

THE NEW *CIVIL CODE* OF QUÉBEC AND INTELLECTUAL PROPERTY: PRELIMINARY REFLEXIONS AND COMMENTS

by

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Introduction

Persons

- Integrity of the person
- Reputation and privacy
- Name
- Legal persons

Family

Successions

Property

- Kinds of property and ownership
- Undivided co-ownership
- Administration of the property of others

Obligations

- Contract of adhesion
- Civil liability
- Solidarity
- Damages
- Sale
- Lease
- Contract of employment
- Contract for services

Hypothecs

Evidence

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Onus
 Judicial knowledge
 Authentic acts
 Computerized records
 Reproduction
 Admissibility of evidence

Prescription

Applicable limitation period
 Prescription must be pleaded
 Wrong jurisdiction
 Solidarity

Publication of rights

Private international law

Conclusion: Portalis
 Appendix A - Authors
 Postface

Introduction

For those of you who are not familiar with the civil approach to a codification, let's say that a Code is a systematic arrangement, in a comprehensive body, of the rules which relate to a particular matter.

A Code is not an administrative consolidation of preexisting laws and regulations nor a restatement which is generally a report -or statement- of the rules emerging from caselaw (and which, therefore, is more in the nature of a compilation).

The Code proceeded from a legislative intent to reduce in one instrument the laws of Québec. The Civil Code of Québec (as well as its predecessor, the Civil Code of Lower Canada) is a practical and accessible code and does not contain any statements of philosophic principles (as is the case, for instance, for the German Code): it only codifies the positive law. Indeed, in *An Act respecting the Codification of the Laws of Lower Canada relative to Civil matters and Procedure* (L.C. 1857, c. 43, s. 4 and 6) the mandate of the codifiers was described as follows:

4. The said Commissioners shall reduce into one Code, to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature; but they shall not include in the said Code, any of the Laws relating to the Seignorial or Feudal Tenure.

6. In framing the said Codes, the said Commissioners shall embody therein such provisions only as they hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest amendments as they think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are found.

Such a spirit and practical approach was maintained in the Civil Code of Québec (or "CCQ"), the Preliminary Provision of which reads:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *juris commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

The Civil Code of Québec covers almost every facet of the "Property and Civil Rights in the Province". It follows that it interacts/intersects with the day-to-day operation of the federal intellectual property ("I.P.") statutes, *i.e.* the exercise of those rights of property in the intangibles such as ownership, assignment, license or legal devolution thereof.

The Civil Code of Quebec can be used to resolve questions such as, for example:

(a) Who is the owner of an invention or of the copyright in a work? The *Patent Act* is silent on the matter and section 13 of the *Copyright Act* provides only for a general proposal; the answer will have to be found in articles 2085, which deals with contract of employment and 2098 which covers contract for services.

(b) What happens with the co-ownership of a patent or the commercial exploitation of a work of joint authorship? Answers could be found in the provisions of the CCQ relating to undivided co-ownership. And, as one will see, those answers are not necessarily in complete harmony with the findings in the recent *Forget v. Speciality Tools of Canada Inc.* (1993), 48 C.P.R. (3d) 323 (B.C.S.C.) Rowan J.

(c) Who is entitled to defend the moral rights of a deceased author under section 14.2 of the *Copyright Act*? How could property rights be claimed in an unregistered trademark or tradename, apart from a passing off action? Could a trademark or a patent be seized? could it be mortgaged?

(d) What is the destination of the so-called "I.P." rights in the matrimonial relationship, especially when it ends by death or otherwise?

The *Civil Code of Québec* came (S.Q. 1991, c. 64; Bill 125) came into force on 1994.01.01. It replaced the *Civil Code of Lower Canada* ("CCLC") which was adopted by chapter 41 of the statutes of 1865 of the legislature of the Province of Canada (C.I.F. 1866.08.01).

The *Civil Code of Québec* comprises ten books, namely:

- Book One: Persons;
- Book Two: The Family;
- Book Three: Successions;
- Book Four: Property;
- Book Five: Obligations;
- Book Six: Prior Claims and Hypothecs;
- Book Seven: Evidence;
- Book Eight: Prescription;
- Book Nine: Publication;
- Book Ten: Private International Law.

Each of these Books is divided in Titles, which are themselves divided in Chapters, which Chapters in turn are divided in Sections, Subsections and Sub-subsections.

The *Civil Code of Québec* (or CCQ), which comprises itself 3168 articles (or "sections"), should always be read in conjunction with the 719 sections of *An Act respecting the implementation of the reform of the Civil Code* (S.Q. 1992, c. 57; Bill 38).

Furthermore, to implement the *Civil Code of Québec*, several acts were abrogated or modified in depth and new acts were passed, impressive sets of regulations were adopted and numerous forms were created. Again, all as of January 1st of 1994.

As each and every provision of the CCQ could not be discussed in this paper, a selection -albeit arbitrary- had to be made; these provisions will be treated more or less in the order in which they appear in the CCQ.

Book One: Persons

The comments under this Book will be divided as follows:

- °Certain Personality Rights
 - ¬Integrity of the Person
 - ¬Reputation and Privacy
 - ¬Name
- °Legal persons

Integrity of the Person

Today, to our control of inert matter has been added the control of living matter, including the human being in all its aspects. Faced with this "bursting" of the body, now a scientific tool as well as material for industry, the boundaries between persons and things are not always clear. (see DELEURY (Édith), *La personne et son corps: l'éclatement du sujet* (1991), 70 Canadian Bar Review 448, editorial presentation)

For those of you who are consulted by clinical institutes or biotechnology industries, the CCQ offers "some" clarifications apart from the general principle that: "Every person is inviolable and is entitled to the integrity of his person". art. 10(1)

Alienation inter vivos.

- (a) a part of the body may be alienated inter vivos provided the risk assumed is not disproportionate to the benefit anticipated: art. 19;
- (b) this alienation is gratuitous: art. 25(1);
(this constitutes a departure from art. 20 CCLC where the alienation of part of the body susceptible of regeneration was convertible into cash)
- (c) the consent to the alienation shall be in writing but may be withdrawn verbally: art. 24.

Experimentation on human.

- (a) experimentation on the human body is permissible provided the risk assumed is not disproportionate to the benefit anticipated: art. 20;
- (b) this experimentation is gratuitous: art. 25(2)
(i.e., no financial reward but compensation for the loss and inconvenience suffered);

(c) the consent shall be in writing but may be withdrawn verbally: art. 24.

Dead body.

(a) a dead body may be disposed of, in whole or in part: art. 42

(b) this alienation is gratuitous: art. 25(1)

(c.) the consent to the alienation may be given in writing or verbally: art. 43.

Reputation and Privacy

Article 3 CCQ confirms that every person is the holder of personality rights, such as the right to the respect of his name, reputation and privacy. This general principle is applicable to natural persons as well as to legal persons; article 303 provides that "the provisions of this Code respecting the exercise of civil rights by natural persons are applicable to (legal persons), adapted as required".

Article 35(1) CCQ states the general principle that "Every person has a right to the respect of his reputation and privacy".

Article 36 CCQ provides for a non-exhaustive list of acts which may be considered as invasions of a person's privacy, amongst which:

- ° appropriating or using his image or voice while he is in private premises;

- ° using his name, -image, -likeness or -voice for a purpose other than the legitimate information of the public;

- ° using his correspondence, manuscripts or other personal documents.

Article 3 CCQ provides specifically for the inalienability of the personality rights but it does not prohibit their licensing.

Indeed, article 35(2) CCQ confirms this possible exploitation by a third party: "No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law". This article may be compared, for instance, with the wording of subsection 27(1) of the *Copyright Act*: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright does..." or section 28.1 of the same Act "...in the absence of consent by the author..."

Article 35(2) CCQ also confirms that such rights do not end with the death of the person but, as property rights, are to be considered as part of the estate:

"No one may invade the privacy of a person without the consent of the person or his heirs (...). For an application of the legal devolution of those rights reference could be made, for instance, to *Fondation Le Corbusier v. Société en commandite manoir Le Corbusier Phase I* (1991), (1991) R.J.Q. 2864 (Qué.Sup.Ct.) Lemieux J., at 2871-2873; in appeal 500-09-001609-916, which, even if decided before the coming into force of the Civil Code of Quebec offers interesting perspectives.. In this matter, a French foundation claimed to be entrusted to represent as its legal heir the French architect Charles Edouard Jeanneret dit Le Corbusier. The foundation successfully restrained a property developer from using the words "Le Corbusier" as part of its corporate name.

The devolution "à cause de mort" of these personality rights is also confirmed by article 625(3):

The heirs are seised of the rights of action of the deceased against any person or that person's representatives, for breach of his personality rights.

Article 1610 CCQ further states that where the rights of a creditor to damages result from a breach of personality right, such a right may not be assigned and may be transmitted only to his heirs.

As the personality rights are inherent to the person, there is no legal requirement, like in Tennessee or California to record specifically those rights, apart from the general formalities related to the acceptance of a succession.

It would also seem that the applicable limitation of action for breach of a personality right would be the general one of three years (art. 2925) unless the action is considered as for defamation (in which case it would be one year of the knowledge: art. 2929).

As a last word, be it noted that the collection, use and communication of information on a person is now seriously circumscribed in view of article 37 and its related *An Act respecting the protection of personal information in the private sector* or "*Loi sur la protection des renseignements personnels dans le secteur privé*" (S.Q. 1993, c. 17)

Name

Article 5 states that "every person exercises his civil rights under the name assigned to him and stated in his act of birth" The use of a name other than his name is not, however, prohibited: it would be the case, for instance for a

pseudonym or nom de plume. In such a case "a person who uses a name other than his own is liable for any resulting confusion or damage".

The right to the respect of the name, already referred to in article 36(5) CCQ, is restated at article 55(1) CCQ: "Every person has a right to the respect of his name".

There is a right of action to insure the respect of a name that is vested upon the holder of the name as well as his spouse or close relatives: article 56(2) CCQ. Whether such rights of action of the spouse or the relatives are distinct from the rights of action of the holder of the name has yet to be determined, as well as, for instance, priority between heirs who might consent to this use and surviving spouses or relatives who do not.

An interesting question may also arise in regard of the descendability (or, if one prefers, transmissibility) *ad infinitum* of the right to a name (or related personality rights) and paragraph 9(1)(L) of the *Trade-Marks Act*, which reads:

No person shall adopt in connection with a business, as a trademark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for (...) the portrait or signature of any individual who is living or has died within the preceding thirty years.

It is also of interest to note that article 35 CCQ, as particularized by article 36 CCQ, is a quasi duplication of section 5 of the Québec *Charter of Human Rights*: it follows that an invasion of the personality rights may give rise to a claim for the damages sustained as well punitive and exemplary damages.

Legal persons

Corporations, under the Civil Code of Quebec, are no longer referred to as "corporations" but rather "legal persons", either of public or of private interest. Unless otherwise indicated, legal persons have the same rights as natural persons.

A legal person has a name under which it exercises its rights but it may also use a name other than its own name: art. 306 CCQ.

At this point, it is important to note the coming into force, also as of 1994.01.01 of *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* or "*Loi sur la publicité légale des entreprises individuelles, des sociétés et des personnes morales*" (S.Q., 1993, c. 48) (Indeed, one will

have also noted that, as a matter of legal drafting, "short titles are no longer used in Quebec legislation!")

The fact is that section 2 of this *Act respecting legal publicity* provides for the compulsory registration of:

- (1) every natural person operating a sole proprietorship in Québec, whether or not it is a commercial enterprise, under a name which does not include the person's surname and given name;
- (2) every general partnership and limited partnership formed in Québec;
- (3) every partnership not formed in Québec, if it carries out an activity in Québec, including the operation of an enterprise, or possesses an immovable right, other than a prior claim or hypothec, in Québec;
- (4) every legal person established for a private interest and which is constituted in Québec;
- (5) every legal person established for a private interest not constituted in Québec, but domiciled in Québec, which carries on an activity in Québec, including the operation of an enterprise, or possesses an immovable real right, other than a prior claim or hypothec, in Québec;
- (6) every legal person contemplated in paragraph 4 or paragraph 5 which results from an amalgamation, other than a simplified amalgamation, or from a division, where such operation is provided for in law.

Legal persons constituted before 1994.01.01 will also have to register inasmuch as they still fall in one of the named categories.

Pursuant to section 10 of this *Act respecting legal publicity*, a declaration of registration shall contain, inter alia, (1) the registrant's name and (2) any other name used by the registrant in Québec in carrying on an activity or in operating an enterprise.

The most surprising aspect however is the interpretation currently given to this obligation by the Quebec Superintendent of Financial Institutions ("Inspecteur général des institutions financières" or "IGIF"). The IGIF considers that trademarks, whether for wares or services, as they distinguish the business of the legal person, or part thereof, should be included in this registration. Indeed the IGIF's guide of Déclaration d'immatriculation - personne morale specifically states, at p. 9:

Autres noms utilisés au Québec.

Tous les noms utilisés au Québec par un assujéti dans l'exercice de son activité, de l'exploitaion de son entreprise (...) doivent être enregistrés.

Cela comprend non seulement les noms d'emprunt utilisés pour identifier une activité, un établissement ou une entreprise, mais encore les noms de marchandises ou de services (marques de commerce) dont l'assujéti est propriétaire ou usager au Québec.

One may argue (amongst other things!) that, at least from a conceptual point of view, such an interpretation of the IGIF takes us back to the situation prevailing before the *Trade Marks Act of 1954* when the trademark could not be assigned without the related goodwill of the business.

In any event, as the fee for the deposit of an annual declaration is only 69\$ (for a profit-making legal person), irrespective of the number of trademarks, tradenames or styles referred to in the registration form, it would certainly be a good move to include all those trademarks in the declaration as it should constitute a bar to the adoption of a similar trademark/tradename by third parties. Despite ambiguities in the wording of the Guide, it would seem that this registration should cover only the "names" used in the Quebec territory, therefore excluding proposed use trademarks.

In view of the fact that when assigning a name to a legal person, the Quebec IGIF does not consult nor take into account the trademarks register or the federal (or other provincial) tradenames registers, this registration shall be considered as an interesting tool to protect one's trademark against the incorporation of such a trademark as part of the business or corporate name of a third party constituted in corporation under the *Quebec Companies Act* (R.S.Q., c. C-38) or similar statutes. The underlying constitutional debate over the matter is obviously not in the scope of this paper.

(as to the prohibitions of registration, see section 13 of that statute and regulations thereunder:

13(1) "contrary to the Charter of the French language,

13(2) "prohibited by regulations",

13(7) "falsely suggests relation to another person",

13(8) "may lead to confusion with a name used by another person",

13(9) liable to mislead third persons".)

Finally, as amended also on 1994.01.01, subsection 68(1) of the *Charte de la langue française* (L.R.Q., c. C-11) allows

A firm name may be accompanied with a version in a language other than French provided that, when it is used, the French version of the firm name appears at least as prominently.

Une raison sociale peut être assortie d'une version dans une autre langue que le français pourvu que, dans son utilisation, la raison sociale de langue française figure de façon au moins aussi évidente.

This subsection of the *Charter* parallels section 13 of the aforesaid *Act respecting the legal publicity*: "Every registrant whose name is in a language other than French must declare the French version of the name used in Québec in carrying on activities, (or) in operating an enterprise (...)."

Let's deal now shortly with the corporate veil! Article 309 CCQ sets down the general principle to the effect that "Legal persons are distinct from their members (and that). (T)heir acts bind none but themselves, except as provided by law." Article 317 CCQ specifically provides for the lifting of the corporate veil in the following terms: "In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order". Even if the circumstances enumerated in article 317 CCQ appear to be construed as exhaustive (i.e. the words "entre autres" were deleted from the Avant-projet), it follows that the lifting of the corporate veil by the Courts should no longer be held as exceptional. Interesting tool/lever for a plaintiff!

This should end my remarks on the first Book.

Book Two: The Family

The interest of this Book in regard of "I.P." resides mainly in the incidence of matrimonial regimes on the ownership and exploitation of those intellectual property rights.

In Québec, the principal matrimonial regimes are the partnership of acquests (or "property") (art. 448 CCQ) and the conventional separation of property (art. 485 CCQ). Antenuptial contracts are permissible and may modify the legal regime.

Consorts married on or after 1970.07.01 who have not entered into special agreement by marriage contract are subject to a regime of partnership of acquests (art. 432 CCQ). Acquests falling into partnership consist of

- i) all properties not declared by law to be private property and in particular
- ii) proceeds of consort's work during the regime and
- iii) the fruits and income which fall due or are received during the regime, whether originating from spouse's private property or acquests.

The private property of each spouse consists, *inter alia*, of

- i) property owned before the marriage,
- ii) property which devolves to that spouse by succession or gift (including revenues if so stipulated)

Article 458 CCQ provides that "Intellectual and industrial property rights are private property, but all the fruits and income arising from them and collected or fallen due during the regime are acquests" Indeed, this article is similar to its predecessor, article 490 of the CCQ (1980), which itself is a duplication of article 1266(L) CCLC (1970).

"Intellectual property" is generally construed as referring to literary and artistic property or "copyright" while "industrial property" refers to patents, designs, trademarks and the like.

The rule laid down by new article 458 CCQ is understandable if one consider "intellectual property" (such as copyright), as a continuation/extension of the personality of the author. However its justification is much more remote in respect of a patent, a trade secret or an integrated circuit topography!

At first glance, the rule laid down by article 458 CCQ appears easily applicable. However, this is not always the case! Indeed, in order to ascertain whether revenues related to "intellectual property" are acquest or private property, reference should be made first to the nature of the payment itself, whether these so-called fruits are really revenues (deriving from the exploitation of the I.P.) or payment for the disposition of an asset (being said I.P.).

In "I.P." matters, payments are often spread over a period of time and on the basis of a percentage of the exploitation of the "I.P." rights be it a patent, a copyright or otherwise.

If the author has assigned his copyright in a book to a publisher so that the publisher is now the copyright owner, the royalties or other moneys paid by

the publisher to the author should be considered as payment of the price of sale of the copyright and therefore be considered as private property.

If, on the other hand, the author only grants to the publisher a right to publish the work, then the author retains ownership and the payments made by the publisher should be construed as falling in the partnership of acquests.

Again, article 458 CCQ does not give a spouse a right to force the other to exploit his/her "I.P." rights nor to dictate the terms and conditions of such exploitation: article 458 CCQ only provides for the ownership of the "I.P." as private property and of the revenues deriving therefrom, as acquests.

Book Three: Successions

When there is no will, the succession passes to the lawful heirs in the order established by the Code and they become legally seized with the possession and ownership of all the assets composing the estate. In the absence of such heirs it devolves to the State

Except maybe for subsection 14.2(2) of the *Copyright Act* and maybe subsection 49(1) of the *Patent Act*, federal "I.P." statutes do not deal at length with descendibility of these rights. However, "I.P."rights, even if incorporeal, are moveable property which forms part of the estate of a *de cujus* as other properties.

Subsection 49(1) of the *Patent Act* reads:

ASSIGNEE OR PERSONAL
REPRESENTATIVES

49.(1) A patent may be granted to any person to whom an inventor, entitled under this Act to obtain a patent, has assigned in writing or bequeathed by his last will his right to obtain it, and, in the absence of an assignment or bequest, the patent may be granted to the personal representatives of the estate of the deceased inventor.

CESSIONNAIRE OU
REPRÉSENTANTS
PERSONNELS

49.(1) Un brevet peut être concédé à toute personne à qui un inventeur, ayant aux termes de la présente loi droit d'obtenir un brevet, a cédé ou légué par son dernier testament son droit de l'obtenir. En l'absence d'une telle cession ou d'un tel legs, le brevet peut être concédé aux représentants personnels de la succession d'un inventeur décédé.

and section 14.2 of the *Copyright Act* reads as follows:

TERM

14.2 (1) Moral rights in respect of a work subsist for the same term as the copyright in the work.

DURÉE

14.2 (1) Les droits moraux sur une œuvre ont la même durée que le droit d'auteur sur celle-ci.

SUCCESSION

(2) The moral rights in respect of a work pass, on the death of its author, to

(a) the person to whom those rights are specifically bequeathed;

(b) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or

(c) where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies instate.

DÉCÈS

(2) Au décès de l'auteur, les droits moraux sont dévolus à son légataire ou, à défaut de disposition testamentaire expresse, soit au légataire du droit d'auteur, soit, en l'absence d'un tel légataire, aux héritiers de l'auteur.

Let's discuss, for instance, devolution of moral rights.

Devolution - General. Moral rights are personal, not proprietary rights; they cannot be assigned but may transferred at death according to the provisions set forth in subsection 14.2(2) of the *Copyright Act*.

On the death of the author moral rights in respect of a work will be transmitted according to the following hierarchy:

- i) if there is a will,
 - to such persons as the testamentary provisions may specifically direct or, in the absence of such provisions

- to such persons as to whom the copyright passes;
- ii) if there is no will,
 - to such persons entitled to any other property.

It should be remembered, however, that section 14.2 of the *Copyright Act* does not provide for a comprehensive treatise on wills and successions. The devolution of rights at death are governed by the applicable provincial laws: see discussion in BRISSON (Jean-Maurice), *L'impact du Code civil du Québec sur le droit fédéral: une problématique* (1992), 52 *Revue du Barreau* 345, at pp. 348-349. Notwithstanding the three situations described in subsection 14.2(2) of the *Copyright Act*, and irrespective of the terms of the will or of the intestate provisions of the law, no one is bound to accept a succession which has devolved to him.

Specific Bequeath. Paragraph 14.2(2)(a) of the *Copyright Act* provides first that "these pass on the death of the owner of the right to such persons as he may by testamentary dispositions specifically direct. The use of the words "specifically" means that the right will have to be identified by a sufficient description in the will if the direction in the will is to be effective. It will probably be necessary to refer to the right expressly": LESTER (David) et al., *Joynson-Hicks on UK Copyright Law* (London, Sweet & Maxwell, 1990), at no. 11.38.

Nothing would apparently prevent an author from subdividing the moral rights between his heirs, as one may be vested with the paternity right and another with the right of integrity; further division could also be contemplated, for instance, according to the media, or the territory: see paragraphs 28.2(1)(a) and (b) of the *Copyright Act*.

"to follow copyright". Absent a specific bequest, the moral rights will follow the bequeath of the copyright in the work: see paragraph 14.2(2)(b) of the *Copyright Act*. Should the copyright be subdivided amongst the heirs (as translation rights, adaptation rights, performing rights or reproduction rights), it would appear that the moral rights so bequeathed will follow, for the same part, the specific copyright.

"to follow other property". If there is no specific bequest of the moral rights nor of the copyrights, then the moral rights will pass to the legal representatives of the author: see paragraph 14.2(2)(c) of the *Copyright Act*.

Body Corporate - Corporations as Successors. An author can bequeath his moral rights to a corporation or an association, which will then be invested

with the mission to maintain the name of the deceased author and the integrity of his work: see *Fondation Le Corbusier v. Société en commandite Manoir le Corbusier** (1991), (1991) R.J.Q. 2863 (Que.Sup.Ct.). Where there is no heir, seisin of a succession falls to the State, with the result that the State might become the defensor (and also the beneficiary: see paragraph 28.2(1)(b) of the *Copyright Act*!) of the moral rights of an author.

Succession of Corporation. As the notion of death and bequeath are not compatible with the very nature of a corporation, the provision of subsection 14.2(2) of the *Copyright Act* will not apply to a body corporate, as a "deemed author" of photographs (see section 10 of the *Copyright Act*) or records, perforated rolls and other mechanical contrivances by means of which sounds can be mechanically reproduced (see section 11 of the *Copyright Act*).

Successors of Successors. So long as the moral rights subsist, subsection 14.2(2) of the *Copyright Act* will apply and nothing will prevent he who has inherited the moral rights (or part thereof), from bequeathing those rights (or part thereof) by will or otherwise to his heirs.

Past Infringements. Infringements occurring before the death of the author will form part of his estate and, subject to the three year limitation period of section 41 of the *Copyright Act*, are actionable by the successor; see also art. 625(3) and 1610(2) CCQ

Unanswered Questions. Does a waiver of moral rights in favor of a third party, give to that third party the right to bequeath or pass on to his heirs whatever benefit that waiver may have provided him?

Does the reversion clause of section 14 of the *Copyright Act* affect the devolution of paragraph 14.2(2)(c) of the *Copyright Act*?

What happens when joint heirs cannot agree on the exploitation of the moral rights they inherited?

How could joint heirs assert the paternity right or the right to anonymity?

Does the legacy of the moral right in a work constitute a "grant", for the purpose of the *locus standi* of section 36 of the *Copyright Act* or for registration under subsection 57(1) of the *Copyright Act*?

- °Kinds of property and ownership
- °Undivided co-ownership
- °Administration of the property of others

Kinds of property and ownership

Incorporeal property (*i.e.* patent, copyright and the like), falls in the general category of moveable property.

Recently in *Poolman v. Eiffel Productions S.A.* (1991), 35 C.P.R. (3d) 384, 42 F.T.R. 201 (F.C.T.D.), Pinard J. concluded that copyrights were incorporeal moveable property and, as a "thing" were subject to the provisions of the Civil Code (then art. 1487 CCLC, now art. 1713 CCQ) dealing with the sale of (thing/)property by a person other than the owner thereof. However, except for this case, the nature of "I.P." rights have not often been directly discussed by Québec courts. Authors generally consider these types of rights as incorporeal property and for our purpose, suffice it to say that each of them should be considered as a form of incorporeal moveable property.

The acquisition of I.P. rights is dealt with in the federal "I.P." statutes, such as the *Patent Act*, the *Industrial Design Act*, the *Trade-Marks Act*, the *Copyright Act*, the *Plant Breeders' Act* or the *Integrated Circuit Topography Act*. What is less clear, however, is how related rights, such as trade secrets, tradenames, goodwill or performers rights are created (and protected): possession under art. 914 CCQ, accession under art. 916 CCQ or even as an emanation of privacy rights under art. 3 and 35 CCQ?

The interaction of those federal "I.P." statutes and the CCQ might also fuel interesting -even sometime farfetched- discussions as to the application of the so-called exhaustion doctrine («épuisement du droit»), especially when the object of the "I.P." rights is living material that could reproduce itself.

Reverting now to more practical matters, article 909 CCQ (which has no counterpart in the CCLC) defines what constitutes capital and revenues. More particularly, "capital also includes rights of intellectual or industrial property except sums derived therefrom without alienation of the rights (...)". Let's illustrate with "topographies", as defined in the *Integrated Circuit Topography Act* (S.C. 1990, c. 37, s. 2). As property under the CCQ, a registered topography would be considered as capital as would be the product of its alienation: article 909(2) CCQ; however, licensing fees relating to the exploitation of this topography will be considered as "fruits and revenues produced by that property": art. 910(1) CCQ. This last qualification as "revenues" found its justification in art 910(3) CCQ which

provides that revenues comprise also sums of money yielded by property such as rents, interests and dividends.

Undivided co-ownership

As it happens, in "I.P." matters, one of the more frequent modes of ownership encountered is the undivided co-ownership.

Typical of such ownership is the situation where two inventors working together -and obviously not having bothered to draft a contract- obtain the grant of a patent.

Typical also of this situation under the *Copyright Act*, is the "work of joint authorship" meaning a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors. In this last situation, in view of the general rule laid down by subsection 13(1) of the *Copyright Act*, the co-authors are also the co-owners of the work; furthermore neither of them could claim any exclusive rights or title in this particular work. The same situation may also arise when manuscripts and related copyrights are part of an intestate estate.

The CCQ sets a comprehensive body of rules governing the undivided co-ownership, amongst which:

1) the shares of the undivided co-owners are presumed equal: art. 1015(1) CCQ;

2) each undivided co-owner has the rights and obligations of an exclusive owner as regards to his share and may thus alienate or hypothecate his share, which may also be seized by his creditor: art. 1015(2) CCQ;

3) each undivided co-owner may make use of the undivided property provided it does not affect i) its destination or ii) the rights of the other co-owners: art. 1016(1) CCQ;

4) The right of accession operates to the benefit of all the undivided co-owners proportionately to their shares in the indivision: art. 1017 CCQ;

5) the revenues of the undivided property accrue to the indivision: art. 1018 CCQ;

6) any undivided co-owner may exercise a right of redemption against a third party who has acquired, by onerous title, the share of an undivided co-owner: art 1022(1) CCQ;

7) undivided co-owners may agree in writing to postpone partition of a property for a term not exceeding thirty years (which is renewable): art 1013CCQ.

Compare *Forget v. Speciality Tools of Canada Inc.* (1993), 48 C.P.R. (3d) 323 (B.C.S.C.) Rowan J. with *Marchand v. Péloquin* (1978), (1978) C.A. 267 (Qué.C.A.) Mayrand J., even if decided under the CCLC!

Administration of the property of others

Under this topic, I intend to regroup the principal provisions of the CCQ dealing with the duty to act faithfully. This is of special interest in the employee/ employer, agent/ principal, mandatary/ mandator or director /legal person relationship and in the context, for instance of business opportunities or trade secrets.

In *limine litis* let's remember the general proposition of article 6 CCQ: "Every person is bound to exercise his civil rights in good faith". Indeed there are 73 references to "good faith" in the CCQ !

Legal persons: articles 321, 322, 323 and 324 CCQ

321. A director is considered to be the mandatary of the legal person. (...)

322. A director shall act with prudence and diligence.

He shall also act with honesty and loyalty in the best interest of the legal person.

323. No director may minge the property of the legal person with his own property nor may he use for his own profit or that of a third person any property of the legal person or any information he obtains by reason of his duties, unless he is authorized to do so by the members of the legal person.

324. A director shall avoid placing himself in any situation where his personal interest would be in conflict with his obligation as a director. (...)

Administrator for others: articles 1309, 1310, 1313 and 1314 CCQ

1309. An administrator shall act with prudence and diligence.

He shall act honestly and faithfully in the best interest of the beneficiary or of the object pursued.

1310. No director may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator.
(...)

1313 No administrator may mingle the administered property with his own property.

1314. No administrator may use for his benefit the property he administers or information he obtains by reason of his administration except with the consent of the beneficiary or unless it results from the law or the act constituting the administration.

Employee: article 2088 CCQ

2088. The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work.

These obligations continue for a reasonable time after the cessation of the contract, and permanently where the information concerns the reputation and private life of another person.

Mandate: articles 2138 and 2146 CCQ

2138. A mandatary is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it.

He shall also act honestly and faithfully in the best interest of the mandator, and avoid placing himself in a position that puts his own interest in conflict with that of his mandator.

2146. The mandatary may not use for his benefit any information he obtains or any property he is charged with receiving or administering in carrying out his mandate, unless the mandator consents to such use or such use arises from the law or the mandate.

If the mandatary uses the property or information without authorization, he shall, in addition to the compensation for which he may be liable for injury suffered, compensate the mandator by paying, in the case of information, an amount equal to the enrichment he obtains, or, in the case of property, an appropriate rent or the interest on the sums used.

This ends my preliminary remarks on Book Four of the Civil Code of Québec.

Book Five: Obligations

- °contract of adhesion
- °civil liability
- °solidarity
- °damages
- °sale
- °lease
- °contract of employment
- °contract for services

contract of adhesion

Definition. A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties and were not negotiable («ne pouvaient être librement discutées»): art. 1379 CCQ.

Application. As a type of contract, Licence Agreements and Franchise Agreements fall squarely within such definition. Indeed, by the very nature of these types of contracts (*i.e.* the preservation of the concept of the licensor/franchisor) the essential stipulations are not discussed (*e.g.* quality controls and standards, image and presentation, ownership of the indicia, territory, nature of the services rendered or to be offered, fees and supply, defaults) even though some of the provisions are.

Essential stipulations. However, article 1379 CCQ is concerned only with the essential stipulations of the contract, not the whole contract. Again article 1379 CCQ makes reference to the possibility of negotiating those essential clauses, not necessarily to have them modified.

Consent. Apart from the general obligations of good faith and free consent, which are common to all contracts, the CCQ reinforces the quality of the consent given by the franchisee/licensee.

External clause. In a contract of adhesion, an external clause is null if, at the time of the formation of the contract, it was not expressly brought to the attention of the adhering party. This may, for instance, comprise the rules relating to promotional and advertising programs, operational guides and the like. The onus is on the franchisor to prove the knowledge of these external clauses by the franchisee.

And what would be the status of a subsequent external clause, like a timely modification to the operational guide?

Illegible clause. Article 1436 CCQ states that in a contract of adhesion a clause which is illegible or incomprehensible to a reasonable person (and not only to the franchisee) is null if the adhering party suffers injury.

Quite frankly a lot of provisions in Franchise Agreements, especially when they result from patchwork/merging of various forms are not easy to catch, even for the trained eye. Look for instance at the last ownership and use of the improvements clauses you might have drafted recently or those dealing with the exceptions to the exclusive territory!

Charter. By the way section 55 of the *Charter of the French Language* is still operational and contracts of adhesion (as well as related documents) shall be drafted in French unless there is an express agreement of the parties to the contrary.

Implied. A third point to consider is article 1434 CCQ : a contract binds the parties not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity and law.

Interpretation. As a last and fourth point, note that in the case of a contract of adhesion, the contract is interpreted in favour of the adhering party: art. 1432 CCQ .

Reductibility. Finally, over and above these points, article 1437 CCQ stipulates that an abusive clause (*i.e.*, excessive or abusive, disproportionate)

in a contract of adhesion is null or the obligation arising from it may be reduced by the court.

Summary. As summarized by Professor Popovici:

$(1379 + 1399) \times 1379 = 1435 + 1436$

where 1379 is good faith
 where 1399 is free and enlightened consent
 where 1379 is a contract of adhesion
 where 1435 stands for external causes
 where 1436 stands for incomprehensible clauses.

Transitional. Sections 81 and 82 of the Transitional Provisions state that contracts of adhesion entered into before the coming into force of the CCQ are to be interpreted according to the provisions of the CCQ.

Civil liability

The general principle of civil liability is set down at article 1457 CCQ (formerly art. 1053 CCLC):

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another person and he is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

When applied to "I.P.", let's say that article 1457 provides for the basis of action for unfair competition, of which section 7 of the *Trade-marks Act* appears as a partial codification.

This article also provides the foundation for an action for wrongful appropriation of trade secrets, commercial parasitism, trademark dilution, passing off, and the like.

Quaere of the liability of an inventor for a defective product made under his licensed technology: see articles 1468 and 1469 CCq as to the liability of a manufacturer or distributor for safety defect.

Sections 85 and 86 of the Transitional Provisions state that the conditions of civil liability are governed by the legislation in force at the time of the fault.

Solidarity

1523. An obligation is solidary between the debtors where they are obligated to the creditor for the same thing in such a way that each of them may be compelled separately to perform the whole obligation (...)

1526. The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligations are extra-contractual (which is the case for civil liability)

Finally, solidarity between debtors is not presumed, except where an obligation is contracted for the service of an enterprise, which is the carrying on of an organized economic activity, whether or not commercial in nature: art. 1525.

Damages

The damages due to the creditor obey the general rule of *restitutio in integrum*, namely compensation for the amount of the loss he has sustained and the profit of which he has been deprived.

Legal interest and special indemnity (*i.e.* rate of interest fixed for the claims of the State, less legal interest) may be awarded: art. 1619 CCQ. The interest accrued on principal may also itself bear interest, if so required: anatocism of article 1620 CCQ.

Except as provided specifically by law, punitive and exemplary damages are not to be awarded in the civil courts of Québec: art. 1621 CCQ. The only notable exceptions to this principle are found in the *Charter of Human Rights and Freedoms*, the *Consumer Protection Act*, the *Act respecting Access to documents held by public bodies and the Protection of personal information*, and the *Act for the Protection of Trees*!

In regard of trade secrets, two new provisions of the Civil Code of Quebec are of great interest:

1612. The loss sustained by the holder of a trade secret includes the investment expenses incurred for its acquisition, perfection and use; the profit of which he is deprived may be compensated through payment of royalties.

but

1472. A person may free himself from his liability for injury caused to another as a result of the disclosure of a trade secret by proving that considerations of general interest prevailed over keeping the secret and, particularly, that its disclosure was justified for reasons of public health or safety.

In this last case, however, one should also bear in mind article 2088 CCQ:

2088. The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work.

These obligations continue for a reasonable time after the cessation of the contract, and permanently where the information concerns the reputation and private life of another person.

Hence the question: would article 1472 CCQ apply to confidential information that does not fall squarely within the definition usually given to trade secret? It would seem so; furthermore, article 2088 CCQ appears to prohibit the use by the employee for his own benefit of confidential information while article 1472 CCQ deals with the divulgence of a trade secret and not the use of same for the employee's own benefit.

Sale

"I.P." rights are assignable: see, for instance, section 48 of the *Trade-Marks Act*, sections 13 and 57 of the *Copyright Act*, section 13 of the *Industrial Designs Act*, sections 49-51 of the *Patent Act*, section 7 of the *Integrated Topography Act* or section 31 of the *Plant Breeders' Rights Act*.

Apart from the formal condition of a writing in the case of a copyright or a patent or the effect of registration of the assignment (see 31(3) of the *Plant Breeders' Rights Act*, 57(3) of the *Copyright Act* or 51 of the *Patent Act*), the assignment or sale of those rights are governed by the general rules relating to Property and Civil Rights in the Province, amongst which those set under Book Five of the CCQ, either under its Title One "Obligations in general" or Chapter I "Sale" of its Title Two "Nominate contracts".

Hence, the seller is bound to provide the buyer with

- a warranty as to the ownership of the property sold: art. 1723 CCQ;
- a warranty of quality as to the property sold, *i.e.* that the property is free for latent defects or unfit for the use for which it was intended: art. 1726 CCQ.

Furthermore, the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* (S.Q. 1988, c. 69; R.S.Q., c. 32.01), covers the following fields:

- (a) visual arts (painting, sculpture, engraving, drawing, illustration, photography, textile arts, installation work, performance, art video and the like);
- (b) arts and crafts (which are conveyed by the practice of a craft related to the working of wood, leather, textiles, metals, silicates or any material);
- (c) literature (*i.e.*, a written work, be it a creation or a translation).

This Act deals with the obligatory content of contracts in these fields: sections 20 to 42 thereof (except sections 35: surety; 37 arbitration), are provisions of public order.

Lease

For some a licence (here, a bare licence) is a right of use (or a personal servitude!) governed by articles 1172-1176; for others it is an usufruct (here, an exclusive licence) which is governed by articles 1120-1171 CCQ.

Licences are generally construed as leases: see *I.G.U. (Ingraph) Inc. v. L.B.G.P. Consultants Inc.* (1990), J.E.-90-1224 (Que.Sup.Ct.) Trudel, J.

Generally, the principles governing sale apply to assignments while those governing lease apply to licence.

Of course, those provisions are of a particular interest to "supplement" a Licence Agreement which is otherwise silent on a specific point. As we will see, the application of some of the provisions of the CCQ respecting lease may lead to unexpected twists in a licensor/licensee relationship and indeed, might be quite detrimental over the operations of a franchise system.

Let's examine some of the provisions of the Chapter dealing with the lease, keeping in mind our usual trademark licence provisions.

1851. Lease (Licence) is a contract by which a person (licensor), the lessor, undertakes to provide another person (licensee), the lessee, in return for a rent (royalties), with the enjoyment (use) of a movable (trademark) or immovable property for a certain time (duration).

The term of the lease is fixed or indeterminate.

1853. The lease of movable property is not presumed; a person using the property by sufferance of the owner is presumed to have borrowed it by virtue of a loan for use. (...)

°comment: see also art. 2313 CCQ which reads: "Loan for use is a gratuitous contract by which a person, the lender, hands over property to another person, the borrower, for his use, under the obligation to return it to him after a certain time".

1854. The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and provide him with peaceable enjoyment of the property throughout the term of the lease.

He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.

°comment: also referred to as "garantie de jouissance paisible et de non éviction";

°comment: e.g., -renew the registration, -maintain the exclusivity of the Licensed Goods or Licensed Territory, -take action if there is infringement by a third party.

1855. The lessee is bound to pay the agreed rent and to use the property with prudence and diligence during the term of the lease.

°comment: could also be read as

–"the user undertakes to use the trademark in conformity with the quality standards and control established from time to time by the owner"; or

–"the user undertakes to conform with by-laws, rules and laws enacted from time to time by public authorities for security, sanitary, standardization, publicity, importation and the like measures relating the purchase, the manufacturing, the sale and the distribution of wares or services in association with which the trademark is used"

°for instance,

–variation in use/deviation from proper use (as per guide of graphic norms),

–dilution of the trademark by generic/descriptive/improper use or marking

1856. Neither the lessor nor the lessee may change the form or destination of the leased property during the term of the lease.

°comment: see the consequences of the modification/variation/modernization of the trademark;

°comment: see the impact of an amendment to the statement of wares or services

1858. The lessor is bound to warrant the lessee against legal disturbance of enjoyment of the leased property.

Before pursuing its remedies, the lessee shall notify the lessor of the disturbance.

°comment: compare with 50(3) of the *Trade-Marks Act*: "Subject to any agreement subsisting between the owner of the trade-mark and a licensee of the trade-mark, the licensee may call on the owner to take proceedings for the infringement thereof and, if the owner refuses or neglects to do so within two months after having been so called on, the licensee may institute proceedings for infringement in the licensee's own name as if the licensee were the owner, making the owner a defendant."

°comment: see also art 1859 CCQ. "The lessor is not liable for damage resulting from the disturbance of enjoyment of the property by the act of a third person; he may be so liable when the third person is also a lessee of that property or is person whom the lessee allows to use or to have access to the property.

If the enjoyment of the property is diminished by the disturbance, however, the lessee retains his other remedies against the lessor."

1870. A lessee may sublease all or part of the leased property or assign his lease. In either case, he is bound to give notice of his intention and the name and address of the intended sublessee or assignee to the lessor and to obtain his consent

°comment: to be read also with art. 1871CCQ: "The lessor may not refuse to consent to the sublease of the property or the assignment of the lease without a serious reason. (...)"

°comment: to bear in mind art. 1873 CCQ. The assignment of a lease acquits the former lessee of his obligations, unless (...) the parties agree otherwise.

1877. A lease with a fixed term terminates of right upon the expiry of the term. A lease with an indeterminate term terminates upon rescission by one of the parties.

1880. The term of a lease may not exceed one hundred years. If it exceeds one hundred year, it is reduced to that term.

°comment: this ends the controversy as to the validity of a perpetual lease, which is now prohibited; the period of 100 years is found elsewhere: usufruct (1123), emphyteusis (1197) and annuity (2376).

1882. A party who intends to rescind a lease with an indeterminate term shall give the other party notice to that effect.

The term of the notice is of the same duration as the term fixed for payment of the rent, but may not be of more than three months. Where the lease property is a movable, however, the notice is of ten days, whatever the period fixed for payment of the rent may be.

°comment: see also art. 1878.CCQ "A lease with a fixed term may be renewed. It may only be renewed expressly (...)"

°comment: see also art.1881CCQ "Security given by a third person (e.g. suretyship under 2333) to secure the

obligations of the lessee does not extend to a renewed leased."

°comment: see also art.6 CCQ "Every person is bound to exercise his civil rights in good faith."

°comment: see also art.7 "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith."

°comment: see also (1991) 3 Contrats Concurrence Consommation 50, fasc. 5551 -*Mercedes Benz France v. Auto Lux* (C.A.Paris, 5e chambre; 1990.12.20)

1886. Voluntary or forced alienation of leased property or extinction of the lessor's title for any other reason does not terminate the lease of right.

By the way, section 4 of the Transitional Provisions provides that "In contractual situations which exist when the new legislation comes into force, the former legislation subsists where supplementary rules are used to determine the extent and scope of the rights and obligations of the parties and the effects of the contracts. However, the provisions of the new legislation apply to the exercise of the rights and the performance of the obligations, and to their proof, transfer, alteration or extinction."

contract of employment

As we have already covered the obligation of loyalty, let's say a word on the non-competition clause dealt with by articles 2089 and 2095 CCQ.

- The parties may stipulate
 - °in writing and
 - °in express terms that
- even after the termination of the contract,
- the employee may
 - °neither compete with his employer nor
 - °participate in any capacity whatsoever in a competing enterprise
- Such a limitation shall be limited as to
 - °time
 - °place and

- °type of employment
- to whatever is necessary for the protection of the legitimate interests of the employer.
- The burden of proof that the stipulation is valid is on the employer
- An employer may not avail himself of a stipulation of non-competition if
 - °he has resiliated the contract without a serious reason or
 - °if he has himself given the employee such a reason for resiliating the contract.

Contract for services

When read together, the provisions of art. 2085 and 2098 CCQ might be helpful in order to ascertain the nature of the relations between parties and, for instance the ownership of inventions or copyrights.

Book Six: Hypothecs

According to article 2644 CCQ, the property of a debtor is charged with the performance of his obligation and is the common pledge of his creditors («le gage commun de ses créanciers»). As "I.P". rights are a form of incorporeal moveable property, they form part of the patrimony of a person and could be affected/charged, as other more tangible property, with the performance of his obligations.

In Québec, the taking of security interest on intellectual property has not been often discussed, even though, in practice they were included in the general terms of the trust deeds supporting floating charges taken under the authority of the *Quebec Special Corporate Powers Act* (R.S.Q., c. P-16), which, en passant, was only applicable to corporations!

The main difficulty in specifically pledging specific elements of intellectual property was the requirement of dispossession of the pledged moveable property. Without venturing further in this discussion, let's say that art. 2684 CCQ now specifically permits the hypothecation of patents and trademarks.

A hypothec is a real right on a moveable or immovable property made liable for the performance of an obligation. It confers on the creditor the right

to follow the property into whosever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined in this Code: art. 2260 CCQ.

°2661 A hypothec is merely an accessory right, and subsists only as long as the obligation whose performance it secures continues to exist.

°2663 The hypothecary rights conferred by a hypothec may be set up against third persons only when the hypothec is published in accordance with this Book or the Book on Publication of Rights.

°2668(1) Property exempt from seizure may not be hypothecated.

°2692 A hypothec securing payment of bonds or other title of indebtedness (...) shall, on pain of nullity, be granted by notarial act en minute (...)

A hypothec is moveable if the object charged is moveable property: "I.P." rights, as we have seen, are moveable property (art. 2665(1) CCQ).

Quid of the hypothec (or security) in an intellectual property licence held by the debtor/licensee? Again, inasmuch as a licence falls within the definition of property, I see no problem- at least from a conceptual point of view- in having such a licence charged with an hypothec. Indeed, the CCQ provides already for the sublicensing and assignment of a lease/licence (1875)! Of course, the registration of such a hypothec may trigger the defaulting clause of the Licence Agreement but such is not the point.

A moveable hypothec may be created with or without the delivery of the moveable hypothecated (art. 2665(2) CCQ). If there is no delivery, then the hypothec shall be registered to be opposed to third parties (art. 2663 CCQ); if there is delivery (pledge/gage), publication is made through possession of the property (art. 2703 and 2705 CCQ).

As a general rule, art. 2683 CCQ states that a natural person could only grant a movable hypothec without delivery on the property of that enterprise, otherwise delivery is compulsory.

Delivery of intellectual property has always created difficulties as, by their nature, those rights are incorporeal. However, delivery of the title evidencing this "I.P." right (for instance, the letters patent for an invention, the certificate

of copyright or the certificate of plant breeders' rights) should be considered to avail for the delivery required by the Code (art. 2703 CCQ).

2684. Only a person (legal or natural) or a trustee carrying on an enterprise (within the meaning of art. 1525) may grant a hypothec on a universality of property, movable or immovable, present or future, corporeal or incorporeal.

The person or trustee may thus hypothecate animals, tools or equipment pertaining to the enterprise, claims and customers accounts, patents and trademarks (why those and not the others?) or corporeal movables included in the assets of any of his enterprises kept for sale, lease or processing in the manufacture or transformation of property intended for sale, for lease or for use in providing a service.

This hypothec replaces the trust deed which existed under the *Special Corporate Powers Act* and was applicable to whoever is operating an enterprise (*i.e.*, an economic activity, whether or not of a commercial nature) as well as the equivalent provision under the *Act respecting bills of lading, receipts and transfers of property in stock* (R.S.Q. , c. C-53), now repealed.

Section 27 of the Special Corporate Powers Act now reads:

°Any joint stock legal person which does not carry on an enterprise,

–constituted as a legal person under an Act or by letters patent and

–empowered to borrow and to hypothecate or

°any legal person

–thus constituted outside Québec,

–if so empowered by its charter or by the law governing it

°may avail itself of the provisions of the Civil Code of Québec and

°grant a hypothec, even a floating hypothec, on a universality of property, movable or immovable, present or future, corporeal or incorporeal.

Quaere: Could a security interest be taken against part of a trademark (for instance, the clothing part of a trademark registered for cosmetics and clothing)? Why not? Indeed, Rules 59 and 60 of the *Trade-marks Rules* already provide for the possibility of the assignment of part of a trademark, whether registered or not; therefore, the hypothecation of only part of the trademark that is susceptible of being assigned should be permitted.

However, in the event of a default under the hypothec, the Registrar of Trade-marks would presumably only recognize a new ownership of the

hypothecated part of the trademark inasmuch as it conforms with the *Trade-Marks Act* and the Rules adopted thereunder. Subsection 15(3) of the *Trade-Marks Act*, for instance, would prohibit an amendment of the register recording any change in the ownership of the owner of any one of a group of associated trademarks unless the same change has occurred with respect to all the trademarks of the same groups. On the same token, should the hypothec be granted for only part of the related wares of one class (e.g. cosmetics and perfumes), the Registrar will most probably, under the current practice, refuse to recognize the transfer on his register, even if perfectly valid under the hypothecary provisions of the CCQ.

Finally, sections 133 to 140 of the Transitional Provisions deal with Prior Claims and Hypothecs granted before the coming into force of the CCQ. Basically, property charged as security and for which the right to the realization of the security was acquired before the coming into force of the CCQ are governed by the former legislation. If the right to the realization was not then acquired, the new legislation is applicable.

Book Seven: Evidence

The general principle of who is asserting a right shall prove the facts on which his claim is based (art. 2803 CCQ) has been maintained as well as the presumption of good faith (art. 2805 CCQ)

Judicial knowledge has now been codified and includes facts that are generally known (art. 2808 CCQ) as well as foreign law (art. 2809 CCQ) provided it has been pleaded. So, if the licence agreement upon which your claim is based is governed by the laws of Nebraska or Ontario, you must alledge it, failing which the court will apply the Québec law on the matter.

In aid sometimes to section 24(a) of the *Canada Evidence Act* (R.S.C. 1985, c. C-5), art. 2813-2820 CCQ allows the introduction in evidence of "authentic acts", which are those received or attested by a competent public officer according to the laws of Québec or of Canada, with the formalities required by the law. Such would be the case for the documents attested by (or for!) the Registrar of Trade-marks or of Copyrights, irrespective of the provisions of sections 53 or 54 of these statutes. The recital, in an authentic act, of the facts which the public officer had the task of observing or recording makes proof against all persons.

Computerized records respecting a juridical act are now admissible, subject to the reliability of the entry of the data: art. 2837-2839 CCQ.

Proof of a document could now be made by the filing of the reproduction thereof subject to certain conditions as to its accuracy and identification: art. 2840-2842 CCQ.

Admissibility of evidence and proof. Three articles of acute interest:

2857. All evidence of any fact relevant to a dispute is admissible and may be presented by any means.

2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute. (...)

2867. An admission made outside the proceeding in which it is invoked is proved by the means admissible as proof of the fact which is its object.

Book Eight: Prescription

That which is not an object of commerce or not transferable may not be prescribed (art. 2876 CCQ); easy to understand and apply for human tissues but what would be the situation with respect to personality rights like name and image?

Quaere. Would a distant relative, ultimate heir of the "fame" of a composer otherwise ignored/unknown since eighty years but now discovered and "à la mode" be entitled to protect this fame; and what about the composer who becomes known posthumously, for which the heirs of the first generation have never reacted to the commercial use of the image of the deceased but for which heirs of the second or third generation invest themselves of a mission to protect the work and the commercial exploitation of the image of this composer?.

Applicable limitation period. Section 41 of the *Copyright Act* provides for a three year limitation period, section 18 of the *Industrial Designs Act* provides for a twelve month limitation period and section 12 of the *Integrated Circuit Topography Act* provides for a three year limitation period. As to the other "I.P." federal statutes the law is silent: therefore the limitation applicable to

patent, trademark or plant breeders' right infringement would obey to the qualification of the acts reproached in the jurisdiction chosen. In Québec, an action for infringement of these rights would constitute "an action to enforce a personal right or movable real right" and would obey to the three year limitation period: art. 2925 CCQ.

Care should be taken in the framing of an action under section 22 of the *Trade-Marks Act* as trademark dilution or interference with goodwill (which indeed is another word for reputation) could be considered as falling under the one year short prescription for defamation: art. 2929 CCQ.

As to actions for passing off, encroachment of an unregistered trademark, unfair competition, parasitism, genericide, abuse of confidence, breach of trust or wrongful appropriation of trade secrets, they will be subject to the three years limitation.

Prescription must be pleaded. The court cannot of its own motion supply the plea resulting of prescription, except when the forfeiture of the right is expressly stated in the text of law: art. 2878 CCQ. Under the Civil Code of Quebec, contrary to the situation prevailing under 2267 CCLC, the short prescriptions of articles 2925 and 2929 CCQ are not declared as extinguishing the right and as a complete bar to action. It follows that the court should not take these limitations in consideration unless they are pleaded.

Wrong jurisdiction. An action dismissed without a decision having been made on the merits will interrupt the limitation period provided a fresh action is taken within three months of this decision: art. 2895 CCQ.

This is of great interest when an action is dismissed, for instance for *forum non conveniens* or want of jurisdiction or for mere procedural flaws. Typically this might involve an action before the Federal Court to be declared the owner of an unregistered trademark by virtue of a will or an action for generic use of a an unregistered trademark or for unfair competition.

Solidarity. As stated by art. 2900 CCQ, interruption with regard to one of the creditors or debtors of a solidary or indivisible obligation has effect with regard to others. Extracontractual obligations, like "I.P." rights infringements are solidary: art. 1526.

Book Nine: Publication of Rights

An "I.P." right, as we have seen already, is a form of incorporeal moveable property. As such it could be the object of various contracts, be it sale/assignment, lease/licence, usufruct, co-ownership, hypothec, or otherwise.

These transactions over "I.P." may be recorded at the proper branch of the CIPO; they may also (and even, sometimes, they shall) be published by registration in the register of personal and moveable real property so to have effect against third parties.

Indeed, the publication of "I.P." rights is effected by their registration in the central register of personal and moveable real rights in Montreal, presumably by using a RG compulsory form for a general inscription or a RH compulsory form for moveable hypothec.

2941. Publication of rights allows them to be set up against third part persons, establishes their rank and where the law so provides, gives them effect.

Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

An interesting question might arise here in the case of conflictual recordal of grant of interest or assignment under those federal "I.P." statutes which provide for a priority of right to the first *bona fide* recording assignee and a prior publication under the CCQ.

See for instance subsection 31(3) of the *Plant Breeders' Rights Act*:

An assignment of plant breeder's rights is void against a subsequent assignee thereof for valuable consideration without notice who is registered as the holder of the rights unless, before the subsequent assignee is so registered, the person to whom that assignment is made is registered as holder of the rights.

section 51 of the *Patent Act*:

51. Every assignment affecting a patent for invention, whether it is one referred to in section 49 or 50, is void against any subsequent assignee, unless the assignment is registered as prescribed by those sections, before the registration of the instrument under which the subsequent assignee claims.

or subsection 57(3) of the *Copyright Act*:

Any grant of an interest in a copyright, either by assignment or licence, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice, unless the prior assignment or licence is registered in the manner prescribed by this Act before the registering of the instrument under which the subsequent assignee or licensee claims.

In such a case, what would be the situation of the subsequent assignee who records his rights at the CIPO against the initial assignee who has not recorded his rights at CIPO but has caused them to be published under the CCQ before the making of the recordal of the subsequent/second assignee? Could the recordal made under the CCQ be opposed to the one made at CIPO? (What about the paramountcy of the Federal legislation, in such a case?) Would the publication under the CCQ be sufficient to give to the subsequent assignee the actual knowledge or notice of the first non-CIPO recorded assignment so as to render the subsequent - but first CIPO!- assignment void?

Interesting, isn't it.

Book Ten: Private International Law

Let's summarize/select some of the provisions of the Book on Private International Law.

°Characterization is made according to the legal system of the court seised of the matter: art. 3078 CCQ.

°The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred: art. 3126 CCQ.

°Evidence is governed by the law applicable to the merits of the dispute: art. 3130 CCQ.

°Prescription is governed by the law applicable to the merits of the dispute: art. 3131 CCQ.

Procedure is governed by the law of the court seised of the matter: art. 3132 CCQ.

The doctrine of *forum non conveniens* is now accepted: art. 3135 CCQ.

In personal actions of patrimonial nature (as are infringement of "I.P." rights), Québec courts have jurisdiction where the defendant has his head office/domicile or has a place of business/residence in Québec, a fault was committed in Québec or damages were committed in Québec or there is consent or acquiescence to the jurisdiction of Québec courts: art. 3148 CCQ.

As a general rule, Québec courts will now recognize and enforce decisions rendered outside Québec: art. 3155 CCQ.

Let's illustrate by an example: the infringement of a registered trademark belonging to a US corporation, committed in Québec by a person domiciled in Ontario.

Québec courts certainly have jurisdiction over such an action (art. 3148(3) CCQ) which obligation would be qualified under Québec law as a personal action of a patrimonial nature (art. 3126 CCQ); the applicable prescription would then be governed by the law of Québec (art. 3126 & 3131 CCQ) and therefore the appropriate limitation period would be three years (art. 2295 CCQ). On the other hand, in view of the domicile of defendant, it is assumed that Ontario courts will also accept jurisdiction, in which case the limitation period will be six years, therefore increasing considerably the exposure of the defendant and the amounts of damages that could then be claimed.

Let's conclude this Book by saying that it may worth taking some time to make some "forum shopping" before launching court action.

Conclusion

In conclusion, we shall borrow the words of Portalis (1746-18070, one of the drafters of the French Civil Code:

"Un code, quelque complet qu'il puisse paraître, n'est pas plutôt achevé, que mille questions inattendues viennent s'offrir au magistrat. Car les lois, une fois rédigées, demeurent telles qu'elles ont été écrites; les hommes, au contraire, ne se reposent jamais; ils agissent toujours; et ce mouvement, qui ne s'arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit à chaque instant quelque combinaison nouvelle, quelque nouveau fait, quelque résultat nouveau.

Une foule de choses sont donc nécessairement abandonnées à l'empire de l'usage, à la discussion des hommes instruits, à l'arbitrage des juges.

L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquence, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière.

C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, à en diriger l'application.

De là, chez toutes les nations policées, on voit toujours se former, à côté du sanctuaire des lois, et sous la surveillance du législateur, un dépôt de maximes, de décisions et de doctrines qui s'épure journallement par la pratique et par le choc des débats judiciaires, qui s'accroît sans cesse de toutes les connaissances acquises, et qui a constamment été regardé comme le vrai supplément de la législation."

~Jean-Étienne-Marie PORTALIS, *Discours préliminaire sur le projet de code civil* (1801), in *Écrits et discours juridiques et politiques*, Collection des Publications du Centre de Philosophie du Droit (Aix, Presses universitaires d'Aix-Marseille, 1988), at p. 26 (Emphasis added.)

APPENDIX A

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Postface

Le demandeur n'a trouvé qu'une réponse à ces autorités et ces arrêts, ce fut de dire que ce n'est pas le droit français ni notre code civil, mais le droit anglais qui régit ces matières; pourquoi, en vertu de quelle loi? il ne l'a pas dit. C'est une de ces suggestions jetées à tout hasard, dans l'espoir qu'elle fera peut-être, son chemin auprès de quelque juge, mais qui, pour moi, est un aveu que les opinions ne varient pas sur la question, et que la discussion n'est pas possible d'après le droit français.

→ *Ward v. The Montreal Cold Storage & Freezing Co.* (1904), 26 C.S. 310 (Que.Sup.Ct.-Rev.), Pagnuelo J., at p. 348

English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and even then not as binding authorities but rather as *rationes scriptae*: and it is only on that footing and for purposes of comparison only that I shall refer to them.

→ *Curley v. Latreille* (1920), 60 S.C.R. 131 (S.C.C.) Anglin J., at pp. 133-134

With respect, it seems to me that it is time to react against the habit, in cases from the Province of Quebec, of resorting to English common law precedents, on the ground that the Civil Code contains a rule which is in accordance with a rule of English law. On many points (...) the Civil Code and the common law do have similar rules. However the civil law is a complete system in itself and must be interpreted in accordance with its own rules. If, whenever the legal principles are the same, the courts can resort to English law in order to interpret French civil law, the monument of French jurisprudence might equally be cited to throw light upon the rules of English law. I repeat, each system is complete in itself, and apart from the case where one system takes from the other a rule that was formerly foreign to it, there is no need to go beyond it in search of the rule which should be applied to varied situations that arise in daily practice.

→ *Desrosiers v. The King* (1920), 60 S.C.R. 105 (S.C.C.) Mignault J., at p. 126 (translated and cited in *Rubis v. Gray Rocks Inn Ltd.* (1982), (1982) 1 S.C.R. 452 (S.C.C.) Beetz J., at p. 469)

Cependant, je regrette d'avoir à le dire, les avocats de l'intimée, lors de l'audition de la cause, ont persistés à ne citer, outre les articles du code, que des autorités tirées du *common law*. Ce n'est pas ainsi que l'on conservera dans toute son intégrité le droit civil dans la province de Québec. Et j'ajoute qu'il est grandement temps que l'on se convainque que ce droit est assez riche en doctrine et en jurisprudence pour fournir une solution conforme à son génie à toutes les difficultés qui se rencontrent dans la pratique.

—*The Mile End Milling Company v. Peterborough Cereal Company* (1924), (1924) S.C.R. 120 (S.C.C.), Mignault J., at p. 129

ROBIC + LAW
+ BUSINESS
+ SCIENCE
+ ART

ROBIC + DROIT
+ AFFAIRES
+ SCIENCES
+ ARTS

