

“Family Law : Patrimonial and Corporate implications for married couples and recent developments regarding unjust enrichment for “de facto” spouses”.



PRESENTED BY THE D'AMICO FAMILY WEALTH MANAGEMENT GROUP & PATRICIA FOURCAND FROM MILLER THOMSON, LAWYERS

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**FAMILY LAW : PATRIMONIAL AND CORPORATE IMPLICATIONS FOR
MARRIED COUPLES AND RECENT DEVELOPMENTS REGARDING UNJUST
ENRICHMENT FOR “DE FACTO SPOUSES”**

Me Patricia Fourcand, Partner

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I. OVERVIEW OF BASIC NOTIONS

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A. Partition of Assets

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1) Family Patrimony

The family patrimony was introduced in 1989 to remedy a situation where one spouse would be disadvantaged by the dissolution of the marriage. At the time, the legislature adopted the legal provisions pertaining to the family patrimony with a view to especially protect women, who historically were more disadvantaged by the consequences of the breakdown of the marriage.

The family patrimony is a public order regime. Article 423 of the C.C.Q. provides that:

423. The spouses may not, by way of their marriage contract or otherwise, renounce to their rights in the family patrimony.

The *Civil Code of Quebec* does not allow the spouses to renounce to the family patrimony prior to the moment that gives rise to partition, namely on the date of the institution of the proceedings.

Marriage necessarily entails the creation of a family patrimony consisting of property belonging to both spouses, regardless of who has a right of ownership over the property.



Property Included in the Family Patrimony

The family patrimony consists of the following property:

- Residences of the family
- Furniture, decorations and movables which serve for the use of the household
- Vehicles used for the family's transportation
- Pension plans accrued during the marriage (including RRSPs) (415 C.C.Q.).

Property devolved to one of the spouses by gift or inheritance is excluded from family patrimony (415 C.C.Q.)



Calculation of the Value to Partition of the Family Patrimony

1. **Identification of Assets:** Each spouse must identify the property they own that falls into the family patrimony.
2. **Net Value:** The net value of the family patrimony is then determined according to the value of the property composing the patrimony and the debts contracted for the acquisition, improvement, maintenance or preservation of the property composing it on the date of the institution of the action in divorce or for separation from bed and board; the property is valued at its market value.
3. **Deductions:** Once the net value of the family patrimony has been determined, a deduction may be made.



Deductions

- The property owned by one of the spouses at the time of marriage that is included in the family patrimony, as well as the increase in value acquired by the property during the marriage proportionately to the ratio existing at the time of the marriage between the net value and the gross value of the property (Ex. A home already owned by one spouse)
- A contribution made by one of the spouses during the marriage for the acquisition or improvement of property included in the family patrimony, where the contribution was made out of property devolved by succession or gift, or its reinvestment, as well as the increase in value acquired since the contribution, proportionately to the ratio existing at the time of the contribution between the value of the contribution and the gross value of the property (Ex. Inheritance money used to renovate the kitchen of the family residence)
- Reinvestment during the marriage of property included in the family patrimony that was owned at the time of the marriage

Suggestions to Provide to Clients

- RRSPs
- Residences
- Art Collections
- Vehicles



Personal Right

- Partition of the family patrimony is effected by giving in payment or by payment in money. The choice belongs to the debtor.
- The partition of the family patrimony does not confer a right of property to either spouses. The partition gives rise to a personal right.
- If partition is effected by giving in payment, the spouses may agree to transfer ownership of other property than that composing the family patrimony.



2) Matrimonial Regimes

- Partnership of Acquests

The partnership of acquests is the default matrimonial regime that applies to married couples in Québec who do not enter into a marriage contract prior to celebrating their marriage.

This regime qualifies each spouse's assets as either acquest or private property. The value of each spouse's acquests are subject to partition upon the dissolution of the matrimonial regime, whereas the value of private property will not. For both categories of property, ownership is unaffected.

The separate as to property regime will apply to spouses who adopt this matrimonial regime by way of marriage contract. Other than the assets that form part of the family patrimony, the spouse's other assets acquired during marriage remain separate and there will be no value to partition.



Acquest Property

- The acquests of each spouse include all property not declared to be private property by law, and, in particular:
 - The proceeds of one spouse's work during the regime (art. 449 (1) C.C.Q.)
 - The fruits and income due or collected from all that spouse's private property or acquests during the regime (art. 449 (2) C.C.Q.)
 - This includes the fruits and income devolved to a spouse by succession or gift if the testator or donor did not stipulate that they are private property (art. 450 (2) C.C.Q.)
 - Property acquired with private property and acquests, if the value of the acquests used is equal to or greater than one-half of the total cost of acquisition of the property (art. 451 al. 1 C.C.Q.)
- Other specific property provided for under articles 452 to 458 C.C.Q.
- All property is presumed to constitute an acquest, unless it is established that it is private property (art. 459 C.C.Q.)



Private Property

450. The private property of each spouse consists of:

- (1) property owned or possessed by that spouse when the regime comes into effect;
- (2) property which devolves to that spouse during the regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided;
- (3) property acquired by that spouse to replace private property and any insurance indemnity relating thereto;
- (4) the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or plan of retirement, other annuity or insurance of persons;
- (5) that spouse's clothing and personal papers, wedding ring, decorations and diplomas;
- (6) the instruments required for that spouse's occupation, saving compensation where applicable.



Shares and Interest on RRSPs

Partnership of Acquests

One spouse's shares in a company and investments (other than RRSPs) that are acquired during the marriage are considered acquests. The value of these assets will be subject to partition.

Separation as to Property

Spouses married under the separation as to property regime will not have to share the value of their company shares and investments held in their personal name in the context of their divorce or separation proceedings.



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II. CORPORATE ASPECTS / ESTATE FREEZES

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A. Corporate Reorganization

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Payment in Shares

Can a spouse ask for the transfer of the other spouse's shares in a company in settlement of the partition of acquests?

Droit de la famille — 112606, 2011 QCCA 1554 (CanLII)

The Court cited the relevant provision of the *Civil Code of Quebec*, which states that:

481. Once the settlement of compensation has been effected, the net value of the mass of acquests is established and evenly divided between the spouses. The spouse who holds the patrimony may pay the portion due to the other spouse by paying him or her in money or by giving in payment.

The Court of Appeal therefore concludes that the partition of acquests is settled by payment in money, unless the debtor decides to transfer assets instead. The choice belongs to the debtor and so the creditor spouse cannot force the other spouse to transfer his or her shares.

Redemption of Shares

Different Lines of Authorities

Droit de la famille — 161885, 2016 QCCS 3640 (CanLIJ)

- The judge determined that the Court does not have the power to force one spouse to buy back the other spouse's shares of a company, in which they were equal shareholders.

Droit de la famille — 132041, 2013 QCCS 3713 (CanLIJ)

- The judge determined that in certain circumstances, the Court could order a company jointly owned by the parties to buy back one of the spouses shares:

[142] Le Tribunal conclut que dans les circonstances du présent dossier, il peut ordonner le rachat des actions par [la société A]. L'article 34 du *Code de procédure civile* permet au Tribunal de prononcer une telle ordonnance, quand l'actionnaire qui demande le rachat démontre « qu'il y a eu violation d'un droit, abus d'un droit, ou conduite d'administrateurs qui font prévaloir leurs intérêts personnels ou qui adoptent des mesures discriminatoires envers des minoritaires ».



Dividends

Strategic decisions that may assist clients:

Civil Code of Quebec

456. Securities acquired by the effect of a declaration of dividends on securities that are the private property of either spouse remain that spouse's private property, saving compensation.
[...]

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B. Consequences of Estate Freeze



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Droit de la famille 142142, 2014 QCCA, 1562

With respect to the division of the partnership of acquests, the trial judge qualified shares held by the husband's company in another company, where the transaction was completed in the context of an estate freeze, to be private property. According to the trial judge, the value of these shares should not have been taken into consideration when establishing the value of the father's acquests.

Court of Appeal Judgment:

With respect to the partition of the value of the partnership of acquests, the Court of Appeal held that the trial judge should not have qualified the shares acquired by the husband's company in another company as private property.

- The shares that the father held directly in the company were acquests
- The father could therefore not claim that these shares were vested in him by succession or by donation because they were acquired by his company (Company B) at a price of \$100, while 100% of the fair market value of the grandfather's company (Company A) on the day of the estate freeze, still belonged to the company.
- According to the Court, in order to assess the value of the father's acquests, the value of his company (Company B) had to be partitioned, which included the value of the shares it held in his grandfather's company (Company A).



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III. DE FACTO SPOUSES/MARRIED OR CIVIL UNION SPOUSES

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A. Definition and Remedies

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Definition

Often mislabelled « Common-law », a *de facto* union exists when two people live together as a couple without being married.

- In Quebec, the Civil Code does not afford *de facto* union spouses the same rights as married couples, except the right to maintain occupancy of a dwelling where the other spouse was the lessee (art. 1938 C.c.Q.)
- Some specific statutes include *de facto* unions in their definitions of marriage (notably those governing social assistance, income tax, legal aid, Quebec Pension Plan, worker's compensation).
- At the break-up of a *de facto* relationship, owners of property will retain their full ownership and there is no obligation of support, unless there is a *domestic contract*.
- Note that marital status of the parents does not influence custody or child support.

Remedies

There are some remedies if the outcome is inequitable (these remedies are also available for divorcing couples):

i) Unjust Enrichment (1493-1496 C.c.Q.): if one person enriches another without reason.

The Plaintiff must prove:

- 1) An enrichment
- 2) An impoverishment
- 3) A correlation between the enrichment and the impoverishment
- 4) A lack of a justification
- 5) Absence of evasion of the law
- 6) Absence of any other remedy

ii) Undeclared Partnership (2250-2266 C.c.Q.): when *de facto* union spouses are also business partners.

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B. UNJUST ENRICHMENT



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Relevant Caselaw

Droit de la famille 13245 – 2013 QCCA 1585 (C.A.)

The Court of Appeal recalls that “**activities of a domestic nature**” may be considered in an application for unjust enrichment and that the approach must be flexible.

The Court of Appeal concludes that the first instance judge made an important mistake in charging the Appellant (Mrs) the burden of demonstrating that “had it not been for her investment in the family and the business, she would have benefited from outside work, more lucrative, which would have earned her higher remuneration and benefits than those she enjoys today ...”

In the presence of a traditional long-term common-law relationship, it was up to Mr to demonstrate, through “strong contrary evidence”, that the impoverishment of Mrs was unrelated to his enrichment and that there is a legal reason for it. The Court considers that this evidence has not been made. (paragraph 48)

The Court of Appeal concludes that a spouse that performs domestic duties may expect to share the property of the parties at the time of separation.

Conclusion : An indemnity of 398,000\$ is granted to the Appellant.

Relevant Caselaw

Droit de la famille 13245 – 2013 QCCA 1585 (C.A.)

The Quebec Court of Appeal has recognized that the Supreme Court of Canada's decision *Peter v. Beblow*, [1993] 1 SCR 980 creates two presumptions in favour of the spouse making a claim for unjust enrichment where they have been in a long-term relationship, namely:

- 1) A correlation between the enrichment and the impoverishment and;
- 2) Absence of any other remedy.

Relevant Caselaw

Eric v. Lola Case: Quebec (Attorney General) v. A., 2013 SCC 5

The Supreme Court determined that articles 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Quebec*, which afford protection to married spouses, do not infringe upon the right to equality of *de facto* union spouses pursuant to Section 15(1) of the *Canadian Charter of Rights and Freedoms* in an unjustified way.



Relevant Caselaw

Decisions rendered in a context of contribution of a spouse to a family co-entreprise

Droit de la famille – 182048, 2018 QCCS 4195

- › Duration of the relationship : 15 years / 2 children
- › Assets of the parties : Whereas at the beginning of their relationship, the parties had modest incomes, at their rupture, Father had sold one of his companies built during the relationship, from which his net share totaled 17 M\$.
- › Quantum claimed by the Mother : 3,4 M\$ and a provision for costs of 100 000\$.
- › Father claimed a rental allowance for the occupation by the Mother of the family residence since 2012.
- › The Court judges that the impoverishment of the Mother results mainly of her contribution in family and domestic services, which allowed Mr to concentrate on the creation of the product which led to his enrichment.
- › The Court grants the claim of the mother and declares that she would be adequately indemnified by the attribution of an equivalent sum of 20% of the net value of the Father at the time of separation of the parties (3,4 M\$), taking into account that the net values of both parties at the time of their union were equivalent to each other.
- › The Court also grants the Mother claim for a provision for costs.

Relevant Caselaw

Decisions rendered in a context of contribution of a spouse to a family co-entreprise

Recent Developments of this Case

- Declaration of Appeal filed in front of the Court of Appeal, Montreal - **November 5th, 2018**;
- Application for a stay of execution rejected, C.A. Montreal, no. 500-09-027904-184 - **December 18th, 2018**;



Relevant Caselaw -

Decisions rendered in a context of contribution of a spouse to a family co-entreprise

Boudreau c. Débigaré, 2017 QCCS 2060

- › Duration of the relationship : 15 years / 2 children
- › Assets : the defendant (Father) works and bought the family business from his father during the parties' union.
- › Quantum claimed by plaintiff (Mother) in unjust enrichment : **610 000\$**
- › During their union, the parties paid each for half all of the family expenses.
- › Notwithstanding the fact that the defendant's incomes increased considerably. According to this evidence, the assets of the Mother during their union went from \$62,465.00 to \$83,503.00 while the assets of the Father increased from \$ 127,850.00 to \$ 2,725,223.00 (paragraph 33).
- › The Court judges :
 - During their time together, the plaintiff contributed significantly to the enrichment of the defendant. She is the one that took care of everything regarding the family tasks, education of the children and household chores;
 - She also contributed to defendant's business in working with his father on some housing rental managing tasks;
 - She did not get the occasion during the parties' union to devote as much energy to the growth of her beauty hair salon and her business;



Relevant Caselaw

Decisions rendered in a context of contribution of a spouse to a family co-entreprise

Boudreau c. Débigaré, 2017 QCCS 2060

Conclusion

The Court finds that the Mother is entitled to 25% of the net assets of the Father at the time of separation.

The Court establishes the net value of the assets of Father at the time of separation to 2 436 488,00\$.

The Court orders Father to pay Mother 25 % of said value : 609 122,75\$ that the Court rounds to 610 000,00\$.

Recent Developments of this Case

- Application for authorization to appeal to the Supreme Court of Canada, no 38779 - August 19th, 2019;
- Motion for the suspension of execution of the judgment of the Court dismissed - September 20th, 2019;

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C. Conclusion on De Facto Spouses/Married or Civil Union Spouses

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Conclusion on *De Facto* Union

The liberal and global analysis based on all of the contributions of the spouses during their time together is necessary in a conjugal context.

Beware of the amount claimed! Do not lose sight of the very purpose of the remedy of unjust enrichment :

- To restore a fair equilibrium between parties;
- To compensate one party for a contribution, in goods or services, which has allowed the other party to be in a superior position of which would have not been hers had it not been for the parties union and time together;



Conclusion on *De Facto Union*

- Qualification of the type of relationship: long or short term with or without children.
 - In the presence of a long term relationship: two presumptions of facts apply;
 - In the presence of a short term relationship: a question of evidence!;
- Net Assets of both parties from the beginning until the end of their union;
- Exceptional contribution to domestic services;
- Quantum and family co-entreprise : accumulated value method (between 15% to 35%);

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