



# Guide to the English Terminology of the Civil Code of Quebec

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## Guide de terminologie anglaise du Code civil du Québec

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## Accoucheur

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The term “accoucheur” is referred to in the Civil Code of Québec (“CcQ”) regime governing particularities relating to the status of persons and, more specifically, acts of civil status.<sup>1</sup> Although the etymology of this word is French, the Oxford English Dictionary also uses it to describe a male midwife,<sup>2</sup> which could explain the legislator’s choice to use this French term in the English version of the CcQ.

The “accoucheur,” referred to at articles 111 and 112 CcQ, is a person authorized by law to practice deliveries and draw up the attestation of birth or constat de naissance. Although there has been a certain ambiguity in legal scholarship, and some authors maintain that any person may assist the birth and sign the attestation of birth, the “accoucheur” is described as a doctor or midwife by the Bureau du Directeur de l’état civil (Directeur).<sup>3</sup>

The “accoucheur” ensures the accuracy of acts of birth. Before 1972, births were declared to churches and/or municipalities, which made it difficult for the Directeur to keep a proper record of civil acts, particularly births.<sup>4</sup> In 1972, doctors were made responsible for drawing up attestations for the register held and administered by le Ministère de la Santé et des Services Sociaux.<sup>5</sup> The Civil Code Revision Office maintained the requirement that the person assisting the mother in the delivery attest the birth, which was consistent with their recommendation that the system of creation and conservation of civil acts be centralized.

In light of the above changes, the purpose of the attestation, which underlies the importance of the accoucheur’s role, is to “support the declaration

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<sup>1</sup> The CcQ recognizes three acts of civil status : birth, marriage or civil union, and death. All of these documents are authentic and drawn up, and the *Directeur de l’état civil* is responsible for signing them or drawing them up when necessary. See arts 107–9 CcQ.

<sup>2</sup> The Oxford English Dictionary, *sub verbo* “accoucheur,” online : [Oxford English Dictionary](#).

<sup>3</sup> Directeur de l’état civil du Québec, “Directive : Absence d’un constat de naissance dressé par un médecin ou une sage-femme” (4 April 2011), online: [Directeur de l’état civil du Québec](#); Conversation with employee from the Bureau du Directeur de l’état civil (22 June 2012); Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 3d ed (Cowansville (Qc): Yvon Blais, 2002) at para 339, note 54.

<sup>4</sup> *Ibid* at para 323–4.

<sup>5</sup> *Public Health Protection Act*, RSQ 1972, c P-35, s 45–7. Today, the *Public Health Act*, RSQ, S-2.2 does not govern births, instead the *Directeur de l’état civil* is solely responsible for the administration, preservation and delivering of these acts.

of the parents” and ensure the veracity of the information contained in the birth certificate and in the records of civil acts kept by the Directeur.<sup>6</sup>

As a legal term, “accoucheur” is not only used in the civil law. Although the term is not used in Canadian common law statutes, it can be found in late 18th century as well as 19th and 20th century Canadian and American case law.<sup>7</sup> It can also be found in early 20th century case law from the United Kingdom<sup>8</sup> and some, more recent, decisions.<sup>9</sup>

## Amenities

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Amenities form part of the regime of the Civil Code of Québec (“CcQ”) governing disbursements for “constructions, works, or plantations” on another’s property.<sup>10</sup> The CcQ categorizes all such disbursements into three categories: those that are necessary; those that are useful; and those for amenities. In the CcQ, the term “amenities” is used to refer to a possessor who has made disbursements for amenities for himself on another’s property.<sup>11</sup> This suggests that amenities comprise disbursements that are of subjective, idiosyncratic, or sentimental value to the possessor; they serve to satisfy the personal taste of the person who incurs them.<sup>12</sup>

Under the CcQ regime of immovable accession, improvements made by the possessor of an immovable become property of the owner of the

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<sup>6</sup> Office de la révision du Code civil : *Rapport sur l’enregistrement des personnes* (LFIY), at 24, para 3.4.

<sup>7</sup> *R v Pocock*, [1927] OJ No 152 (Ontario Supreme Court) High Court division at para 3, Middleton JA, aff’d on other grounds [1928] OJ No 14; *Aylett v Minnis*, [1973] LEXIS 6, Wythe 219 (Supreme Court of Virginia), rev’d on other grounds 1 Wash 300; *Rothweiler v Superior Court*, [1965] No 2 CA-CIV 109, 1 Ariz App 334 (Court of Appeals of Arizona), aff’d on other grounds 1 Ariz Ap 487, 100 Ariz 37, rev’d in part on other grounds *State ex rel De Concini v City Court of Tucson*, 9 Ariz App 522.

<sup>8</sup> *Ritter and Wife v Godfrey*, [1918–19] All ER Rep 714, [1918–19] (CA) : “The most skilful **accoucheur** is very unlikely ever to meet a case in which [...] he is able with certainty to diagnose [...]”

<sup>9</sup> *Williamson* (1807) 3 C&P 635: “where a man who practiced as an **accoucheur**, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died.”, cited in *R v Misra and another*, [2004] EWCA Crim 2375, [2004] All ER (D) 107 (Oct), leave to appeal to the House of Lords was refused, [2004] All ER (D) 150 (Oct) (October 13, 2004).

<sup>10</sup> Art 957 CcQ.

<sup>11</sup> Arts 961–962 CcQ.

<sup>12</sup> See also Paul-André Crépeau Center for private and comparative Law, *Private Law Dictionary and Bilingual Lexicons – Property*, (Cowansville (Qc): Yvon Blais, 2012) *sub verbo* “disbursements for amenities” [Private Law Dictionary and Bilingual Lexicons – Property].

immovable.<sup>13</sup> In such instances, reimbursement for the possessor differs according to the classification of the improvement as necessary, useful, or for amenities.<sup>14</sup> The CcQ appears to value the corresponding disbursements in descending order. To illustrate, possessors who make necessary disbursements are guaranteed reimbursement for costs, as well as, depending on whether the possession is in good or bad faith, the fruits and revenues arising therefrom.<sup>15</sup> For these purposes, possession is in good faith if the possessor is justified in believing that he or she holds the real rights that are being exercised; here, the right to make alterations on the immovable.<sup>16</sup> Where useful disbursements are concerned, good faith possessors are guaranteed similar protections, while the owner retains some control over reimbursing bad faith possessors.<sup>17</sup> By contrast, there is greater variation in the regime regarding reimbursement for amenities. From the possessor's perspective, the reimbursement (if any) available to him or her will depend on (1) whether the possession was in good faith, and (2) what the owner decides to do with the amenity. In all cases, the possessor has no control over whether an amenity is to remain attached to an immovable or removed. In addition, possessors who have made disbursements for amenities cannot, regardless of the nature of possession, retain the immovable against the owner as security for reimbursement.<sup>18</sup>

A possessor in good faith can expect some form of compensation, regardless of the owner's decision to keep or remove the amenity. If the owner chooses to keep the amenity, the good faith possessor is entitled to reimbursement for the amenity he or she is forced to abandon, limited to the lesser of the cost of the amenity and the value it adds to the immovable.<sup>19</sup> If the owner chooses removal, the good faith possessor can expect to keep any amenities that can be removed "advantageously" from the immovable.<sup>20</sup> The

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<sup>13</sup> Art 957 CcQ.

<sup>14</sup> Art 957 CcQ.

<sup>15</sup> Art 958 CcQ.

<sup>16</sup> Art 932 CcQ.

<sup>17</sup> Contrary to the ostensible intention of the CcQ, possible defects in the drafting of art 959 CcQ result in some useful disbursements giving an inferior right to reimbursements than some disbursements for amenities. See Audrey E. Boctor & David Lametti, "Rewarding Ownership, Valuing Possessors: Making Sense of Articles 957–962 of the CcQ" in Sylvio Normand, ed, *Mélanges François Frenette* (Québec: PUL, 2006) 151.

<sup>18</sup> Unlike good faith possessors who have made necessary or useful disbursements. See art 963 CcQ.

<sup>19</sup> Art 961 (2) CcQ.

<sup>20</sup> Art 961 (1) CcQ.

only situation where a good faith possessor is left without compensation is where the owner chooses to remove an amenity that cannot be detached without being destroyed.<sup>21</sup>

The regime is much less sympathetic to the bad faith possessor. It does, however, impose passive limitations on the owner to protect a minimum range of the possessor's rights. Thus, the owner's primary remedy is to demand removal of the amenity and complete restoration at the expense of the bad faith possessor.<sup>22</sup> Only if such a restoration is impossible<sup>23</sup> may the owner keep the amenities without compensating the possessor.<sup>24</sup>

## Compensation

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Compensation has intuitively similar but distinct usages in the Civil Code of Québec ("CcQ"), distinguishable by context and by comparison to the French text. For example, the owner's discretion to pay compensation (Fr. verser une indemnité) to a possessor who has improved the owner's property in art 959(1) CcQ is distinct from the owner's right, recognized in the same provision at art 959(2) CcQ, to effect compensation (Fr. opérer la compensation) for fruits and revenues owed to him by a possessor. The two senses are discussed below.

1. More commonly, compensation may refer to the object of an obligation to rectify a loss, or the object of an obligation arising in respect of benefits received. This form of compensation, which is closer than (2) to the lay sense of the word, typically appears in the context of damages to property or in obligations arising in contract. For example, a person is "liable for compensation" when he or she owes a debt to another as a result of a juridical fact involving loss.<sup>25</sup> The creditor of such a debt may

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<sup>21</sup> The regime is silent on this particular outcome of cases. However, the effect of arts 961 and 962 is likely the possessor would not receive compensation for the destroyed amenity. The requirement of "advantageous" removal in art 961 CcQ appears to apply solely to the immovable.

<sup>22</sup> Art 962 CcQ.

<sup>23</sup> The criterion for impossibility appears to be objective. Thus, in cases of the possessor's refusal when restoration of the immovable is possible, the owner may be expected to take on restoration (either by hiring a third party or doing it him/her-self) at the possessor's expense. See art 1602 CcQ.

<sup>24</sup> Art 962 CcQ.

<sup>25</sup> See e.g. art 1016 CcQ.

be said to be “entitled to compensation”,<sup>26</sup> or have a “right to obtain compensation”.<sup>27</sup> In these instances, the French equivalents used are typically *indemnité*; *réparation*; *en compensation des pertes*; or similar. Elsewhere, the CcQ may require that certain obligations be performed “for compensation” of a benefit previously received.<sup>28</sup> In these instances, the phrase *en compensation de l’apport* (or similar) is the French equivalent.

2. In more particular usage, “compensation” appears in the regime of the CcQ governing the extinction of obligations. Certain obligations are said to be extinguishable “by compensation”.<sup>29</sup> The effect of compensation is the mutual reduction of reciprocal debts whose objects are of the same type.<sup>30</sup> To take a rudimentary example, where two people owe each other a debt, one for \$60 and the other for \$40, the effect of compensation will be such that the debt of the first person (\$60) will be reduced to \$20, while the debt of the second person (\$40) will be extinguished outright.

Compensation is effected by operation of law, when the requirements of art 1673 CcQ are met. It is automatic and irreversible.<sup>31</sup> Thus, neither party in the above example could, absent previous agreement, insist the debts be paid over two transactions instead of one. However, not all reciprocal debts are subject to compensation. Either party in an agreement involving reciprocal debts may argue against compensation by claiming that the debts do not meet the requirements for compensation under the CcQ. The criteria for the mechanism of compensation set out in the CcQ pertain to (a) characteristics of the debts involved, and (b) the objects of these debts.

- a) First, only debts that are certain, liquid, and exigible are subject to compensation.<sup>32</sup> The requirement of certainty rules out debts whose existence is contestable, as well as debts attached to contingencies (as

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<sup>26</sup> See e.g. art 1067 CcQ.

<sup>27</sup> See e.g. art 2092 CcQ.

<sup>28</sup> See e.g. art 427 CcQ.

<sup>29</sup> See e.g. art 1671 CcQ.

<sup>30</sup> Jean-Louis Baudouin, Pierre-Jobin & Nathalie Vézina, *Les Obligations*, 7th ed (Cowansville (Qc): Yvon Blais, 2013) art para 1058–1059 [Baudouin & Jobin].

<sup>31</sup> *Ibid.*

<sup>32</sup> Art 1673 CcQ, although of course it may give rise to a claim for compensation in sense (1).

those arising in conditional obligations).<sup>33</sup> The requirement of liquidity rules out debts whose value is not easy to calculate.<sup>34</sup> In principle, this means that a person cannot, by arguing compensation, withhold a portion of payment to a contractor who has performed his task poorly.<sup>35</sup> This is because while the debt to the contractor is liquid, losses arising from poor services are generally not.<sup>36</sup> However, in such instances, the CcQ allows the application for judicial liquidation before setting up compensation.<sup>37</sup> The requirement of exigibility rules out claims of compensation based on obligations that are not actionable in law, such as natural obligations.<sup>38</sup>

- b) The second criterion for compensation requires the object of each debt to be either money or fungible property identical in kind.<sup>39</sup> The object of the debts cannot be exempt from seizure.<sup>40</sup> In practice, compensation is rarely claimed for debts of fungible property, as the parties are likely to have made contractual arrangements for mutual extinguishment of debts.

In addition to the basic requirements above, the CcQ imposes a number of restrictions that further limits the scope of compensation. For example, an act intended to harm another cannot be the basis for a claim of compensation.<sup>41</sup> Compensation cannot be claimed for a debt owed to someone who is bankrupt, unless the reciprocal obligations were taken on prior to bankruptcy.<sup>42</sup> The state may claim compensation against individuals, but individuals may not claim compensation against the state.<sup>43</sup>

## Deed

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<sup>33</sup> Baudouin & Jobin, *supra* note 21 at para 1062.

<sup>34</sup> *Ibid* at para 1063.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> Art 1673 CcQ; Baudouin & Jobin, *supra* note 21 at para 1064.

<sup>38</sup> *Ibid* at para 1065.

<sup>39</sup> Art 1673 (1) CcQ.

<sup>40</sup> Art 1676 (2) CcQ.

<sup>41</sup> *Ibid*.

<sup>42</sup> Baudouin & Jobin, *supra* note 21 at para 1076.

<sup>43</sup> Art 1672 CcQ; Baudouin & Jobin, *supra* note 21 at para 1075.

A deed is a document that attests to a juridical act.<sup>44</sup> For example, a deed of acquisition attests to the transfer of ownership that takes place in a sale. “Deed” (Fr. acte) appears to be interchangeable with “act” in the Civil Code of Québec (“CcQ”).

“Deed” as it appears in the CcQ differs significantly from its counterpart in common law. In the common law, a deed is a document that bears a signature and seal, and that is intended to bring about juridical consequences.<sup>45</sup> Common law deeds are most commonly associated with the conveyance of interests in land,<sup>46</sup> but they can also be used to make gifts of personalty, to exercise powers of appointment, to change one’s name, or to create a binding obligation in the absence of contractual consideration. The requirement of “delivery” of a common law deed does not refer to physical delivery but to an intention that the deed take legal effect. Although the functions of a deed of the CcQ may overlap with the functions of a common law deed, the term carries a different set of connotations and requirements in Quebec. “Delivery”, in the special sense associated with common law deeds, is not relevant in Quebec civil law, nor is there any requirement of sealing. Conversely, while a common law deed can be created privately, the intervention of a notary is required to make the deed conform to the standards of a notarial act under Quebec civil law.<sup>47</sup>

## Discuss/Discussion

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Many provisions in the Civil Code of Québec (“CcQ”) use the words “discuss” and “discussion” in their lay sense to mean having a conversation for a particular purpose.<sup>48</sup> Certain usages of discuss and discussion, however, denote procedural requirements pertaining to the seizure and sale of property.

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<sup>44</sup> Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons – Obligations*, (Cowansville (Qc): Yvon Blais, 2003) *sub verbo* “deed” [Private Law Dictionary and Bilingual Lexicons – Obligations].

<sup>45</sup> *Friedmann Equity Developments Inc. v Final Note Ltd.*, [2000] 1 SCR 842, 188 DLR (4th) 269 at 36; Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 3<sup>rd</sup> ed (Oxford, New York : Oxford University Press, 2011) *sub verbo* “deed (A)”.

<sup>46</sup> Black’s Law Dictionary, revised 4th ed, *sub verbo* “deed”.

<sup>47</sup> *Private Law Dictionary and Bilingual Lexicons – Property*, *supra* note 3 *sub verbo* “deed”.

<sup>48</sup> See e.g. arts 190, 343 CcQ.



The discussion of property in this sense is the seizure and judicial sale of certain kinds of property (the property under discussion) before others.<sup>49</sup>

In the CcQ, the discussion of property typically requires creditors to maintain a preference for the property of primary debtors before turning to the property of secondary debtors (e.g. a surety<sup>50</sup> or spouse<sup>51</sup>). In such instances, the secondary debtor is said to enjoy the “benefit of discussion” against the creditor.<sup>52</sup> The CcQ sometimes orders groups of assets, requiring creditors to first discuss certain property before having access to other property that is available for the debt. For example, creditors of a partnership must discuss the property of the partnership before instituting proceedings against any of the partners.<sup>53</sup> Similarly, creditors of the institute in a succession must discuss his personal property before having access to the property held in the succession.<sup>54</sup> Despite the lay connotations of “discuss” and “discussion”, the requirement of the discussion of property, wherever it appears in the CcQ, is strict. The creditor is not merely required to consider favoring the property of the primary debtor, but must systematically favor it over that of any secondary debtors.

## Enterprise

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“Enterprise” appears in three contexts in the Civil Code of Québec (“CcQ”): (1) in the regime governing the solidarity of obligations; (2) in the regime governing the nominate contract of enterprise, also called the contract for services; and (3) in connection with procedural requirements involving the enterprise registrar. It is important not to confound the “contract for the carrying out of an enterprise” that applies in sense (1) with the “contract of enterprise”, defined separately in relation to sense (2) as a nominate class of contracts. Similarly, “enterprise register” and “enterprise registrar” in sense (3) refer to entities defined in An Act Respecting the Legal Publicity of

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<sup>49</sup> John E. C. Brierley & Paul-André Crépeau, eds, *Dictionnaire de droit privé et lexiques bilingues*, 2<sup>nd</sup> ed, Quebec Research Centre of Private and Comparative Law (Cowansville (Qc) : Yvon Blais, 1991) *sub verbo* “discussion” [Dictionnaire de droit privé et lexiques bilingues – 2<sup>nd</sup> ed].

<sup>50</sup> Arts 2347–2348 CcQ.

<sup>51</sup> Art 484 CcQ.

<sup>52</sup> See a.g. arts 1766 (1), 2347 CcQ.

<sup>53</sup> Art 2221 (2) CcQ.

<sup>54</sup> Art 1233 (2) CcQ.

Enterprises,<sup>55</sup> and this sense is unrelated to the other two senses of “enterprise”.

1. The regime of the CcQ governing solidarity of obligations defines an enterprise as any economic activity that involves the provision of a service or the production, administration or alienation of property.<sup>56</sup> An enterprise may consist of one or more persons and need not be commercial in nature.<sup>57</sup> In general, the CcQ’s usage of “enterprise” outside the regime of solidarity conforms to this definition. In slightly extended usage, “enterprise” may appear elsewhere in the CcQ to mean the apparatus of the economic activity<sup>58</sup> or the persons or entities engaged in the economic activity.<sup>59</sup> The technical significance of “enterprise” in the regime of solidarity is outlined below.

“Enterprise” in the CcQ regime of solidarity relates to the cause<sup>60</sup> for which a person may take on an obligation or agree to a contract; obligations contracted for other (that is, non-enterprise) reasons are sometimes called civil obligations.<sup>61</sup> In regime under the CcQ, “enterprise” usually occurs in the phrase “obligations contracted for the carrying out of an enterprise”. In practice, however, “enterprise” is more likely to affect entire contracts rather than single obligations.<sup>62</sup> It is therefore more convenient to speak of contracts for the carrying out of an enterprise.

Solidarity is presumed between the debtors of contractual obligations that are incurred in relation to the carrying on of an enterprise.<sup>63</sup> This means that the creditor of such obligations will, in most cases,<sup>64</sup> have

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<sup>55</sup> RSQ c P-44.1.

<sup>56</sup> Art 1525 (3) CcQ.

<sup>57</sup> *Ibid.*

<sup>58</sup> See e.g. art 427 (2) CcQ.

<sup>59</sup> See e.g. art 746 CcQ.

<sup>60</sup> In the sense of the subjective, rather than objective, reason for taking on an obligation. See Private Law Dictionary and Bilingual Lexicons – Obligations, *supra* note 35 *sub verbo* “cause”.

<sup>61</sup> The explicit distinction between enterprise and civil obligations of the CCLC did not survive into the CcQ. However, the notion of civil obligations continues to serve as a useful contrast. See Baudouin & Jobin, *supra* note 21 at para 73.

<sup>62</sup> *Ibid.*

<sup>63</sup> Art 1525 (2) CcQ; see also, in the context of partnerships, arts 2221 (1), 2254 CcQ.

<sup>64</sup> That is, absent specific agreement to make the debt not solidary.

the right to demand full performance by any one of the debtors.<sup>65</sup> It is important to note that this is normally not the case. Debts arising in non-enterprise (that is, civil) contracts are not presumed to be solidary.<sup>66</sup> This discrepancy gives rise to a grey area for contracts that, while not directly for the carrying out of an enterprise, are nevertheless accessory to the carrying out of one.<sup>67</sup> Although there is reason to suggest that such accessory contracts give rise to the presumption of solidarity, the authorities are somewhat divided on the matter.<sup>68</sup>

2. The CcQ regime of nominate contracts defines the “enterprise contract” or “contract of enterprise” as a contract between a contractor and a client by which the former promises the latter performance of physical or intellectual work in exchange for payment without creating a relationship of subordination.<sup>69</sup> The lack of subordination is the distinguishing feature of the contract of enterprise.<sup>70</sup> Whereas the employee in a contract of employment is subject to the employer’s direction and control (including specific instructions pertaining to the performance of the contract<sup>71</sup>), the contractor in a contract of enterprise retains control over the means of performing the contract.<sup>72</sup> For example, the contractor is generally free to hire a subcontractor to carry out the contract.<sup>73</sup> However, the contractor’s general freedom does not preclude the client from providing general instructions to the contractor, or from demanding inspection and supervision over the contractor to ensure proper performance.<sup>74</sup>
  
3. “Enterprise register” and “enterprise registrar” are terms defined in An Act Respecting the Legal Publicity of Enterprises with effect in the CcQ.

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<sup>65</sup> Art 1523 CcQ.

<sup>66</sup> Art 1525 (1) CcQ.

<sup>67</sup> Baudouin & Jobin, *supra* note 21 at para 75.

<sup>68</sup> *Ibid.*

<sup>69</sup> Art 2090 CcQ. See also Dictionnaire de droit privé et lexiques bilingues – 2<sup>nd</sup> ed, *supra* note 40 *sub verbo* “contract of enterprise”.

<sup>70</sup> Art 2099 CcQ. See also Dictionnaire de droit privé et lexiques bilingues – 2<sup>nd</sup> ed, *supra* note 40 *sub verbo* “contract of enterprise”.

<sup>71</sup> Rules concerning the contract of employment are found in arts 2085 ff CcQ. See also Dictionnaire de droit privé et lexiques bilingues – 2<sup>nd</sup> ed, *supra* note 40 *sub verbo* “contract of employment”.

<sup>72</sup> Art 2099 CcQ.

<sup>73</sup> Art 2101 CcQ.

<sup>74</sup> *Drouin v Desautels*, [1995] CS 123 at 128–9.

For example, declarations of partnership can be set up against third parties from the date they are recorded in the enterprise register.<sup>75</sup> The enterprise register, then, is the official collection of registration documents for entities such as partnerships, sole proprietorships, and legal persons established for private interests.<sup>76</sup> The enterprise registrar is an appointed public officer charged with the management of the enterprise register.<sup>77</sup>

## Equity

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“Equity” in the Civil Code of Québec (“CcQ”) is a broad notion of fairness, especially in relation to discretion exercised by a judge. It is unrelated to its common law counterpart meaning the body of law pertaining to such “equitable remedies” as injunctions, estoppel, and trusts.<sup>78</sup>

There are two references to “equity” in the CcQ. First, in the regime governing movable accession; equity limits the usual right of accession in disputes involving circumstances unforeseen by the CcQ itself.<sup>79</sup> In this instance, “equity” is fairness in balancing the competing interests of disputing parties.<sup>80</sup> Second, in the regime governing obligations, validly formed contracts are said to include not only the express terms of the agreement, “but also [...] what is incident to it [...] in conformity with usage, equity or law.”<sup>81</sup> Notable examples of such implicit obligations have been the obligation of clubs and professional associations to follow certain principles of procedural equity when disciplining their members.<sup>82</sup> In these cases, procedural equity was found to be an implicit term in the contract between the association and its members, even

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<sup>75</sup> Art 2195 CcQ.

<sup>76</sup> An Act Respecting the Legal Publicity of Enterprises, *supra* note 46 s.21.

<sup>77</sup> *Ibid* s.1–3.

<sup>78</sup> Anne-Françoise Debruche, *Équité du juge et territoires du droit privé – le paradoxe de l’emprise immobilière dans les systèmes romanistes et de common law*, (Cowansville (Qc) : Yvon Blais, 2008) at 359.

<sup>79</sup> Art 975 CcQ.

<sup>80</sup> Private Law Dictionary and Bilingual Lexicons – Obligations, *supra* note 35 *sub verbo* “equity”. Similarly, art 976 CcQ may be understood as an equitable constraint on the right of ownership, though it does not explicitly say so. For a more detailed study of equity acting as a limit on rights, see Debruche, *supra* note 69.

<sup>81</sup> Art 1434 CcQ.

<sup>82</sup> *Senex v Montreal Real Estate Board*, [1980] 2 SCR 555; *Delage v Club de Golf St-Lambert Inc*, [2003] RL 454.

if the association itself did not act as a tribunal or otherwise exercise quasi-judicial functions.<sup>83</sup>

It must be emphasized that when the CcQ speaks of “equity” or the “principles of equity”, it is in reference to this broad notion of fairness in decision-making and not any regime associated with the common law. In brief, “equity” in common law jurisdictions refers to a supplemental body of law that developed in parallel to the common law, reaching back to the Court of Chancery in England in the 15<sup>th</sup> century.<sup>84</sup>

The CcQ’s usage of “equity” remains distinct from its counterpart in French civil law as well. The Napoleonic Code reflects the post-Revolutionary goal of eliminating any law-making power on the part of judges, whose roles were to be limited to the direct application of the law.<sup>85</sup> To this day, *équité* in the French legal system carries with it the somewhat negative connotation of judges derogating from written law in the name of an independent, or subjective, notion of fairness.<sup>86</sup> By contrast, “equity” (as the subjective notion of fairness) is generally not regarded with suspicion in Quebec.<sup>87</sup>

## Good faith

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“Good faith” is a principle in the Civil Code of Québec (“CcQ”) that applies generally to the exercise of civil rights<sup>88</sup> and universally to contractual relationships.<sup>89</sup> In Quebec civil law, good faith takes two dominant forms:<sup>90</sup> the

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<sup>83</sup> *Ibid* at para 6.

<sup>84</sup> Private Law Dictionary and Bilingual Lexicons – Obligations, *supra* note 35 *sub verbo* “equity”.

<sup>85</sup> Art 5 *Code Civil* (1815–).

<sup>86</sup> Debruche, *supra* note 69 at 23–4.

<sup>87</sup> This is in part due to the federalist court system of Canada necessitating longer judgments from Quebec judges. This type of reasoning admits a greater degree of subjectivity than the “judicial syllogism” of France. For more, see Debruche, *supra* note 69 at 26–7.

<sup>88</sup> Didier Lluelles & Benoît Moore, *Droit des obligations*, (Montreal: Édition Thémis, 2006) at para 1972 [Lluelles & Moore].

<sup>89</sup> Art 1375 CcQ; Baudouin & Jobin, *supra* note 21 at para 132.

<sup>90</sup> Louise Rolland divides these two forms into the “knowledge-ignorance” conception of the “duty-fault” conception [translated by author]. Louise Rolland, “La bonne foi dans le Code civil du Québec: du général au particulier” (1995–1996) RDUS 377 at 383.

first is a subjective conception of reality based on what one knows or does not know, and the second is an objective norm of behaviour.<sup>91</sup>

The first conception is based on actual knowledge and intention. It can be contrasted with bad faith, where there is malicious intention. A name.<sup>92</sup> An example of the first conception would be disbursements made in good faith, meaning that the owner did not know the disbursements were being made on someone else's property.<sup>93</sup>

The contours of the second conception, "reasonable behaviour", were drawn by the Supreme Court of Canada in *Houle v Canadian National Bank*, where the court accepted the theory of abuse of rights based on good faith.<sup>94</sup> The court held that rights are to be exercised in a "reasonable" manner, meaning that a right can be "abused" even if there is no malicious intention.<sup>95</sup> This principle is codified at article 7 CcQ.<sup>96</sup>

Good faith, in the context of contractual obligations, can take an active or passive form. Indeed, the requirement of good faith can impose a positive obligation in the formation, performance and extinction of the contract. Obligations of disclosure in both formation and performance of contracts<sup>97</sup> (which can trigger the rules on mistake),<sup>98</sup> obligations of loyalty<sup>99</sup> and cooperation<sup>100</sup> as well as implicit<sup>101</sup> and explicit<sup>102</sup> obligations associated with

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<sup>91</sup> Baudouin & Jobin, *supra* note 21 at para 132.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* See also arts 958–9 CcQ.

<sup>94</sup> [1990] 3 SCR 122, 74 DLR (4th) 577 [*Houle*].

<sup>95</sup> *Ibid.* at 150–52. Reasonable behaviour is therefore evaluated objectively.

<sup>96</sup> Art 7 CcQ prohibits both malicious intention and the excessive, unreasonable exercise of a right.

<sup>97</sup> In *National Bank v Soucisse*, [1981] 2 SCR 339 at 355–58, 363, the court held that there is a contractual obligation to disclose, failure of which can result in an action not being receivable in a court of law (*fin de non-recevoir*). A duty to disclose based on the principle of good faith also emerged from this judgment, as the bank's "fault" was its failure to disclose the existence of letters of suretyship to the deceased's heirs and proceeding to extend further loans. See also Lluellas & Moore, *supra* note 79 at para 2003, 2005.

<sup>98</sup> Brigitte Lefebvre, "Liberté contractuelle et justice contractuelle: le rôle accru de la bonne foi comme norme de comportement" in *Développements récents en droit des contrats*, vol 129 (Cowansville (Qc): Yvon Blais, 2000) 49 at 68.

<sup>99</sup> Baudouin & Jobin, *supra* note 21 at para 161; Lluellas & Moore, *supra* note 79 at para 1979.

<sup>100</sup> Baudouin & Jobin, *supra* note 21 at para 162–3; Lluellas & Moore, *supra* note 79 at para 1997–2003.

<sup>101</sup> Baudouin & Jobin, *supra* note 21 at para 434–5. The purpose of implicit obligations (as well as the principle of good faith more generally) is to protect the weaker contracting party from exploitation.

<sup>102</sup> Some obligations have been codified, such as the employee's obligation to act faithfully and honestly towards his employer (art 2088 CcQ) and the insured's obligation of utmost good faith disclosure towards the insurer (arts 2408–10 CcQ).

certain types of contracts are all examples of what can be an active obligation.<sup>103</sup> It must be noted that the obligation of loyalty is within the larger concept of good faith, and is distinct from the common law notion of fiduciary duty.<sup>104</sup> Good faith also limits contractual rights to what is reasonable in the contractual and social context, as established in *Houle*. This is reflected at articles 7 and 1375 CcQ. Finally, article 1434 CcQ, which includes in any contractual obligation “what is incident to” the contract “according to its nature and in conformity with usage, equity, or law” clearly illustrates that both positive and negative obligations can be a part of a contract without explicit consent to these obligations.

Civilian good faith must be distinguished from good faith in the common law, which is much more restricted in its application. As a response to the historical opposition and anxiety from common lawyers towards a general principle of good faith,<sup>105</sup> the common law “has developed piecemeal solutions in response to demonstrated problems of unfairness”.<sup>106</sup> Common law courts, instead of abiding by a general principle such as that found in the CcQ, have introduced various concepts that apply to certain types of contracts. The principle of equity, the doctrines of mistake, misrepresentation, undue influence, duress, unjust enrichment and restitution are some examples, many of which can be found in statutes and regulations.<sup>107</sup>

The key difference between the common law principle of good faith and the civil law version is that the latter applies it to both the formation and performance of a contract, whereas the common law “enunciates the narrower view” that it is only applicable to the performance of the obligation.<sup>108</sup> The civil

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<sup>103</sup> It should be noted that most obligations can take both an active and a passive form. For example, the obligation of loyalty may be a negative obligation to act without malicious intention or a positive obligation of honesty.

<sup>104</sup> An obligation of loyalty is usually imposed in relationships where trust is key, such as the contract for services or contract of mandate.

<sup>105</sup> William Tetley, “Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering” (2004) 35 J Mar L & Com 561 at 570: “[t]he opposition among common lawyers to a general good faith duty is generally rooted in the persistent anxiety that importing such an overriding principle into the common law, particularly as applied to pre-contractual bargaining (as opposed to post-contractual performance), would result in cases being decided on subjective standards of morality and fairness, thus giving rise to uncertainty, the bane of commercial law”.

<sup>106</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, [1988] 1 All ER 348 at 353, Bingham LJ (UKCA).

<sup>107</sup> Tetley, *supra* note 96 at 571–9.

<sup>108</sup> *Ibid* at 567.

law sees a contract as a relationship between two parties that must be governed by good faith; therefore, the principle applies without question to the formation of the contract during negotiations, when the relationship begins.<sup>109</sup> In the common law, the contract is based on offer, acceptance and consideration and no contract exists until these elements are met.<sup>110</sup> As a result, the common law does not import good faith obligations in pre-contractual relationships (in the formation of a contract) because, to a common lawyer, no legal relationship exists until there is a contract. The option for one to sue in tort law remains and, as mentioned above, the common law has adopted doctrines such as misrepresentation to achieve the same ends (justice and equity) as the good faith principle in the civil law.<sup>111</sup>

## Inalienable

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“Alienability” in property regimes refers to whether a person’s relationship with a thing can be severed. Inalienable objects of property cannot be sold, gifted, abandoned, or seized. Restrictions on alienation outside of the property regime can be understood by analogy; for example, a person may not forfeit his or her right to life in any way.<sup>112</sup>

Although the concept of alienation in the Civil Code of Québec (“CcQ”) can be understood in reference to property rights, it is important to note that the CcQ’s usage of “alienate” and related forms (including “inalienable”) suggests a broader regime pertaining to rights in general.<sup>113</sup> The alienability – or inalienability – of a right appears to depend on the inherent characteristics of that right. For instance, while it appears that personality rights are, in general, inalienable,<sup>114</sup> the opposite appears to be true for property rights.<sup>115</sup> Thus, despite the sense of absolute inalienability surrounding personality

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* at 571–9.

<sup>112</sup> Art 3 CcQ.

<sup>113</sup> Strictly speaking, it is not the object of property that is or is not alienable, but rather the rights over that object.

<sup>114</sup> Art 3 CcQ.

<sup>115</sup> For instance, according to art 947 CcQ, the right of ownership includes the right to dispose property “fully and freely”. However, property can be made to be inalienable under certain circumstances.



rights, such as the right to life and the inviolability of the person,<sup>116</sup> the CcQ recognizes the alienation of body parts under specific circumstances.<sup>117</sup>

Conversely, inalienability is the exception and alienability the norm in the CcQ regime of property. Stipulations of inalienability over certain objects of property<sup>118</sup> are restricted to limited circumstances. Only property conveyed by gift or will may be made inalienable, and only when the stipulation itself is temporary and justified by a “serious and legitimate interest”.<sup>119</sup> In most circumstances, property that is made inalienable by stipulation will not be subject to seizure for debts of the new owner.<sup>120</sup> However, in cases where the original interest that justified the stipulation has disappeared, or where it has been overridden by a competing and greater interest, the court may allow the disposal of otherwise inalienable property.<sup>121</sup> Further, the stipulation of inalienability may not forbid the new owner from contesting the validity of the stipulation, or from applying for the judicial authorization of the disposal of the property.<sup>122</sup>

Other examples of inalienability in the CcQ property regime may involve circumstances in which certain types of property are inalienable. Thus, while the right to dispose of property is one of the main characteristics of ownership,<sup>123</sup> the CcQ may limit the owner’s right of alienation over certain objects of property, such as movables serving for the use of a family residence.<sup>124</sup>

## Oblique Action

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The term “oblique action” is used in Book Five of the Civil Code of Québec (“CcQ”) governing obligations. It is one of two measures provided by the CcQ to protect the right to performance of obligations; in other words, to

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<sup>116</sup> Art 3 CcQ.

<sup>117</sup> Art 19 CcQ.

<sup>118</sup> The regime is set forth at arts 1212–17 CcQ.

<sup>119</sup> Art 1212 CcQ.

<sup>120</sup> Art 1215 CcQ.

<sup>121</sup> Art 1213 CcQ.

<sup>122</sup> Art 1216 CcQ.

<sup>123</sup> Art 947 CcQ.

<sup>124</sup> Art 401 CcQ.

“preserve” the creditor’s rights.<sup>125</sup> The oblique or “indirect” action is based on the juridical principle that the property of the debtor “is charged with the performance of his obligations and is the common pledge of his creditors”.<sup>126</sup> The law therefore grants the creditor a power of “supervision” on the debtor’s patrimony in order to ensure that its value is not unduly depreciated voluntarily or by carelessness.<sup>127</sup> This power of supervision allows the creditor to exercise the debtor’s rights when he or she neglects or refuses to do so, causing the creditor prejudice.<sup>128</sup>

The oblique action is also called an “indirect action” at article 1035 of the English version of the CcQ and these two terms are used interchangeably in legal scholarship.<sup>129</sup> The creditor exercises the rights in the debtor’s name and for his or her benefit; consequently, any property collected by the creditor who took on the action falls into the debtor’s patrimony and benefits all the creditors.<sup>130</sup> Unlike a direct action,<sup>131</sup> the creditor is not acting in his or her own name but for the debtor, and the action is undertaken against the debtor’s debtor and not the debtor him/herself. As a result, the creditor will profit from this action indirectly (once the property is in his or her debtor’s patrimony), according to his or her rank.<sup>132</sup> Another consequence of the oblique action is that the person against whom the action is brought may “set up against the creditor all the defenses he could have set up against his own creditor.”<sup>133</sup>

Examples of the oblique action include the settlor’s or beneficiary’s right to take legal action in the place of the trustee,<sup>134</sup> the sub-lessee’s right to exercise the lessee’s rights against the lessor<sup>135</sup> and the hypothecary creditor’s

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<sup>125</sup> Art 1626 CcQ. The two measures are the oblique action and the Paulian action (arts 1631–6 CcQ).

<sup>126</sup> Art 2644 CcQ.

<sup>127</sup> Louise Langevin & Nathalie Vézina, “La protection du droit à l’exécution de l’obligation” in *Obligations et Contrats: Collection de droit, École du Barreau du Québec*, vol 5 (Cowansville (Qc): Yvon Blais, 2011–2012) 104 at 105.

<sup>128</sup> *Private Law Dictionary and Bilingual Lexicons – Obligations*, supra note 35 sub verbo “oblique action”.

<sup>129</sup> These two terms are synonyms in both English and French. See *Private Law Dictionary and Bilingual Lexicons – Obligations*, supra note 35 sub verbo “oblique action”; Baudouin & Jobin, supra note 21 at para 891.

<sup>130</sup> Langevin & Vézina, supra note 118 at 2. See also art 1630 CcQ.

<sup>131</sup> *Private Law Dictionary and Bilingual Lexicons – Obligations*, supra note 35 sub verbo “direct action”.

<sup>132</sup> Langevin & Vézina, supra note 118 at 4.

<sup>133</sup> Art 1629 CcQ.

<sup>134</sup> Art 1291 CcQ; Langevin & Vézina, supra note 118 at 2.

<sup>135</sup> Art 1876 CcQ; Langevin & Vézina, supra note 118 at 2.

right to exercise the debtor's rights to the benefit of his or her hypothec.<sup>136</sup> This action is most useful when the creditor wants to accomplish an act in the debtor's name, such as interrupt prescription, publish a right, accept or renounce a succession or collect a debt.<sup>137</sup> However, where the law allows it, creditors will prefer direct and personal actions so that they can benefit directly from the action.<sup>138</sup>

In order to ensure that interferences in the debtor's patrimony are justified, strict conditions must be met for this power of supervision to be exercised.<sup>139</sup> The debt must meet certain requirements for the recourse to be possible:<sup>140</sup> it must be certain (no suspensive or resolutive conditions),<sup>141</sup> liquid (the amount must be determinable at the time of the judgment on the oblique action),<sup>142</sup> and exigible (the creditor must prove that he or she has the right to immediate payment).<sup>143</sup> The creditor may not, however, exercise extra-patrimonial or patrimonial rights that are "strictly personal to the debtor."<sup>144</sup> Examples of strictly personal extra-patrimonial rights include divorce actions, separation from bed and board, nullity of marriage, contestation of filiation, etc. Patrimonial rights can also be purely personal to the debtor, for example, partition of family patrimony, inalienable rights, actions for damages, etc.<sup>145</sup>

The creditor must be justified in taking on the action. He or she must show that a prejudice will result from the debtor's actions; this is most often the case when the debtor is insolvent.<sup>146</sup> Negligent management of one's patrimony is not enough to constitute a prejudice allowing the creditor to

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<sup>136</sup> Louis Payette, "Exercice des droits et recours hypothécaires" in *Les sûretés réelles dans le Code civil du Québec*, 4<sup>th</sup> ed (Cowansville (Qc): Yvon Blais, 2010) 772.

<sup>137</sup> Baudouin & Jobin, *supra* note 21 at para 886; Langevin & Vézina, *supra* note 118 at 4.

<sup>138</sup> Langevin & Vézina, *ibid.* See also Baudouin & Jobin, *supra* note 21 at para 891.

<sup>139</sup> Langevin & Vézina, *supra* note 118 at 2.

<sup>140</sup> Art 1627 CcQ.

<sup>141</sup> The existence of the obligation cannot be doubted. A debt which depends on a future and uncertain condition as defined by art 1497 CcQ, does not satisfy this requirement. Baudouin & Jobin, *supra* note 21 at para 882.

<sup>142</sup> If the action is one in contractual or extra-contractual damages, there must be a judgment to establish the amount before the oblique action can be exercised. Baudouin & Jobin, *supra* note 21 at para 882.

<sup>143</sup> Any term attached to the obligation must be respected, unless the debtor loses the benefit of the term (art 1514 CcQ), renounces to the benefit of the term or forfeits it (art 1515 CcQ). Baudouin & Jobin, *supra* note 21 at para 882.

<sup>144</sup> Art 1627 CcQ.

<sup>145</sup> Baudouin & Jobin, *supra* note 21 at para 887.

<sup>146</sup> *Ibid* at para 882.

interfere, and the creditor cannot exercise an oblique action where the debtor has taken an action to do so him/herself.<sup>147</sup> Some authors argue that insolvency is not a necessary condition in cases where the debtor's solvency does not compensate for the prejudice caused by his or her actions.<sup>148</sup>

Finally, the oblique action must be distinguished from the Paulian action and from subrogation. The Paulian action makes the debtor's fraudulent action unenforceable against the creditor.<sup>149</sup> Unlike the oblique action, which requires no fraudulent intention (inaction or refusal to exercise a right suffice), the Paulian action cannot be exercised unless the debtor's fraudulent intention is proven. In addition, although the oblique action has been referred to as "action subrogatoire",<sup>150</sup> no subrogation takes place.<sup>151</sup>

## Period of Grace

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The term "period of grace," more commonly written as "grace period" outside of the Civil Code of Québec ("CcQ"), is used in Book Five of the CcQ governing obligations, specifically in the section on the right to enforce performance,<sup>152</sup> and on compensation.<sup>153</sup> A "grace period" is extra time granted to the debtor, by the court or by the creditor, "without incurring the usual penalty for being late,"<sup>154</sup> when the term has already passed; the debtor has more time to perform the obligation, but the term remains expired.<sup>155</sup> A period of grace therefore does not prevent compensation<sup>156</sup>, and the debtor "remains liable for injury resulting from delay in the performance of the obligation from the moment he begins to be in default."<sup>157</sup>

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<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid* at para 881; Langevin & Vézina, *supra* note 118 at 4.

<sup>149</sup> Art 1631 CcQ.

<sup>150</sup> *Private Law Dictionary and Bilingual Lexicons – Obligations*, *supra* note 35 *sub verbo* "oblique action".

<sup>151</sup> Gérard Cornu, *Vocabulaire juridique*, 2<sup>nd</sup> ed (Paris : Presses Universitaires de France, 1990) *sub verbo* "subrogation"; *Private Law Dictionary and Bilingual Lexicons – Obligations*, *supra* note 35 *sub verbo* "subrogation".

<sup>152</sup> Art 1600 CcQ.

<sup>153</sup> Art 1675 CcQ.

<sup>154</sup> Bryan A. Garner et al, eds, *Black's Law Dictionary*, 9<sup>th</sup> ed (St.Paul (Minn): Thomson Reuters, 2009) *sub verbo* "grace period".

<sup>155</sup> Baudouin & Jobin, *supra* note 21 at para 1064.

<sup>156</sup> Compensation refers to the extinguishment of reciprocal debts and obligations (art 1672 CcQ).

<sup>157</sup> Art 1600 CcQ.

It is therefore important to differentiate the grace period from prorogation, which fixes a new term at a later date, preventing compensation.<sup>158</sup> The “period of grace” is also often equated to the judicial term,<sup>159</sup> a suspensive term that the judge grants the debtor to allow him or her to perform his or her obligations after the term has passed. However, not all judicial terms are “periods of grace”. Indeed, the suspensive term set by the judge could simply be a new later term, or he or she could set a term where one had not been set at all.<sup>160</sup> A “period of grace” must be distinguished from the suspensive term, to which the exigibility of a right is subordinated.<sup>161</sup> Although both terms seem similar because the debtor is granted a certain amount of time to perform, the “period of grace” does not produce all the effects of the suspensive condition. The “period of grace” simply delays the creditor’s recourse to force the execution of the obligation and the obligation remains exigible even after the debtor is granted a “period of grace”. This is unlike the suspensive term where the obligation is not exigible until the term expires.<sup>162</sup>

## Simulation

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The Civil Code of Québec (“CcQ”) regime of simulation allows contracting parties to keep their agreement hidden from third parties. For example, a leasing arrangement may be disguised as a contract of sale so as to make the lessee appear to be the owner of the property.<sup>163</sup> The simulation of an agreement results in the creation of a secondary contract named the apparent contract while the true intent of the contracting parties is said to exist in a counter-letter.<sup>164</sup> In the above example, the contract of lease (represented in the counter-letter) would appear to third parties as a contract of sale (the apparent contract). Despite the historic association of simulation with either fraudulent intent, designed to trick third-parties into engaging in unfavorable transactions,<sup>165</sup> or attempts at circumventing prohibition against certain

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<sup>158</sup> Baudouin & Jobin, *supra* note 21 at para 1064.

<sup>159</sup> *Private Law Dictionary and Bilingual Lexicons – Obligations*, *supra* note 35 *sub verbo* “judicial term”.

<sup>160</sup> Arts 1510, 1512 CcQ.

<sup>161</sup> *Private Law Dictionary and Bilingual Lexicons – Obligations*, *supra* note 35 *sub verbo* “suspensive term”.

<sup>162</sup> *Ibid.*

<sup>163</sup> Baudouin & Jobin, *supra* note 21 at para 491.

<sup>164</sup> Art 1451 CcQ. However, neither the apparent contract nor the counter-letter need be written; *Jean-Pierre v Lubain*, 2008 QCCS 346 at para 25.

<sup>165</sup> Gerald E. Le Dain, “Security upon movable property in the province of Quebec” (1956) 2 McGill LJ 77.

juridical operations,<sup>166</sup> the CcQ permits contracting parties to hide the true nature of their agreement, so long as they comply with rules of public order.<sup>167</sup>

Simulation typically takes three forms. Most commonly, simulation entails the partial or complete misrepresentation of an agreement (e.g. the case of simulated sale above).<sup>168</sup> Another kind of simulation occurs when an apparent contract is drawn up between parties who have absolutely no intention of making an agreement.<sup>169</sup> This type of simulation is most commonly used to defraud third-party creditors.<sup>170</sup> Last, simulation may involve substituting one of the contracting parties, either to maintain anonymity, or to circumvent laws concerning capacity to consent.<sup>171</sup>

The very nature of simulation is such that the apparent contract is designed to contradict the true nature of the parties' agreement. Thus, the CcQ provides a regime for resolving disputes arising: (1) between contracting parties, (2) between contracting parties and third parties, and (3) between interested third parties. Disputes between contracting parties will be settled according to the counter-letter.<sup>172</sup> Meanwhile, third parties acting in good faith may avail themselves of either the agreement expressed in the apparent contract, or the true agreement in the counter-letter.<sup>173</sup> This option protects innocent third parties from being harmed by simulation. The requirement of good faith likely means that the third party was unaware of the simulation when he or she first got involved.<sup>174</sup> Disputes between interested third-parties will be resolved in favor of those who have relied on the terms of an apparent contract.<sup>175</sup> Thus, in the previous example involving a lease disguised as a sale, third-party creditors acting as if a piece of property belonged to the lessee/purchaser (based on the apparent contract of sale) will be favored over other third-party creditors acting as if the property belonged to the lessor/seller (based on the counter-letter of lease).

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<sup>166</sup> Baudouin & Jobin, *supra* note 21 at para 492.

<sup>167</sup> *Ibid* at para 491.

<sup>168</sup> *Ibid* at para 492.

<sup>169</sup> *Ibid* at para 493.

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid* at para 495.

<sup>172</sup> Art 1451 CcQ.

<sup>173</sup> Art 1452 CcQ.

<sup>174</sup> Baudouin & Jobin, *supra* note 21 at para 501.

<sup>175</sup> Art 1452 CcQ.