may not be presumed.[274] The general principles of interpretation applicable to all contracts[275] would also apply to a guaranty. In interpreting a guaranty, its nature, the circumstances in which it was formed, the interpretation that has already been given to it by the parties or that it may have received, and usage are all taken into account.[276]

In case of doubt or if the guaranty is a "contract of adhesion," Quebec courts apply a rule similar to the common law doctrine of *contra proferentem:*[277] the guaranty is construed strictly in favor of the guarantor and against the obligee.[278] Under Quebec law, a contract of guaranty in which the essential stipulations were imposed or drawn up by the obligee, on its behalf or upon its instructions, and were not negotiable is a contract of adhesion.[279] An example is the form of guaranty often drawn by a lending institution on a standard form, where the guarantor has little or no part in the negotiation of the agreement.

## C. Other Suretyship Situations

Other than pursuant to a contractual agreement, a guaranty may be imposed by statute or a court order, and would be subject to the rules that govern consensual guaranties.[280]

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[271]TANCELIN Maurice, *Des obligations en droit mixte du Quebec*, 7th ed., Montréal, Wilson & Lafleur Ltée, 2009, para 255 *ff*; *see also* analysis in Royal Institution for the Advancement of Learning v. Hutchison, (1931) 50 B.R. 107, and in Banque canadienne impériale de commerce v. Mallette et Co., [1987] R.J.Q. 96 (C.A.).

[272]Other than the cause, the other three Quebec law requirements to form a valid contract are capacity, consent, and object (i.e., juridical operation); Article 1385 CCQ.

[273]Articles 1371, 1410 CCQ. Article 984 of the former *Civil Code of Lower Canada* made "a lawful cause or consideration" one of the four requisites to the validity of a contract.

[274]Article 2335 CCQ; *see also* the Comments of the Minister of Justice under such Article. The foregoing is contrary to the general principal of Article 1386 CCQ, which provides that the exchange of consents may be either express or implied.

[275]*See* Articles 1425 to 1432 CCQ.

[276]Article 1426 CCQ.

[277]For an application of this doctrine by the Supreme Court of Canada, *see* Manulife Bank of Canada v. Conlin, [1996] 3 S.C.R. 415.

[278]Article 1432 CCQ.

[279]Article 1379 CCQ.

[280]Article 2334 CCQ; *see also Commentaires du ministre de la justice*, le *Code civil du Quebec : un mouvement de société*, published 1993 by Gouvernement du Quebec, Ministère de la justice for such Article; for an example of a guaranty imposed by statute, *see* section 155 of the *Bills of Exchange Act* (R.S.C., 1985, c. B-4); for an example of a court-ordered guaranty, *see* section 716 of the *Civil Code of Procedure* (CQLR c. C-25).

A third party may pledge collateral in favor of the obligee to secure the primary obligation without becoming personally liable for the primary obligation.[281] Although such relationship is called *cautionnement réel*,[282] it would not entitle the third-party pledgor to the benefits and defenses typically available to a guarantor pursuant to the rules governing guaranties.[283]

Quebec law recognizes performance or completion guaranties regarding obligations other than the payment of money. Though typically entered into by insurance companies against remuneration to support the completion of construction projects, such guaranties are governed by the same rules applicable to guaranties for payment of money.[284] In this regard, unless the obligee requires for a specific person to be the guarantor, the guarantor must be domiciled in Canada and have and maintain sufficient property in the Province of Quebec to meet the object of the primary obligation.[285]

## D. Reimbursement, Subrogation, and Contribution Rights

Under Quebec law, a person who pays in the place of a debtor may be subrogated to the rights of the creditor (which includes any security thereunder),[286] but such person may not have more rights than the subrogating creditor.[287] Pursuant to Article 1656(3) CCQ, though it may occur on consensual basis, subrogation will take place by operation of law in favor of a person (i.e., the guarantor) who pays a debt to which he is bound with others or for others and that he has an interest in paying. Once subrogation has occurred, the guarantor would replace the obligee and is entitled to claim payment of the underlying obligation from the primary obligor (as well as other guarantors).

Where several persons are solidary guarantors of the same primary obligor for the same debt, each of them is liable for the whole debt and may no longer invoke the benefit of division.[288] Solidarity between co-obligors is presumed where the obligation is contracted for the service or carrying on of an enterprise, and it otherwise exists if so stipulated by the parties or imposed by law.[289]

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[281]Article 2681 CCQ.

[282]In French, *cautionnement* means guaranty; *réel* may be roughly translated to the Latin expression *in rem*.

[283]Roker v. Prêt relais Capital Inc., 2012 QCCA 1295. As such, the *cautionnement réel* is a legal relationship governed by the rules applicable to hypothecs.

[284]Articles 2111, 2123 CCQ; KARIM Vincent, *Contracts d'Entreprise*, 2nd ed., Montréal, Wilson & Lafleur Ltée, 2011, at para 861; *See* Garantie, Cie d'assurance de l'Amérique du Nord v. Vortek Groupe Conseil Inc., 2005 CanLII 11928 (QC C.S.).

[285]Article 2337 CCQ.

[286]Article 3003 CCQ.

[287]Article 1651 CCQ.

[288]Article 2352 CCQ; under the benefit of division, a guarantor may require the obligee to divide its claim and to reduce it to the amount of the share and portion of each guarantor.

[289]Article 1525 CCQ.

Pursuant to Article 2360 CCQ, where several persons have become guarantors of the same primary obligor for the same debt, the guarantor who has paid the debt has in addition to the action in subrogation, a personal right of action against the other guarantors, each for his share and portion.[290] The personal right of action may only be exercised where the guarantor has paid in one of the cases in which he could take action against the debtor before paying. Where one of the guarantors is insolvent, its insolvency is apportioned by contribution among the other guarantors, including the guarantor who made the payment.

Upon receipt of payment, express release granted by the obligee to one of the guarantors releases the other guarantors to the extent of the remedy they would have had against the released guarantor. Nevertheless, no payment received by the obligee from the guarantor for its release may be imputed to the discharge of the primary obligor or of the other guarantors, except as regards the guarantors, where they have a remedy against the released guarantor and to the extent of that remedy.[291]

# IX. Insolvency Laws

## A. Receivership

Receivership in Quebec is regulated by the Bankruptcy and Insolvency Act (BIA),[292] a federal law at Part XI. Under the BIA, a court may appoint a receiver, upon application by a secured creditor, if it considers it to be just or convenient to do so.[293] A receiver may do any or all of the acts provided in the BIA, notably taking possession of all or substantially all of the inventory, accounts receivable, or other property, exercise any control necessary of the insolvent person's business, or take any other action that the court considers advisable.[294] In addition, a receiver may not be appointed before the expiration of a ten-day delay if the secured creditor notifies[295] the insolvent of its intention to enforce a security on specific items.[296] The receiver must prepare various statements throughout the receivership,[297] act honestly and in

[290]*See also* Schwitzguebel v. Cadieux, REJB 2002-30735 (C.A.) at para. 31.

[291]Article 1692 CCQ; payment made by a guarantor to obtain the release of its guaranty should not be considered payment of the underlying obligation of the primary obligor except for the other guarantors who have a claim against the released guarantor (*see* Comments of the Minister of Justice under Article 1692 CCQ); *see also* Banque Nationale du Canada v. Picard, EYB 2007-123123 (C.S.) at para 10.

[292]R.S.C. 1985, c. B-3, hereinafter BIA.

[293]Article 243 (1) BIA.

[294]*Ibid.*

[295]Article 244 (1) BIA.

[296]Article 243 (1.1) BIA.

[297]Article 246 BIA.

good faith as well as deal with the property under his care in a commercially reasonable manner.[298]

## B. Assignment for Benefit of Creditors

An insolvent person may make an assignment of all of his property for the general benefit of his creditors.[299] Should the receiver be the one filing the assignment, he shall appoint a trustee.[300] The assignment will remain inoperative until filed with the official receiver in the locality of the debtor and the official receiver may refuse to file unless the assignment is in the prescribed form[301] and accompanied by a sworn statement.[302]

## C. Fraudulent Transfer Law

The BIA provides that any bankrupt person who makes any fraudulent disposition of his property or, after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property worth 50 dollars or more, is guilty of an offense and is liable to a fine or to imprisonment.[303] Any prosecution by indictment must be undertaken within five years of the offense, and if the offense is punishable by summary conviction, the complaint must be made within three years of the basis of the complaint.[304]

In addition to the provisions of the BIA, the CCQ provides that error on the part of one party induced by fraud committed by the other party vitiates consent.[305] This may take the form of a fraudulent maneuver aimed at deliberately misdirecting someone to conclude a legal act, such as the sale or transfer of property.[306] In such a situation, the party victim of this fraud may petition the court to grant a motion to annul the contract concluded and, in cases were the fraud caused injury, grant damages.[307] Failure to mention a state of insolvency would most probably be considered to be fraud by reluctance under the CCQ.

The CCQ stipulates the various priorities, rights, and obligations of hypothecary creditors, such as those in respect of enforcement of the hypothec and liquidation of the collateral.

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[298]Article 247 BIA.
[299]Article 49 (1) BIA.
[300]Article 49 (4) BIA.
[301]Article 49 (3) BIA.
[302]Article 49 (2) BIA.
[303]Article 198 BIA.
[304]Article 208 BIA.
[305]Article 1401 CCQ.
[306]*Société de fiducie de la Banque Hongkong c. Dubord Construction inc.*, [1998] R.J.Q. 863.
[307]Article 1419 CCQ.

# X. Litigation and Arbitration

## A. Lender Liability

### *1. Duty of Good Faith*

Quebec law imposes a duty of good faith to every person in its exercise of its civil rights.[308] This obligation is reinforced by the fact that no person may exercise a right with the intent of injuring another or in an excessive manner.[309] Thus lenders have to keep in mind that courts may intervene if they decide that rights were exercised in a negligent manner.[310] In this regard, the courts will consider many factors, such as the loan amount, the lender's risk of losing the benefit of any security, the length of the commercial relationship with the borrower, the behavior and reputation of the borrower, the borrower's ability to refinance the loan within a short delay, and all other circumstances surrounding the loan.

In addition, parties have an obligation to conduct themselves in good faith at the time the obligation is created and throughout its performance.[311] This implies an obligation of cooperation between the parties.[312] The good faith requirement of Quebec law implies that a lender's obligation can take the form of a reasonable delay within which the borrower may make a required payment and find financing from a different source.[313] There is no obligation for a secured lender, in a liquidation situation, to renew the borrower's loan.[314] It is important to note that lenders must give reasonable time for the borrower to meet its obligations and exercise its hypothecary rights against the borrower, as the Supreme Court of Canada has determined that such behavior was contrary to the duty of good faith.[315]

### *2. Fiduciary Duty*

Though there is no fiduciary duty imposed on lenders toward their borrowers per se, there is an obligation to act in a prudent and diligent manner towards third parties in order to avoid causing them prejudice. In a landmark case,[316] the Supreme Court of Canada ruled that banks have a duty to keep harmless shareholders of a lender and that sudden and drastic action by the lender, such

[308]Article 6 CCQ.

[309]Article 7 CCQ.

[310]Finney c. Barreau du Quebec, 2004 CSC 36.

[311]Article 1375 CCQ.

[312]Entreprises MTY Tiki Ming Inc. c. McDuff, 2008 QCCS 4898.

[313]*Banque de Montréal c. Modafferi,* [2001] R.L. 189; *Banque Nationale du Canada c. Houle,* [1987] R.J.Q. 1518.

[314]*Confederation Trust Co., en liquidation c. Turcot,* J.E. 2000-1346.

[315]*Houle c. Canadian National Bank,* [1990] 3 S.C.R. 122.

[316]*Ibid.*

as an accelerated liquidation of the company following a default, is a breach of the lender's duty of care. Lenders thus have to always keep in mind that they should allow the borrower reasonable time to remedy any default before taking enforcement action. This case was based on Quebec law, which provides for extracontractual liability of a party. In addition, lenders have a duty to disclose any important information to sureties, as failure to inform could result in the impossibility of a lender to claim all amounts due.[317]

### *3. Consumer Protection Act as Applicable to Commercial Loans*

The Quebec Consumer Protection Act creates onerous obligations on lenders, including various fair business practices and disclosure requirements, but it only applies to contracts between a merchant and a consumer.[318] A consumer is defined as a natural person, except a merchant who obtains goods or services for the purposes of his business.[319] Therefore, for commercial loans, the provisions of the CPA do not apply in Quebec.

## B. Recovery of Attorney's Fees

Article 340 CCP provides that the losing party must pay all costs, unless otherwise ordered by the court. In addition, the court may modulate these costs according to the nature of the action and its complexity. Parties must also keep in mind that the tariff of judicial fees of advocates[320] also applies to actions taken in Quebec. Although Article 340 CCP provides that the losing party should pay the costs, it is possible for the court to force each party to pay their own costs[321] or even force the winning party to pay all costs in the event that it could have settled out of court but elected not to do so.[322] Courts have a large degree of latitude in granting costs and fees to a party,[323] thus it is difficult to anticipate exactly how they will be awarded.

Where the loan is secured, notwithstanding any stipulation to the contrary set forth in the hypothec, the secured party may not recoup through the proceeds of the collateral the extrajudicial professional fees incurred by the creditor to recover the capital and interest secured by the hypothec, or to preserve the collateral.[324] In order to sidestep this rule, secured parties typically rely on guarantees, security obtained outside of Quebec, or other credit enhancements.

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[317] *National Bank c. Soucisse et al.*, [1981] 2 S.C.R. 339

[318] Article 1, Consumer Protection Act, CQLR c. P-40 (hereinafter CPA)

[319] Article 2 CPA.

[320] CQLR c. B-1, r. 22.

[321] Articles 339–341 CCP; *see also Construction Morival ltée c. Kyriacou*, (2006) R.J.Q. 916 (C.Q.).

[322] *Entretien pont roulant Pro Action inc. c. Métallisation Viau inc.*, J.E. 200-554 (C.S.); *Tanguay c. Colmatec inc.*, J.E. 2010-147 (C.S.).

[323] Carignan c. Régie de gestion des matières résiduelles de la Mauricie, J.E. 2006-1619 (C.A.).

[324] Article 2762 CCQ.

## C. Statutes of Limitations

### *1. Applicable Periods of Limitations*

Under Quebec law, the common law concept of statute of limitations is known as extinctive prescription. An action to enforce a personal right or movable real right is prescribed by three years, if the parties have not established a different period.[325] Actions to enforce immovable rights are prescribed by ten years, although actions to retain or obtain possession of an immovable have to be filed within one year from the dispossession.[326] It is important to note that provisions pertaining to prescription are of public order in Quebec; therefore one may not renounce it in advance.[327]

### *2. Extension by Voluntary Payment*

A party may not renounce prescription in advance, but it may renounce it once it has been acquired.[328] The best example is a voluntary payment made by the debtor. Such a payment is considered to be an acknowledgement of debt under Quebec law, which would interrupt prescription. As such, every voluntary payment extends prescription.[329] As with many other jurisdictions, this payment must be made with the clear intention that it is made because a debt is owed to the creditor. Payments made by a joint debtor also produce the same effects.[330]

### *3. Use of Time-Barred Claim as Defense*

A borrower may raise a ground of defense to defeat an action even if the time for using it by way of direct action has expired, but only if such defense was a valid one to an action when it could have been used in a direct action.[331]

### *4. Effect on Collateral for Time-Barred Claim*

A hypothec charging collateral is extinguished by the extinction of the obligation whose performance it secures[332] because a hypothec is merely an accessory right and is valid only as long as the obligation whose performance it secures subsists.[333] Accordingly, if the underlying debt is prescribed, the collateral encumbered by hypothec to secure same would become free of such encumbrance.[334]

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[325]Article 2925 CCQ.
[326]Article 2923 CCQ.
[327]Article 2883 CCQ.
[328]Article 2883 CCQ.
[329]*Aviva, compagnie d'assurances du Canada inc. c. Roberge*, 2006 QCCS 2253.
[330]Article 2900 CCQ.
[331]Article 2882 CCQ.
[332]Article 2797 CCQ.
[333]Article 2661 CCQ.
[334]*Charlebois c. Société d'habitation et de développement de Montréal*, [1998] R.D.I. 152.

### *5. Agreements to Extend or Shorten Limitations Period*

As previously mentioned, prescription may not be renounced in advance.[335] In addition, given that the provisions pertaining to prescription are of public order,[336] parties may not agree upon a prescriptive period other than that provided by law.[337] However, a party may renounce prescription either tacitly or expressly.[338] In order to renounce prescription, the delay must have expired and the debtor must be the one renouncing it. Though it is possible to include a provision limiting the prescription period in an agreement, such provision shall have no effect.[339] Parties may include provisions known as "tolling agreements" where they renounce acquired prescription with regards to claims they may have.

## D. Choice of Law Provisions/Conflict of Laws

Under Quebec private international law, the form of a contract of lending is governed by the law of the place where it is made. If the contract does not create a security interest, it remains valid if made in the form prescribed by the law of the domicile of one of the parties upon execution.[340]

Moreover, basing itself on the Convention on the Law Applicable to Contractual Obligations (Rome Convention of 1980), Quebec law recognizes the will of the parties where the designation of the applicable law is concerned.[341] Thus a contract of lending, whether or not containing any foreign element, is governed by the law expressly designated therein or the designation of which may be inferred with certainty from the terms thereof.[342]

If no law is designated, Quebec courts would apply the law of the jurisdiction with which the contract is most closely connected, in view of its nature and the attendant circumstances.[343] A contract containing no choice of law clause would be presumed[344] to be most closely connected with the law of the jurisdiction where the party who is to perform the prestation that is the characteristic of the contract is domiciled (i.e., the lender).[345]

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[335]Article 2883 CCQ.

[336]*Consumers Cordage Co. c. Connolly,* 31 S.C.R. 244; *Montréal (City of) v. McGee,* 30 S.C.R. 582.

[337]Article 2884 CCQ. *See also Marobi Excavation inc. c. St-Simon-de-Bagot* (Municipalité de), 2009 QCCS 2100; *C.G.U., compagnie d'assurances du Canada c. Longueuil* (Ville de), J.E. 2003-1123; *Caisse populaire de St-Roch de Montréal c. Palence,* [1967] R.L. 442.

[338]Article 2885 CCQ.

[339]3107671 *Canada inc. c. Construction J. & R. Dumouchel & Fils inc.,* J.E. 99-1397 (C.Q.)

[340]Article 3109 CCQ.

[341]*Dell Computer Corp. c. Union des consommateurs,* [2007] 2 S.C.R. 801, 2007 SCC 34.

[342]Article 3111 CCQ.

[343]Article 3112 CCQ.

[344]Article 3113 CCQ.

[345]*Industries Caron (meubles) inc. c. Rich-Wood Kitchens Ltd.,* 2007 QCCS 5101; *see also Industries Caron (meubles) Inc. c. Rich-Wood Kitchens Ltd.,* 2007 QCCS 5101.

## E. Forum and Venue Selection Provisions

Quebec courts have jurisdiction in the following cases involving personal actions of a patrimonial (i.e., monetary) nature:[346] (1) the defendant has his domicile or residence in Quebec; (2) the defendant is a foreign entity but has an establishment in Quebec and the dispute relates to its activities in Quebec; (3) a fault, injury, or injurious act was committed in or one of the obligations arising from the contract was to be performed in Quebec; (4) the parties have agreed to submit the present or future disputes between themselves relating to a specific legal relationship to such courts; and (5) the defendant has submitted to their jurisdiction. However, Quebec courts have no jurisdiction where the parties have agreed to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator unless the defendant submits to the jurisdiction of the Quebec courts.

Where the action involves collateral, Quebec courts have jurisdiction to hear a real action if the property in dispute is situated in Quebec.[347]

## F. Jury Trial Waivers

Jury trials for civil cases were abolished in Canada decades ago.[348] As such, there is no need to have contractual provisions to waive jury trials in a Quebec law contract. Parties may elect to provide specific rules about arbitration in their agreements[349] as set forth below.

## G. Arbitration Agreements

Parties may elect to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.[350] Though many commercial agreements in Quebec do provide for binding arbitration as an alternative to the Quebec courts, it remains the exception for disputes arising between a lender and borrower.

Should parties not provide for binding arbitration rules, the provisions from articles 620 CCP and following would apply. Some provisions of the CCP are preemptory and may not be agreed upon differently by the parties.[351]

[346]Article 3148 CCQ.

[347]Article 3152 CCQ.

[348]Some criminal cases may be tried before a jury, but such discussion falls outside the scope of this chapter.

[349]Article 2638 CCQ.

[350]Article 2638 CCQ.

[351]Article 2643 CCQ.

## H. Pre-Judgment Remedies

Seizure before judgment is available for lenders as a pre-judgment remedy.[352] Such seizure requires the authorization of a judge and may only be granted when there is reason to fear that the recovery of the debt, without the authorization, may be put in jeopardy. Seizure if effected in virtue of a writ, which is issued upon a written request supported by an affidavit,[353] may be exercised against all the movable property of the borrower or only the movable or immovable property specifically designated in the writ.[354] The borrower may prevent such seizure by giving the seizing officer sufficient guarantee chosen by the borrower, which can only be the deposit of a sum of money, a guarantee issued by a financial institution in Quebec, bonds presumed to be sound investments under the CCQ, or an insurance policy securing the borrower's obligations.[355]

## I. Judgments

### *1. Confession of Judgment*

It is possible for defendants to file an acquiescence in a demand, either in the whole or to any part.[356] The defendant may do this at any stage of the proceedings, which implies the filing of a lawsuit. The acquiescence must be done in writing and signed by the defendant or his attorney.[357]

### *2. Interest on Judgments*

Damages incurred by a creditor based on a lending contract consist of interest at the rate agreed to in the contract, or at the legal rate if the contract is silent as to the interest rate,[358] as that may be the only viable remedy available to the creditor.[359] The creditor is entitled to such damages from the date of default by the debtor, and there is no need for the creditor to prove that he has sustained any injury.[360] In addition, the creditor may be entitled to additional damages, but would have to justify them[361] and the contract itself must provide for such damages.[362] The rate of interest applicable to damages incurred by a creditor based on a lending contract that does not provide an interest rate is set forth in the Interest Act.[363]

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[352]Article 518 CCP.
[353]Article 520 CCP.
[354]*Ibid.*
[355]Article 523 CCP.
[356]Article 217 CCP.
[357]*Ibid.*
[358]Article 1617 CCQ.
[359]*Développement Tanaka inc. c. Commission scolaire de Montréal,* 2007 QCCA 1122.
[360]*Ibid.*
[361]*Ibid.*
[362]*Développement Tanaka inc. c. Commission scolaire de Montréal, op. cit.*, note 357.
[363]Interest Act, R.S.C., 1985, c. I-15, article 3.

### 3. Survival of Judgments

Any right resulting from a judgment must be exercised within ten years of the date the judgment is entered.[364] The same time period applies to costs awarded in a judgment.[365] This ten-year period may not be extended under Quebec law.

### 4. Judgment Liens and Post-Judgment Remedies

A claim under a judgment may give rise to a legal hypothec.[366] Any creditor who was awarded a sum of money by a court having jurisdiction in Quebec may acquire such legal hypothec by registering a notice describing the charged property and specifying the amount.[367] This notice is filed with a copy of the judgment and it must be served on the debtor to be valid.[368] A creditor may thus decide to exercise any of the hypothecary rights provided in the CCQ for the enforcement and realization of his security, namely taking possession of the charged property to administer it, taking it in payment of the claim, causing it to be sold by judicial authority, or selling it himself.[369]

In addition to this legal hypothec, the creditor may summon the debtor to appear before a judge or a clerk to be examined as to all of his property, as well as to his sources of revenues.[370] Should a party condemned to deliver or surrender property, the creditor may be placed in possession in virtue of a writ.[371] It is possible to seize bonds, debentures, promissory notes, and other such instruments payable to order or to bearer.[372] A lender may exercise any and all of the different means of execution allowed by law at the same time.[373] Some property may not be seized,[374] and inclusion of such property may allow the debtor to ask the court to remove it from the seizure.[375]

### 5. Assignment of Judgments

As mentioned in the previous section, a judgment granting monies or execution by the debtor creates a claim for the creditor. Under Quebec law, a creditor may assign all or part of a claim against a debtor.[376] This assignment may be set up against the debtor and third parties as soon as the debtor has acquiesced in it, has received a copy of the act of assignment or through any other evidence of the assignment.[377] Any assignment of a universality of claims may be set

[364]Article 2924 CCQ.
[365]*Amos (Ville d') c. Centre chrétien d'Amos inc.,* J.E. 99-551.
[366]Article 2724 CCQ.
[367]Article 2730 CCQ.
[368]*Ibid.*
[369]Article 2748 CCQ.
[370]Article 688 CCP.
[371]Article 692 CCP.
[372]Article 696(2) CCP.
[373]Article 702 CCP.
[374]Articles 694, 696 and 698 CCP.
[375]Articles 735 to 741 CCP.
[376]Article 1637 CCQ.
[377]Article 1641 CCQ.

up by registering the assignment in the register of personal and movable real rights, as long as all other formalities for setup against the debtors who have not acquiesced in it have been accomplished.[378]

## 6. *Enforcement of Foreign Judgments*

As with most jurisdictions, Quebec law has provisions pertaining to foreign decisions.[379] As such, Quebec law permits a motion to be brought in a Quebec court for recognition and enforcement of any final and enforceable judgment *in personam*[380] awarding a sum of money of a foreign court that is not subject to an ordinary remedy at the place where it was rendered, if:[381]

(a) the foreign court rendering such judgment has jurisdiction over the judgment debtor, as determined by the CCQ;[382]
(b) such judgment was not rendered in contravention of the fundamental principles of procedure or contrary to any order made by the Attorney General of Canada under the Competition Act (Canada)[383] or the Foreign Extraterritorial Measures Act (Canada);[384]
(c) there were no proceedings pending in the Province of Quebec and no judgment rendered in the Province of Quebec between the same parties, based on the same facts and having the same object (*res judicata*);
(d) the outcome of such judgment is not manifestly inconsistent with public order as understood in international relations;
(e) such judgment does not enforce obligations arising from the taxation laws of a foreign jurisdiction, unless there is reciprocity; and
(f) the motion for recognition and declaration for enforcement of such judgment in the Province of Quebec is commenced prior to the prescription of such judgment pursuant to the laws applicable to the merits of the dispute.

Further, if the judgment was rendered by default, the plaintiff must prove that the act of procedure initiating the proceedings was duly served on the defendant, and a Quebec court may refuse recognition or enforcement of the judgment if the defendant proves that, owing to the circumstances, he was unable to learn of the act of procedure or was not given sufficient time to offer his defense.[385]

If any such motion for recognition and enforcement is brought before a Quebec court, such Quebec court may only consider whether the conditions set out above were met and may not consider the merits of the judgment.

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[378]Article 1642 CCQ.
[379]Articles 3155 to 3163 CCQ.
[380]i.e., imposing personal liability or obligation on a party
[381]Article 3155 CCQ.
[382]Please refer to the section entitled FORUM AND VENUE SELECTION PROVISIONS above for the applicable criteria.
[383]R.S.C., 1985, c. C-34, s. 82.
[384]R.S.C., 1985, c. F-29, s. 8.
[385]Article 3156 CCQ.