Lending and Taking Security in Personal Property (QC)

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A Q&A guide to provincial law on commercial lending and taking security in personal property (other than consumer goods) in Quebec.

To compare these answers against other jurisdictions, see the Provincial Q&A Comparison Tool.

Security Interest Regime

1. Describe the regime for taking a security interest in personal property in your jurisdiction.

Quebec's civil law system is different than common law provinces with respect to the legal framework surrounding personal property security. This spans from divergences in terminology to differences in legal principles.

To begin, it is important to understand differences in terminology:

- A security interest in Quebec is called a "hypothec".
- A secured party is a "hypothecary creditor".
- A debtor granting security is a "hypothecary debtor" or "grantor".
- Personal property is known as "movable property".
- A security interest in personal property is a "movable hypothec".

Other Quebec terminology and differences include the following: "corporeal property" refers to "tangible property;" and "incorporeal property" is "intangible property". Quebec law does not provide for collateral types or categories of collateral (e.g., goods, equipment, and inventory), as is the case under the *Personal Property Security Acts* of other Canadian provinces.

The movable hypothec is the most widely used type of security interest in personal property in financing commercial transactions. It gives its holder the right to take the debtor's hypothecated property to satisfy the debt, to the preference of other creditors, as well as the right to follow the hypothecated property into the hands of third parties.

Quebec law will not necessarily recognize the creation of a security in any transaction which is intended to create a security interest in personal property under the *Personal Property Security Act*. In principle, instalment sale contracts (conditional sale agreements), leases (true or financing) and leasing contracts are not treated as security under Quebec law but as title retention instruments.

Another difference between common law provinces and Quebec law is that assignments of property for the purpose of securing the performance of an obligation are not valid in Quebec. In practice, this means an assignment of accounts receivable as security is not valid in Quebec. If a secured creditor wants its debtor's accounts as collateral, it must hypothecate the accounts, in other words the debtor must grant a security interest (not an assignment as security) in the accounts.

Lastly, the concept of "attachment" does not exist in Quebec. However, the steps to create a hypothec are very similar (see Question 2).

Bearing the conceptual framework of Canadian secured transactions in mind, we will now turn our attention to the creation and perfection of security interests and hypothecs.

There are two kinds of movable hypothec: movable hypothec with delivery (also called a pledge) and movable hypothec without delivery.

To create a hypothec with delivery, the debtor must give the possession of the hypothecated property to the creditor. The hypothec is granted when the debtor physically delivers the hypothecated property to the creditor (see *Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64, section 2702). When the creditor already has such possession, the hypothec is granted when the debtor consents to let the creditor hold onto it, thus securing its claim. A legal person who owns movable property can charge it with a hypothec with delivery. In the case of securities and security entitlements (within the meaning of *An Act respecting the Transfer of Securities and the Establishment of Security Entitlements*, CQLR, c. T-11.002), possession may be operated by the control of the securities or security entitlements in accordance with that Act (CCQ, S.Q. 1991, c. 64, section 2714.1). The same applies to hypothecs on monetary claims, that is, any claim requiring the debtor to reimburse, return or restore an amount of money or make any other payment in respect of an amount of money, except:

- A claim represented by a negotiable instrument.
- A claim that is a security or security entitlement within the meaning of the *Securities Act*, CQLR, c. V-1.1.
- A claim resulting from the delivery of certain and determinate currency whose repayment, in accordance with the parties' manifest intention, must be made by restitution of the same currency.

A creditor can obtain control of a monetary claim that the debtor of the hypothec has against a third person if:

- The claim relates to the credit balance of a financial account maintained by the third person for the debtor, or the claim relates to an amount of money transferred by the debtor to the third person to secure the performance of an obligation towards the creditor.
- The creditor has entered into an agreement, called a control agreement, with the third person and the debtor, under which the third person agrees to comply with the creditor's instructions, without the additional consent of the debtor, as regards the credit balance or the amount of money.

A hypothec without delivery requires a written agreement (CCQ, S.Q. 1991, c. 64, section 2696). Such agreement shall describe the property that is charged with a hypothec (CCQ, S.Q. 1991, c. 64, section 2697) and specify the amount of money for which the hypothec is granted (CCQ, S.Q. 1991, c. 64, section 2689). A natural person not operating an enterprise may only grant a movable hypothec without delivery on certain types of movable properties, for example:

- Motorized property (e.g., a caravan or a fifth-wheel; a mobile home; a boat; a personal watercraft; an aircraft; a passenger vehicle; a motorcycle; a motor home).
- Certain precious property (e.g., paintings, sculptures, jewelry, rare books, stamps, coins).
- Certain incorporeal property, particularly property that constitutes a form of investment (e.g., shares in companies, participation in a trust, rights arising from copyrights, trademarks and patents)

  (*Regulation respecting the register of personal and movable real rights*, CQLR, c. CCQ, r. 8, sections 15.01 and 15.02.)

A natural person operating a business may grant a movable hypothec without delivery on the movable property of the business. Finally, a legal person can create this type of hypothec on any types of movable assets.

Note that certain restrictions and requirements apply if the secured party acts for more than one lender. Similar to the concept of agent in common law provinces, in Québec a hypothec may be granted in favour of the hypothecary representative for present and future creditors (CCQ, S.Q. 1991, c. 64, section 2692).

Creating a Security Interest

2. What are the requirements for a valid and enforceable security interest in your jurisdiction? Highlight any differences that you are aware of from other jurisdictions.

In order for a hypothec, with or without delivery, to produce the desired results of a right of preference and a right to follow the hypothecated property, it must be duly opposable (which is a concept similar to “perfection” under the *Personal Property Security Act*). Publication of a hypothec renders it opposable to third parties. A hypothec without delivery is published through registration in the Register of Personal and Movable Real Rights and such registration unless discharged or renewed will be in place for a period not exceeding 10 years from the publication date. In the case of a hypothec with delivery, possession, or control of the property by the holder of the hypothec is equivalent to publication.

As of September 1, 2022, all applications for registration in the Register of Personal and Movable Real Rights must be drawn up and presented exclusively in French and any documents accompanying an application for registration must either be drawn up and presented in French, or be accompanied by a French translation that has been authenticated in Québec (*Civil Code of Quebec*, S.Q. 1991, c. 64, sections 2984 and 3006, as amended by Bill 96, *An Act respecting French, the official and common language of Quebec*, S.Q. 2022, c. 14, sections 129 and 130). Notwithstanding the foregoing, requisitions to modify, rectify and/or reduce registrations that were published prior to September 1, 2022, may make reference to the original registration using the language in which that registration was originally published.

Registering a Financing Statement

3. What is required to register a financing statement (or the equivalent) in your jurisdiction?

A hypothec without delivery must be registered at the Register of Personal and Movable Real Rights (RPMRR).

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Perfection by Possession

4. What types of collateral may be perfected by possession in your jurisdiction and how is perfection by possession accomplished?

A hypothec with delivery is known as a “pledge”. It is generally used when the lender is taking shares, partnership units, promissory notes, or other debt instruments as security. A pledge is created by the simple delivery of the movable property to the lender. Often, the delivery of the property is accompanied by the parties’ signature of a written agreement. Such an agreement can be useful to enumerate the rights and obligations of the parties with respect to the property delivered to the lender, but the pledge can be created in its absence. Because this hypothec is created by the delivery and possession of the movable property, it is crucial to understand that the hypothec is extinguished when the lender ceases to possess the charged property. The lender must therefore be very prudent regarding the release of the pledged property.

Perfection by Control

5. What types of collateral may be perfected by control in your jurisdiction?

In Quebec, only security interests in the following may be perfected by control:

- Monetary claims, which are claims requiring the debtor to reimburse, return or restore an amount of money or make any other payment in respect of an amount of money, except:
  - a claim represented by a negotiable instrument;
  - a claim that is a security or security entitlement within the meaning of the *Securities Act*, CQLR, c. V-1.1; and
  - a claim resulting from the delivery of certain and determinate currency whose repayment, in accordance with the parties' manifest intention, must be made by restitution of the same currency.
- Securities and security entitlements, which include a share or similar participation in an issuer or an obligation of an issuer that is:
  - represented by a security certificate in bearer form or registered form, or the transfer of which may be registered on books maintained for that purpose by or on behalf of the issuer;
  - one of a class or series, or by its terms is divisible into a class or series, of shares, participations or obligations; or
  - of a type dealt in or traded on securities exchanges or financial markets, or that is a medium for investment in the area in which it is issued or dealt in or traded and by its terms expressly provides that it is a security for the purposes of *An Act respecting the Transfer of Securities and the Establishment of Security Entitlements*, CQLR, c. T-11.002.
- A security entitlement, which is established when a security or other financial asset is, or is to be, credited to a securities account maintained by a securities intermediary.

General Priority Rules

6. What are the general priority rules in your jurisdiction?

Pursuant to *Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64, section 2650, "a prior claim is a claim to which the law attaches the right of the creditor to be preferred over the other creditors, even the hypothecary creditors, according to the origin of his claim". Prior claims are prior to any security, either arising security or registered security. According to CCQ, S.Q. 1991, c. 64, section 2657, prior claims rank, according to their order among themselves, and without regard to their date, before movable or immovable hypothecs. The proceeds resulting from the liquidation of the property of a debtor when hypothecary rights are exercised (i.e., sale by the creditor or sale by judicial authority) are applied in priority of payment according to the following ranking (CCQ, S.Q. 1991, c. 64, section 2651):

- Legal costs and all expenses incurred in the common interest.
- The claim of a vendor who has not been paid the price of a movable sold to a natural person who does not operate an enterprise.
- The claims of persons having the right to retain movable property, provided that the right subsists.
- Claims of the State for amounts due under fiscal laws.
- Claims of municipalities and school boards for property taxes on taxable immovables as well as claims of municipalities, specially provided for by laws applicable to them on immovables and movables in respect of which the taxes are due.

Subject to the right of the unpaid vendor, once all prior claims have been paid, secured creditors are paid according to their rank from the date and hour of registration.

Purchase-Money Security Interests

> 7. How does a creditor obtain a purchase-money security interest (PMSI) in your jurisdiction for commercial transactions?

The concept of purchase-money security interest (PMSI) is inexistent in Quebec.

The only concept closely resembling a PMSI in Quebec is the seller's hypothec that is created in the debtor's act of acquisition. This hypothec takes rank before all other hypothecs on the charged property acquired by the debtor, regardless of the time of registration, provided it is published in the Register of Personal and Movable Real Rights within 15 days after the sale.

Perfecting a Security Interest in Intellectual Property

8. How do you perfect a security interest in intellectual property in your jurisdiction?

Although most intellectual property (such as patents, copyright, trademarks, industrial designs, integrated circuit topographies, and plant breeder's rights but not trade secrets) are regulated by federal legislation, in Quebec, intellectual property is movable property and security on such intellectual property may be perfected in the same way as any other movable property.

Perfecting a Security Interest in Motor Vehicles

9. How do you perfect a security interest in motor vehicles in your jurisdiction?

In addition to the name files opened under the name and information of the grantor at the Register of Personal and Movable Real Rights (RPMRR), a descriptive file may be established under their identification number for a motor vehicle (*Regulation respecting the register of personal and movable real rights*, CQLR, c. CCQ, r. 8, sections 6, 7 and 14).

Also, unlike a security interest in other types of personal property, conditions of preservation set forth in *Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64, section 2700, are not applicable to motor vehicles because their registration is also established through a descriptive file which enables third parties to know whether or not a motor vehicle is subject to a hypothec.

It is important to know that movable hypothecs without delivery are usually reserved for legal persons or natural persons operating an enterprise. However, CCQ, S.Q. 1991, c. 64, section 2683, and *Regulation respecting the register of personal and movable real rights*, CQLR, c. CCQ, r. 8, sections 13 to 15.01, provide for certain rules and exceptions enabling a natural person to perfect a security interest on a motor vehicle. The process is the same with an application for registration of the hypothec under a descriptive file established with the identification number of the vehicle at the Register of Personal and Movable Real Rights.

Key Loan and Security Documents

10. What are the main loan and security documents for a secured lending transaction in your jurisdiction?

In a secured financing, the lender normally requires a comprehensive security package. If the borrower has a parent company and subsidiaries, then a lender commonly requires all of them to be loan parties as guarantors and grantors of security. The main transactional documents for a typical secured financing (bilateral loan) in Quebec are similar to those used in other Personal Property Security Act provinces, except that the general security agreements and assignment agreements will be replaced by movable hypothecs. Landlord waivers may be required, depending on the situation, but are not typical.

Landlord Rights to Distrain Against Assets of Commercial Tenant

11. Does a landlord have a right to distrain against the assets of a commercial tenant for unpaid rent in your jurisdiction?

No, Quebec legislation does not provide such right to a landlord.

Collateral Description Requirements in a Security Agreement

12. Is there a requirement that a security agreement must contain a description of the collateral “sufficient to enable the collateral to be identified” in your jurisdiction?

In Quebec, the act constituting a movable hypothec must contain a sufficient description of the hypothecated property or, in the case of a universality of movables (i.e., all personal property), an indication of the nature of that universality.

Legal Opinions Provided by Borrower's Counsel

13. What are the common matters which borrower's counsel opines on in a corporate financing transaction in your jurisdiction?

The following transactional opinions, including enforceability, are often requested to be provided by borrower's counsel in Quebec, although some lenders require their own counsel to provide the opinion on enforceability:

- **Status.** The borrower is a corporation incorporated and validly subsisting under the laws of Quebec (or Canada).
- **Qualified to carry on business.** The borrower is registered under the *Act respecting the Legal Publicity of Enterprises* (QPA), CQLR, c. P-44.1, is not in default to file an annual declaration pursuant to the QPA, is not in default to comply with a request made to it under QPA, CQLR, c. P-44.1, section 73. Similarly, if the corporation was constituted and registered under the *Canada Business Corporations Act* (the Federal Act), an opinion that the borrower is a corporation incorporated and existing under the *Federal Act*.
- **Power and authority.** The borrower has the corporate power and authority to own its assets, to carry on business and to execute, deliver, and perform its obligations under the transaction documents.
- **Due authorization.** All necessary corporate action has been taken by the borrower to authorize execution, delivery, and performance of the transaction documents.
- **Due execution and delivery.** Each of the transaction documents has been duly executed and delivered by the borrower.
- **Enforceability.** Each of the transaction documents constitutes a legal, valid, and binding obligation of the borrower enforceable against it in accordance with its terms.
- **No violation.** The execution, delivery, and performance by the borrower of its obligations under the transaction documents will not violate the borrower's constating documents (for example, articles of incorporation, by-laws, and unanimous shareholder agreements) or laws of the Province of Québec and federal laws of Canada applicable therein.
- **No approvals.** Except as provided in the transaction documents, no filings, authorizations, or approvals are necessary with authorities in the Province of Québec or laws of the Province of Québec and federal laws of Canada applicable therein for the execution, delivery and performance by the borrower of the transactional documents.
- **Security.** The movable hypothec executed by the borrower creates a valid conventional hypothec [with/without] delivery in the principal amount of [$AMOUNT], with interest thereon from the date thereof at the rate of [NUMBER]% per annum, on the hypothecated property that is stated to be charged thereunder, as security for the obligations described as being secured thereunder.
- **Registration.** Upon registration of the movable hypothec at the Register of Personal and Movable Real Rights (RPMRR), registration will have been made in all public offices and registries provided for under the laws of the Province of Quebec or the federal laws of Canada applicable in the Province of Quebec where such registration is necessary to render the hypothecs expressed to be created under the movable hypothec opposable against third parties, except that no registration has been made:

- under any federal statute of Canada for security or other interests affecting intellectual property, any vessel which is registered or recorded under the *Canada Shipping Act, 2001*, S.C. 2001, c. 26, or any rolling stock;
- in the public register kept under the *Mining Act*, CQLR, c. M-13.1, for hypothecs, security or other interests affecting mining rights; or
- at the International Registry of Mobile Assets in respect of any "aircraft objects" as such term is defined in the UNIDROIT Aircraft Protocol.

- **Share Ownership.** The authorized capital of the borrower consists of an unlimited number of common shares, of which [NUMBER] common shares are issued and outstanding. The parent is the sole owner of record and the shares have been duly authorized and validly issued and are outstanding as fully paid and non-assessable shares.
- **Pledged Shares.** All necessary corporate action has been taken to authorize the share pledge by the parent.
- **Perfection by Control and Ranking.** The monetary claims or the security and security entitlements is perfected by control and the hypothec with delivery effected by control ranks ahead of any other hypothec encumbering the monetary claims regardless of when such other hypothec is published.

Where the transaction involves a Canadian party and the documents are governed by laws other than the laws of Quebec ("foreign law"), counsel often provide the following additional opinions:

- **Submission to Jurisdiction.** In any proceeding in a court of competent jurisdiction in the Province of Quebec (a "Quebec Court") for the enforcement of the Agreement, the Quebec Court would apply the laws of [FOREIGN JURISDICTION], in accordance with the parties' choice of such laws in the Agreement, to all issues which under the laws of the Province of Quebec and the federal laws of Canada applicable therein are to be determined in accordance with the chosen law of the contract, provided that:
  - the choice of the Foreign Law was not made with a view to avoiding the consequences of the laws of any other jurisdiction and that choice is not otherwise contrary to Quebec public order;
  - if that choice of law is valid, the Quebec Court would apply the internal laws of the Foreign Law to all issues that are to be determined in accordance with such internal laws under the conflict of laws rules of the *Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64, in that action or proceeding and upon appropriate evidence as to those laws being adduced;
  - the Quebec Court may not apply the Foreign Law if its application would be manifestly inconsistent with public order as understood in international relations;
  - the Quebec Court will apply those laws of the Province of Quebec, and will not apply those laws of the Foreign Law, that such Quebec Court would characterize as procedural;
  - the Quebec Court will not apply those laws of the Foreign Law that such Quebec court would characterize as revenue, taxation, expropriatory, penal, or similar laws; and
  - the Quebec Court will apply those laws of the Foreign Law that are not impeachable as void or voidable under such laws.

- **Enforcement of Foreign Judgment.** A Quebec Court would give a judgment based upon a final and conclusive judgment of a court exercising jurisdiction in the [Foreign Jurisdiction] for a sum certain without reconsideration of the merits, except in the following circumstances:
    - the Foreign Court had no jurisdiction under the provisions of Title Four (Recognition and Enforcement of Foreign Decisions and Jurisdiction of Foreign Authorities) of Book Ten of the CCQ and submission to jurisdiction is sufficient for jurisdiction;
    - the Foreign Judgment is subject to ordinary remedy or is not final or enforceable under the Foreign Law;
    - the Foreign Judgment was obtained by fraud or was rendered in contravention of the fundamental principles of procedure;
    - a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in the Province of Quebec, whether it has acquired the authority of a final judgment (res judicata) or not, or is pending before a Quebec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in the Province of Quebec;
    - the outcome of the judgment is manifestly inconsistent with public order as understood in international relations;
    - the judgment enforces obligations arising from taxation laws of any jurisdiction other than the Province of Quebec, unless the taxation laws of the Province of Quebec are recognized and enforced in that jurisdiction, or arising from other laws of a public nature of a jurisdiction outside the Province of Quebec, such as penalty or expropriation laws;
    - a judgment rendered by default may not be recognized or declared enforceable in the Province of Quebec unless the plaintiff proves that the act of procedure initiating the proceedings was duly served on the defaulting party in accordance with the Foreign Law. However, the Quebec Court may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, it was unable to learn of the act of procedure initiating the proceedings or was not given sufficient time to offer its defence;
    - if the motion to enforce the judgment is not made in the Province of Quebec within the enforcement period set forth by the Foreign Law (i.e., the law of the court that rendered the judgment) or, if such law is not pleaded and proven before the court of competent jurisdiction in the Province of Quebec where enforcement is sought, within ten years after the date of such judgment;
    - a Quebec Court may not recognize or declare enforceable a judgment rendered in violation of an order made by the Attorney General of Canada under the *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29 or by the Competition Tribunal under the *Competition Act*, R.S.C. 1985, c. C-34; and
    - the Foreign Judgment has been satisfied or is void or voidable under the Foreign Law.

Guarantees: Formal Requirements

14. What formalities are required for guarantees in your jurisdiction? Are there any financial assistance provisions or other restrictions and conditions applicable to guarantees issued in your jurisdiction?

Suretyship (also called guarantee) is a contract by which a person, the surety, binds himself towards the creditor, gratuitously or for remuneration, to perform the obligation of the debtor if he fails to fulfil it. A suretyship does not create any preference or right to follow the property of the surety, but it gives the lender an additional entity from which to claim in the case of the borrower's default.

Suretyship can be limited or unlimited. An unlimited suretyship gives the lender a right against the surety for all amounts due by the borrower. In practice, however, suretyships are rarely unlimited. They are mostly limited to a certain amount, which is either fixed or a percentage of the obligations due by the borrower.

It is also important to be aware of whether the suretyship is solidary which is the equivalent terminology of "joint and several" in common law jurisdiction, as well as whether the benefits of discussion and division have been renounced. A solidary suretyship allows the lender to claim against the surety and the borrower at the same time, and in the same capacity, in the case of default by the borrower. The benefit of discussion (*Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64, section 2347) gives the surety the right to require that the lender claims against the property of the borrower before suing the surety. The benefit of division (CCQ, S.Q. 1991, c. 64, section 2349) applies in cases where there are several sureties, and it allows the sureties to require that the borrower's debt be divided among them. If a surety renounces these rights, the suretyship will be more effective for the lender as numerous obstacles and potential delays are removed.

Since February 2011 and the coming into force of the Quebec *Business Corporations Act*, CQLR, c. S-31.1, Quebec corporations no longer have any limitation on financial assistance.

As of June 1, 2023, to the extent that a suretyship agreement qualifies as a contract of adhesion (an agreement whose main clauses have been drawn up and imposed by one party and are non-negotiable (*Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64, section 1379)), such documents must be drawn up in French. The French version must be presented to the co-contracting party prior to such party clearly electing and expressing its wish to have the contract drawn up in English or in another language, the whole in accordance with the *Act respecting French, the official and common language of Quebec*, S.Q. 2022, c. 14.

Limitations Act

15. How does the *Limitations Act* in your jurisdiction apply to loan transactions and how does it affect a lender's ability to enforce a guarantee or a promissory note?

In Quebec, the limitation period is known as "extinctive prescription" and is governed by the *Civil Code of Quebec* (CCQ), S.Q. 1991, c. 64.

Prescription with regard to an action to collect a debt owing or an action to enforce a personal right, is prescribed by three years. This three-year period commences on the day the right of action arises.

As prescription continues to run until the filing of a judicial demand based on the right of action in question, unless other events have occurred that interrupt prescription or that give rise to a new right of action, a lender will only be able to collect those chargebacks that date from the three years that immediately precede the date of filing of its action.

Can a Bank Take Security Under Both the PPSA and the *Bank Act*?

16. Can a bank take security under both the PPSA (or Civil Code) and section 427 of the Bank Act in your jurisdiction? If not, please explain.

Yes.

Unique or Unusual Legal Requirements

17. Are there any other unique or unusual legal requirements or restrictions under the laws of your jurisdiction that a lender should take into account when making a loan and taking security in your jurisdiction?

Quebec's civil law system is not the same legal system as the common law provinces and transactions involving parties or assets located in Quebec must account for these differences in the loan and security documentation.

Quebec has rigorous French language requirements regarding the language of legal documentation and the registration and publication of security rights that apply to certain loan documents or security. Quebec counsel should be consulted at an early stage to determine what steps are necessary to ensure compliance with the Quebec regulatory framework.

Any lender making a loan and taking security in Quebec should seek legal advice from qualified legal counsel.

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