

# ASSIGNMENTS OF BOOK ACCOUNTS ASSIGNOR'S WARRANTIES AND STANDING TO SUE

LAZAR SARNA\*  
*Montreal*

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## *Introduction*

It may be said that under the law of Quebec, the exact rules governing general assignments of book accounts suffer debilitating ambiguity. As if wishing to avoid the subject, the Civil Code refers in passing to the registration and service by publication of assignments of present and future accounts in article 1571d C.C. and to the possibility of pledging a category of accounts in the last paragraph of article 1966 C.C. Statutory provisions for the assignment of book accounts emphasize the corporate capacity to pledge rather than the nature and effect of the act of assignment.<sup>1</sup>

\* Lazar Sarna, of the Bar of Montreal.

<sup>1</sup> *Art. 1571d C.c.*: "La vente de l'universalité, d'une partie ou d'une catégorie particulière des créances ou comptes de livres, actuels ou futurs, d'une personne, société ou corporation faisant des affaires de commerce, peut être enregistrée au bureau de chaque division d'enregistrement où le vendeur a une place d'affaires.

"Cet enregistrement tient lieu, à toute fin, de la signification et de la délivrance exigées par l'article 1571, sauf quant aux créances ou comptes de livres payés ou autrement acquittés avant la publication d'un avis de cet enregistrement en français dans un journal quotidien publié en cette langue dans le district judiciaire où le vendeur a sa principale place d'affaires au Québec et en anglais dans un journal quotidien publié en cette langue dans ce même district; s'il n'existe pas de journal quotidien publié en langue française ou en langue anglaise, selon le cas, dans ledit district, la publication peut être faite dans un journal quotidien publié en langue française ou en langue anglaise, selon le cas, dans la localité la plus proche de ce district, où un tel journal est publié."

*Art. 1966 C.c.*: "Le nantissement est un contrat par lequel une chose est mise entre les mains du créancier, ou, étant déjà entre ses mains, est par lui retenue, du consentement du propriétaire, pour sûreté de la dette.

"La chose peut être donnée soit par le débiteur ou par un tiers en sa faveur.

"Si la chose donnée en nantissement est l'universalité, une partie ou une catégorie particulière des créances, ou comptes de livres, actuels ou futurs, d'une personne, société ou corporation faisant des affaires de commerce, l'exécution de l'acte de nantissement, s'il est authentique, ou sa délivrance, s'il est sous seing privé, tient lieu, à toute fin, de la remise de possession prévue par le présent article."

*Art. 1571d C.C.*: "The sale of the whole, of a portion or of a particular category of debts or book accounts, present or future, of a person, firm or corporation carrying on a commercial business, may be registered in the office of each registration division where the vendor has a place of business.

"Such registration shall avail, for all purposes, in lieu of the signification and delivery required by article 1571, except as regards debts or book accounts paid or otherwise discharged before the publication of a notice of such registration, in French

Furthermore, the facile use in legal drafting of common law jargon such as floating charge, trust and assignment as collateral security, tends to blur the civil law framework within which assignments operate. The paucity of codified and statutory guidance has been reflected both in a dearth of jurisprudence on the issue, as well as a judicial ambivalence on such fundamental questions as, whether a given assignment is a sale or pledge, constitutes an absolute or definitive transfer, and confers upon the assignor or assignee legal standing to sue upon the assigned debts.

In this discussion, we propose to deal with two gray issues affecting the general area of assignments, namely warranties of the assignor, and standing to sue. Before embarking on these problems, a review of draft forms of assignment is in order.

### I. *Types of Assignment.*

In speaking of general assignments of book accounts, it would be helpful to reproduce in part the three most common forms of transfer in current use.<sup>2</sup> The first form relates to an assignment of book accounts sold for a consideration, perhaps upon discount, which entails a full transfer of rights to the debts without any right of

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in a daily newspaper published in that language in the judicial district where the vendor has his principal place of business in the Province of Quebec and in English in a daily newspaper published in that language in the same district; if there is no daily newspaper published in the French or the English language, as the case may be, in the said district, the publication may be made in a daily newspaper published in the French or the English language, as the case may be, in the locality nearest to such district where such a newspaper is published.

*Art. 1966 C.C.:* "Pledge is a contract by which a thing is placed in the hands of a creditor, or, being already in his possession is retained by him with the owner's consent, in security for his debt.

"The thing may be given either by the debtor or by a third person in his behalf.

"If the thing pledged is the whole, a portion or a particular category of the debts or book accounts, present or future, of a person, firm or corporation carrying on a commercial business, the execution of the deed of pledge if in authentic form, or the delivery of it, if under private signature, shall avail for all purposes in lieu of the giving of possession contemplated by this article."

Special Corporate Powers Act, R.S.Q., 1964, c. 275, as am., arts 22 to 26.

<sup>2</sup> See for example the forms of assignment contained in *Banque Canadienne Nationale v. Lefavre et al.*, [1951] B.R. 83; *In re Civano Construction Inc.*, [1962] C.S. 45; *J. Cohen (1962) Inc. v. Rothstein*, [1971] C.S. 705; *Desmarteau v. Lord et al.* (1924), 62 C.S. 297; *Guérin v. Gingras*, [1976] C.S. 1130; *Jankauskas v. Société Nationale de Fiducie et al.*, [1963] R.L. 146; *Laliberté et al. v. Larue et al.*, [1931] S.C.R. 7; *Kendall and Bros. Ltd et al. v. Henry Morgan and Co.* (1936), 61 B.R. 419; *Lemaitre v. Tourville et Banque Provinciale du Canada*, [1952] C.S. 221; *Lemcovitz v. Laurentide Acceptance Corporation Ltd et al.*, [1966] B.R. 160; *Marmette et al. v. Villeneuve et al.*, [1968] B.R. 841; *F. Vigneron Construction Générale et Gingras et al. v. Banque Royale du Canada*, [1976] C.A. 367; *Canadian Imperial Bank of Commerce v. Hoffman*, [1975] C.A. 407.

redemption or retrocession to the assignor. The document witnessing the assignment may contain the following text:

The assignor for valuable consideration, receipt whereof is hereby acknowledged, hereby irrevocably assigns and transfers to the assignee all debts, book accounts, demands and choses in action, presently owing to the assignor and which are now vested in the assignor as security for any of the said debts, book accounts, demands and choses in action; and all books, invoices, and documents witnessing or relating to any of the said claims.

On the other hand, a general assignment of book accounts which is not simply sold but granted as security or given in pledge, may be witnessed by the following form and accompanied representations:

The assignor for valuable consideration receipt whereof is hereby acknowledged hereby assigns and transfers to the assignee all debts, book accounts, demands and choses in action, presently owing to the assignor and which are now vested in the assignor as security for any of the said debts, book accounts, demands and choses in action; and all books, invoices, and documents witnessing or relating to any of the said claims.

This assignment and transfer shall constitute a continuing collateral security to the assignee so long as the assignor shall remain indebted or otherwise liable to the assignee for the sums in principal and interest paid to or advanced to the assignor; but the assignor shall be entitled at any time upon the discharge of all indemnities to the cancellation whereof. . . .

. . . The assignee shall have the power to correct, realize or enforce any of the book debts in such manner as the assignor may deem advisable, either in its own name or in the name of the assignor. . . .

The assignee shall not be bound to correct, realize or enforce any of the book debts and shall not be responsible for any loss or damage which may accrue in consequence. . . .

All moneys received by the assignor in payment of any of the debts, book accounts and choses in action shall be received and held by the assignor in trust for the assignee.

These provisions often provide for the assignment of future book accounts and vary in their description of the assignment as "collateral security" or "pledge for collateral security" or "transfer to guaranty" the principal consideration.

Finally, a general assignment of book accounts contained in a trust deed executed between a company and the trustee representing the debenture holders will often stipulate:

In consideration of the above, the company hereby hypothecates, pledges and charges by way of a first floating charge in favour of the trustee for the benefit of the holder of the debenture, and cedes and transfers for the same purposes to the trustee: all its property, moveables and immoveables, both present and future, including its inventory, contracts, revenues, privileges, choses in action, accounts receivable, opened accounts, book debts, provided that the floating charge and assignment shall in no way prevent the company at any time until the present security shall have become enforceable from selling, alienating or otherwise disposing of or dealing with the property and assets included in such floating charge and assignment.

Often the trust deed specifies in detail various warranties of title to the choses in action and stipulates the right of the trustee to invoke the default of the assignor for various enumerated reasons.

In each of these forms of general assignments of book accounts, depending on the details expressed in the text, the assignor is bound to several warranties for the purpose of enabling the assignee either to assure himself that the price paid for the book accounts will be reflected in the value of the accounts, or for the purpose of safeguarding the security given in consideration for the extension of a loan or other modes of financing. At the same time, the forms seem to permit the assignor or assignee or both to sue the assigned debtor.

## II. *Warranties—Implied and Express.*

We will now consider the nature and effect of legal and conventional warranties attached to a general assignment of book accounts by onerous contracts.<sup>3</sup>

For present purposes, "book debts" means all accounts and debts entered into or which are subject to entry in the books of a commercial enterprise in the ordinary course of business.

### A. *Legal Warranties.*

The warranties imposed by law upon the assignor include guarantees that the individual book debts in the general assignment,

- (a) exist;
- (b) exist as commercial accounts;
- (c) are due to the assignor by the debtor stipulated in the books of account;
- (d) confer rights from which the assignee will not be evicted.

On the other hand, there is no legal warranty that the individual book debts,

- (e) are owed by a solvent debtor;
- (f) are secured.

The parties may by express stipulation add to or diminish the nature of legal warranties. Depending on the nature of the assignment as an absolute transfer, or pledge, the effect of legal and conventional warranties varies in practical application.

Most legal or implied warranties may be found to originate in the sale provisions of the Civil Code. Although the Code makes express reference to an assignor as a "seller" or "vendor", the law

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<sup>3</sup> Whether by way of sale, pledge, or pledge by trust deed.

explicitly extends the scope of assignments to include not only sale but also donation and pledge.<sup>4</sup> While it may seem incongruous to graft ordinary sale warranties onto the legal institution of pledge, there are sufficient common elements within the two systems to permit application.<sup>5</sup>

(a) *The debts exist.*

A general assignment of book accounts binds the assignor to warrant that the individual debts exist<sup>6</sup> in the amounts, terms and purposes specified on the books, or invoices prior to entry on the books. The accounts as documented must speak for themselves:<sup>7</sup> the assignee is entitled to assume that the debts as represented are not fictitious or inflated.<sup>8</sup> The assignor is obliged to provide title or proof of assignment for opposition against the debtor, which accurately and completely reflects the juridical relationship between the parties to the account.<sup>9</sup>

Even taking the pejorative view that assignees are generally "spéculateurs" and "usuriers", who must bear the risks of the assignment, Mignault<sup>10</sup> concedes that a warranty of existence of the debts assigned includes a guarantee that debts have not been prescribed or otherwise extinguished on the date of assignment. Faribault furthermore adds that the assignor must warrant the debts

<sup>4</sup> Arts 1570, 1571d, 1572, 1576, 1577, 1578, 1966 C.C.

<sup>5</sup> Delivery, possession, title, eviction, deterioration, etc; for a further example of the juridical grafting, see art. 1839 C.C., which imposes a vendor's warranty of eviction upon a partnership contribution.

<sup>6</sup> *Art. 1576 C.c.*: "Celui qui vend une créance ou autre droit, doit garantir qu'elle existe et lui est due, quoique la vente soit faite sans garantie; sauf néanmoins l'exception contenue en l'article 1510."

*Art. 1576 C.C.*: "The seller of a debt or other right is bound by law to the warranty that it exists and is due to him, although the sale be without warranty. Subject nevertheless to the exception declared in article 1510."

<sup>7</sup> The accounts to which warranty attaches are those which are or should be duly entered in the books of the enterprise; they are not necessarily preliminary invoices or cash register tapes: *Silver et al. v. Shuster*, [1954] C.S. 206.

<sup>8</sup> The courts have repeatedly tended to refer to a finding of fraud or error rather than inexecution of warranty of the existence of the debt: *Giguère v. Bourque*, [1973] C.A. 663; *Rivard v. Racine*, [1950] C.S. 427; *Roy v. Rastoul* (1896), 10 C.S. 44; *Plamondon v. Dubois*, [1962] C.S. 161. But see *Cardinal v. Charron*, [1949] C.S. 434, at p. 437, per Duranleau J.: "La présente action est également basée sur la garantie que doit le défendeur au demandeur en vertu de la loi concernant la vente de créances. . . . Son obligation . . . comporte non seulement que la créance existe, mais aussi qu'elle n'est entachée d'aucun vice en affectant l'efficacité et la valeur."

<sup>9</sup> See also *Quincaillerie Laberge Inc. v. Tremblay*, [1971] C.S. 420. By implication: *McIlwaine v. Equity Accounts Buyers Ltd*, [1974] R.L. 115; *Nepean Motors Limited v. Linval Acceptance Corporation Ltd*, [1973] C.A. 797, at p. 799.

<sup>10</sup> *Droit civil canadien*, t.7 (1916), p. 192.

are free of any defect such as incapacity of the parties, fraud, error, and even compensation,<sup>11</sup> which would negate their existence by judgment rendered after the assignment.

Assuming the statements of law by the authors to be correct, problems regarding the validity of a warranty of existence do arise if we consider:

- (a) a right to extinction by payment;
- (b) a right to extinction by compensation;
- (c) a right to extinction by prescription

arising between the time of the execution of the assignment and the perfection of formalities required to make the assignment perfectly opposable to assigned debtors, namely service or registration and publication of notice of registration. Delay in registration-publication or notification by the assignee may in the circumstances result from simple tardiness on the latter's part. On the other hand, the very nature of the assignment may dictate the postponement of notification: this often arises in contracts purporting to assign accounts as collateral security for repayment of a loan, with the agreement of the parties to permit the assignor-borrower to continue dealing with accounts receivable. The withholding of notification until default upon a loan also constitutes an essential feature of an assignment under a trust deed which encompasses book accounts.

Situation (a) contemplates the discharge of the debtor by payment and receipt of the funds by the assignor, his representative or even trustee in bankruptcy. The assignee has no recourse against the assigned debtor if payment has been made after registration but before publication of notice, since article 1571d C.C. makes specific reference to such "debts paid or otherwise discharged" ("payées ou autrement acquittées") before publication as releasing the debtor; the assignee does however have the right of recovery of payment against the assignor<sup>12</sup> on the basis of a warranty of existence of debt as well as the general obligation to deliver over the right assigned.

Situation (b) contemplates the discharge of a debtor who has neither accepted nor been notified of the registered assignment. The words "paid or otherwise discharged" in article 1571d C.C. are

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<sup>11</sup> *Traité de droit civil du Québec*, t.11 (1961), no. 510, p. 487. Fuzier-Herman, *Code civil annoté*, t.4 (1898), p. 209, para. 50.

There remains some uncertainty in Quebec on the question of compensation: P. Baudouin, *Garantie en matière de transport de créance* (1903), 9 R.L. n.s. 169, at p. 171; but *contra*: Mazeaud & Mazeaud, *Leçons de droit civil*, t.2 (2nd ed., 1971), nos 1273 *et seq.*, pp. 1038 *et seq.*; Planiol & Ripert, *Traité élémentaire de droit civil*, t.2 (1925), no. 1629, p. 568.

<sup>12</sup> *Désy v. Lavut et al.*, [1961] C.S. 666, at p. 668.

unclear as to whether or not the legislator intended to include a situation of discharge by compensation.<sup>13</sup> Nevertheless, article 1192 C.C.<sup>14</sup> permits the assigned debtor to oppose a right of compensation arising prior to notice of assignment against the assignee; but as well, the assignee is immune from a defence of compensation if it arises following notice.

The problem appears: should the assignor be obliged to indemnify the assignee who has not published notice of his registered title, if the right of compensation accrues between the time of assignment and publication? If for example the assignee has permitted one week or three years to elapse prior to publishing notice, should the assignor be made to indemnify the assignee because of the former's role<sup>15</sup> in creating the right of set-off, or should the assignee forfeit the right to warranty of existence of the debt due to his acquiescence, or tardiness in making the assignment opposable against the debtor? The problem highlights the respective burdens of the parties: the assignee of an absolute transfer of accounts who is aware of the risks involved in assuming another's claims, must take all necessary steps to minimize the deterioration of the assets once in his possession,<sup>16</sup> even if it requires registration and notification on the same day as transfer of title. Since it is the nature of book debts in the ordinary course of business to undergo discharge, set-off and extinction, it becomes the responsibility of the assignee, at least from an equitable perspective, to take immediate advantage of the immunity provided to him by article 1192 C.C. without recourse against the assignor in the event of tardy notification to the debtor. If late notification occurs not through the negligence of the assignee, but by the intention of the parties not to

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<sup>13</sup> Had the Code used the word "extinct" ("l'obligation s'éteint") it would have been clear that all modalities of discharge mentioned in article 1138 C.C. would apply.

<sup>14</sup> *Art. 1192 C.C.*: "Le débiteur qui accepte purement et simplement la cession qu'a faite le créancier à un tiers, ne peut plus opposer au cessionnaire la compensation qu'il pouvait opposer au cédant avant son acceptation.

"Le transport non accepté par le débiteur, mais qui lui a été signifié, n'empêche que la compensation des dettes du cédant postérieures à cette signification."

*Art. 1192 C.C.*: "A debtor who accepts purely and simply an assignment made by the creditor to a third person, cannot afterwards set up against the assignee the compensation which he might before the acceptance have set up against the assignor.

"An assignment not accepted by the debtor, but of which due notification has been given to him, prevents compensation only of the debts due by the assignor posterior to such notification."

<sup>15</sup> Arts 1084, 1510 C.C.

<sup>16</sup> Baudouin. *op. cit.*, footnote 9, at p. 171; see arts 1200, 1973 C.C. *Lamy v. Rouleau*, [1927] S.C.R. 288, at p. 299; see *infra* "Conventional Warranties". Compare: *Re Ja. on Construction Ltd* (1972), 29 D.L.R. (3d) 623, at p. 628.

complete title save in the event of default of the assignor on his financial obligations to the assignee, certainly the burden of absorbing a debt extinguished by compensation must be borne by the assignor who has undertaken to provide collateral security of a certain value established at the date of the execution of the assignment.

Situation (c) envisages the discharge of a debt at a time when the assignor has surrendered possession of the claim to the assignee but still maintains a right of action against the debtor. The assignee is barred<sup>17</sup> by law prior to notice to the debtor from taking any effective measures to halt prescription, for suit must be brought in the name of the assignor. Although the former remains the sole determinant of the date of notification to the debtors, there is no reason why the assignor who gives his accounts in pledge should not remain responsible as owner for initiating acts interruptive of prescription until completion of title by notification to the debtors. In practice, where the assignment serves as a collateral security, the assignee often stipulates that the upkeep and management of the accounts remain the responsibility of the assignor; even where the assignee has notified the debtors of the giving of the assignment in pledge, the parties usually stipulate a disclaimer to the effect that the assignee shall not be liable for any failure to institute proceedings for the purpose of collecting the debts.<sup>18</sup> The reason for the disclaimer as well as the suggested effect of the law is that the assignee is not equipped in terms of personnel and intimate knowledge to assume full control of the management of the accounts.

<sup>17</sup> Generally, *Sherwin-Williams Company of Canada Limited v. Boiler Inspection and Insurance Company of Canada*, [1950] S.C.R. 187, at p. 192.

<sup>18</sup> The assignee as pledgee following notification to the debtors assigned is generally responsible for loss or deterioration by reason of prescription (art. 1973 C.C.): *Juneau v. Gingras & Sanson* (1935), 39 R.P. 239, at p. 241:

“La mise-en-cause [créancier gagiste] a reçu pouvoir du demandeur de recevoir . . . le paiement de la créance constituant le gage . . . ; c'est un mandat qui peut donner lieu à un recours contre elle si elle ne l'exécute pas et si par sa faute le gage est perdu.”; the case law has nevertheless sought to restrict the scope of the obligation imposed by art. 1973 C.C.: *Bruneau v. Dansereau* (1928), 66 C.S. 91, and even suggested, although not actually required, a reversal of the burden of responsibility. *Place Québec Inc. v. Desmarais et al.*, [1975] C.A. 910, at p. 912, per Bernier J.:

“Quant au cédant, dans le cas d'une cession de créance à titre de sûreté accessoire, si le transfert est absolu, il n'est cependant pas définitif; celui-ci d'une part, continue à détenir un droit de propriété dans la créance cédée, affecté cependant d'une condition suspensive; la condition est l'extinction de la dette à la sûreté de laquelle la créance a été cédée. Tant que cette condition n'est pas défaillie, le cédant possède un intérêt certain à la conservation de la créance cédée et à son recouvrement sans délai lorsque devenue due et exigible et alors que le débiteur est solvable, pour prévenir la prescription, pour que le produit du recouvrement serve à éteindre la dette qu'il doit au cessionnaire pour que cessent les intérêts et pour que l'excédent, si excédent il y a, lui revienne.”

On the other hand, if the assignment constitutes an absolute transfer of claims, as in the case of discount purchasing of debts, the burden of managing the accounts and halting prescription shifts to the assignee. However, the assignor may be held liable for failing to put the assignee on notice of short or approaching prescription if the books and supporting papers are not available for inspection, or have been misrepresented or altered.<sup>19</sup>

(b) *The debts exist as commercial accounts.*

It might occur that the book accounts may contain entries of debts relating not to the ordinary carrying on of a commercial business, but to matters personal to the administrators or otherwise extraneous to the business of the enterprise. For various tax considerations involving disguise of personal income, administrators may use their business accounting procedures to enter debts ranging from personal damages, to alimony or annuity payments. Where the general assignment specifies "trade" debts or where the assignee seeks to oppose the assignment against the debtors by publication of notice under article 1571d C.C., the categorization of the account as being personal, or extraneous to the commercial operation may result in its exclusion from the assignment or its lack of opposability.<sup>20</sup> We may therefore include within the warranty of existence an implied guarantee that all accounts comprised in the assignment have been incurred in the course of the assignee's commercial operations, unless the intentions of the parties are to effect transfer of any and all debts regardless of origin.

(c) *The debts are due to the assignor.*

The assignor is bound to warrant that the debts are due to him. Although it might be argued that the words "due to him" ("lui est due") stipulated by article 1576 C.C. refer not to the assignor's *title* but to the *exigibility* of the debt at the time of the assignment,<sup>21</sup> it is evident that such an interpretation effectively bars the assignment of debts or rights with a credit term or condition. Since the Code

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<sup>19</sup> By analogy *Ponari v. Spada*, [1972] R.P. 64, at p. 71; but see Baudry-Lacantinerie et Saignat, *Traité de droit civil, De la vente*, t.17 (1900), no. 821, p. 743.

<sup>20</sup> As to the definition of "créance reliée au commerce de cessionnaire", see *In Re O.T.E.A. Inc. La Banque Royale du Canada v. Béliveau*, [1976] C.A. 539; L. Payette, *Nantissements de comptes à recevoir et de créances commerciales* (1968-69), 71 R. du N. 399, at pp. 410-413; outside Quebec: *Canadian Imperial Bank of Commerce v. Campbell*, [1976] 1 S.C.R. 341; *Re Tri-Lateral Enterprises Limited* (1977), 23 C.B.R. n.s. 49.

<sup>21</sup> "Due" meaning "exigible" as used in arts 1070, 1090 C.C. The debts must be due to the assignor in its current corporate state: *Re Ruliff Grass Limited* (1977), 24 C.B.R. n.s. 58.

specifically envisages the sale of future book accounts, it would be difficult to accept a reading of article 1576 C.C. which would have the effect of requiring the assignor to stipulate that certain debts are not due on the date of the assignment in order to protect him against a supposed warranty of exigibility.<sup>22</sup>

The warranty is one of title, namely that the rights ceded do not belong to another party. The warranty extends to guaranteeing not only that the debts are due to the assignor, but that they are not subject to pledge<sup>23</sup> or charge which would diminish the full rights of ownership of the assignee. By way of example, an assignor who has previously ceded the same book debts to a third party may be said to be in breach of warranty toward the subsequent assignee, since he is ceding debts no longer due to him. This is not however the case where the assignor makes an assignment to party A and subsequently assigns the same debts to party B who effects registration and publication prior to A; the breach of warranty toward party A relates not to title but to eviction.<sup>24</sup>

(d) *Warranty against eviction.*

The assignor is obliged to warrant that the assignee shall not be evicted from his right to collect or otherwise deal with the individual debts comprised in the assignment. Express reference to article 1510 C.C.,<sup>25</sup> and the general categorization of the assignment as a sale necessarily implies that the assignor must not only indemnify the assignee for damages caused by his own interference with the

<sup>22</sup> A stipulation excluding warranty that a debt is not "due" (exigible) is the necessary consequence of narrowly construing art. 1576 C.C. as envisaging a warranty of current indebtedness.

<sup>23</sup> Baudry-Lacantinerie et Saignat, *op. cit.*, footnote 19, no. 818, p. 741.

<sup>24</sup> Notwithstanding the reference to title in article 1027 C.C.

*Art. 1027 C.c.*: "Les règles contenues dans les deux articles qui précèdent, s'appliquent aussi bien aux tiers qu'aux parties contractantes, sauf dans les contrats pour le transport d'immeubles, les dispositions particulières contenues dans ce Code quant à l'enregistrement des droits réels.

"Mais si une partie s'oblige successivement envers deux personnes à livrer à chacune d'elles une chose purement mobilière, celle des deux qui en aura été mise en possession actuelle a la préférence et en demeure propriétaire, quoique son titre soit de date postérieure, pourvu toujours que sa possession soit de bonne foi."

*Art. 1027 C.C.*: "The rules contained in the two last preceding articles apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property to the special provisions contained in this code for the registration of titles to and claims upon such property.

"But if a party obliges himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date; provided, however, that his possession be in good faith."

<sup>25</sup> Art. 1576 C.C.

exercise of the assignor's rights, but also by the interference of third parties.<sup>26</sup> The most apparent example of the eviction arises from successive assignments of the same book debts: an assignee may demand indemnification in accordance with article 1511 C.C. where he is prevented from dealing with his rights because of a previously registered assignment with publication or a subsequent assignment registered before the first assignee has had the opportunity to effect registration.<sup>27</sup> An assignee who is aware of a previous assignment of the same book debts at the time of accepting the assignment is limited to a claim in restitution of price.<sup>28</sup>

(d)(1) *Warranty upon re-assignment.*

It may occur that a discount buyer of accounts finds it necessary to transfer or re-assign the accounts he himself has purchased to another discount purchaser. In theory, a re-assignor is simply an assignor: he is responsible not only for all warranties mentioned above *mutatis mutandis*, but also for a guarantee of complete title or opposability against third parties, which implies a warranty of registration of the assignment and notice to the debtors of the accounts.

Where the assignment has originally been given as collateral security, the agreement between the assignor and assignee may stipulate that upon payment of the principal debt between the parties the accounts assigned will be automatically returned or retroceded to the assignor. In such a circumstance, the assignee who has been repaid his principal claim cannot be said by the intentions of the parties to assume any obligation of warranty for the existence or the validity of the accounts as if he were a re-assignor of book debts purchased by way of sale on discount. After all, the obligation to retrocede simply involves an undertaking to deliver the same object which he received from the original assignor including all inherent defects. The Court of Appeal has recently held that a re-assignment to the original assignor is no more than a retrocession caused by the fulfilment of a resolutive clause, namely the payment of the principal debt by the assignor to the assignee.<sup>29</sup> Although the definition of "retrocession" remains as ambiguous as the definition of "cession" or "assignment", the court is apparently of the view that a valid analogy could be made with the effect of a "dation-en-paiement" clause on the transfer of ownership to the creditor.

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<sup>26</sup> Art. 1509 C.C.

<sup>27</sup> The tardiness of the first assignee in registering cannot be held against him: the assignor has a continuing obligation not to interfere with the due exercise of the first assignee's rights whenever they may be invoked.

<sup>28</sup> Arts 1510, 1512 C.C.

<sup>29</sup> *Place Québec Inc. v. Desmarais et al.*, *supra*, footnote 18, at p. 912.

However, in a previous decision, the court noted that retrocession is certainly not automatic as concerns the debtor of the assigned account, and that notice to the assigned debtor is necessary to restore full rights to the assignor, including the right to sue on the account.<sup>30</sup> Nevertheless, the court has not indicated whether retrocession by the re-assignor implies a warranty of any kind, even where the latter has dealt with and administered the accounts while in his possession.

(e) *The debtor is solvent.*

The assignor is not bound to warrant the solvency, present or future of the debtor.<sup>31</sup> Neither is he obliged to warrant that the debtor is a good credit risk. It is to be presumed by the assignee that some reasonable portion of the outstanding book debts are bad; out of a sense of business reality, the law does not demand that the assignor insure his credit-granting practices be perfect.<sup>32</sup> For the same reason, no greater obligation is imposed upon the assignor with regard to future book debts. Nevertheless, deterioration by grossly negligent business practice of book debts assigned by way of guarantee (with continued possession and authorization to deal in the hands of the assignor), may no doubt give rise to a recourse in damages in favour of the assignee.<sup>33</sup>

(f) *The debts are secured.*

The assignor is not bound to warrant that the individual or whole of the book debts are secured. While the Civil Code specifically notes in article 1576 that the assignment of a debt includes its accessories, such as privileges, there is no obligation by law to warrant that in fact such accessories do exist.<sup>34</sup> Neither is there apparently any obligation on the part of the assignor to warrant that all accounts, such as debts arising from the supply of services or materials incorporated into an immovable, have been duly registered as privileges, and that actions have been taken within the prescribed delays.<sup>35</sup> Unless the accounts have been specifically

<sup>30</sup> *Kendall et al. v. Henri Morgan & Cie, supra*, footnote 2.

<sup>31</sup> Art. 1577 C.C.; but see art. 1694 C.N.

<sup>32</sup> Warranty upon assignment in this regard cannot be likened to responsibility for endorsement upon a bill of exchange: Mignault, *op. cit.*, footnote 10, p. 193, note (a).

<sup>33</sup> See the obligations of prudence suggested in arts 1064, 1802, 1972, 1979e C.C.; Laurent, *Principes de droit civil français*, t.24, (1869-77), no. 563.

<sup>34</sup> Unless there is express stipulation to the contrary. Although the Supreme Court in *Faubert v. Poirier*, [1959] S.C.R. 459, at p. 464, was of the view that the use of words such as "obligation" or "acte d'obligation" often imply a secured debt, the plaintiff was entitled to an annulment of the contract on the grounds of error, and not non-fulfillment of warranty.

<sup>35</sup> *E.g.*, art. 2013f C.C.

guaranteed to be fully secured, there is no reason to impose upon the assignor the costly burden of securing all his accounts receivable prior to the assignment especially where the particular business relations and goodwill between the assignor and the debtor assigned makes registration of a privilege or an action on privilege tactless or otherwise undesirable. Even where the assignment is given by way of pledge for collateral security, the imposition of an obligation upon the assignor during the pendency of the pledge to register privileges and take action upon certain accounts is tantamount to imposing an obligation of solvency of the debtor, which the law has not seen fit to require.

B. *Conventional Warranty (garantie de fait).*

The parties are entitled to augment the warranties of the assignor by specific stipulation prior to or following assignment.<sup>36</sup> Although the Civil Code merely makes reference to the simple clause of warranty of present solvency of the debtor,<sup>37</sup> there are several standard stipulations which recur in daily usage, each with a purportedly different effect.

(a) “*Cession avec la garantie de droit*”.

The stipulation “avec la garantie de droit” adds nothing to the legal warranties already discussed; in the words of an often-cited judgment of the Superior Court:

Son obligation (cédant) de garantie n'est donc nullement restreinte et comporte non seulement que la créance existe, mais aussi qu'elle n'est entachée d'aucun vice en affectant l'efficacité et la valeur.<sup>38</sup>

Neither does the assignor thereby stipulate non-responsibility for warranties already imposed by law.

(b) “*Le présent transport est fait avec la garantie légale et celle de fournir et faire valoir jusqu'à concurrence de la considération passée en cas de défaut*”.

An assignment of book debts stipulating a warranty “de fournir et faire valoir” imposes an obligation of suretyship upon the assignor for the debts ceded. All rules of suretyship apply including article 1929 C.C. requiring full payment of the debt in default; and article 1959 C.C. which terminates the responsibility of the assignor in the event the assignee has by his own acts neglected to act against

<sup>36</sup> Art. 1507 C.C.

<sup>37</sup> Art. 1577 C.C.

<sup>38</sup> *Cardinal v. Charron*, *supra*, footnote 8, at p. 437. See also Dalloz, Codes annotés, t.4 (1905-07), p. 277, *sub. art.* 1695 C.N., nos 1-5; *Aubertin v. Aubertin* (1927), 33 R.L. n.s. 49, at p. 51.

the debtor until the latter's insolvency.<sup>39</sup> Although there is jurisprudence to the effect that the obligation "de fournir et faire valoir" merely creates a warranty of solvency of the debtor at the time of the assignment,<sup>40</sup> these cases may be distinguished in that they have in most part disposed of the issue of warranty by holding the assignee negligent in tardily prosecuting his claim.<sup>41</sup> Besides, to hold that the stipulation is merely equivalent to a warranty of current (and not future) solvency is to make applicable the full thrust of article 1577 C.C. which also limits the obligation to repayment of the price paid by the assignee, and not the book value of the debt. Since subsequent jurisprudence has equated the "faire valoir" stipulation to an undertaking of suretyship, a contradiction arises with the terms of article 1577 C.C. Since suretyship implies responsibility for the book value of the debt, the "faire valoir" clause cannot therefore be limited to warranty of present solvency alone.

(c) "*Avec garantie de la solvabilité, tant actuelle que future du débiteur.*"

Where the assignment includes debts presently exigible as well as debts due upon an unexpired term, the warranty of future solvency of the debtor is equivalent to an undertaking of "fournir et faire valoir"<sup>42</sup> which as we have said implies suretyship. A simple assignment of due debts with a guarantee of "la solvabilité future du débiteur" is as well a valid undertaking to act as "caution".<sup>43</sup>

(d) "*Cession avec promesse de faire valoir*".

This stipulation has been assimilated in its effect to the clause of "fournir et faire valoir".<sup>44</sup>

<sup>39</sup> *Lamy v. Rouleau*, *supra*, footnote 16 (assignment of portion of debt upon a loan), at p. 299; see also at p. 293: "Le débiteur, dans cette clause, c'est Legault. La garantie qui y est stipulée 'ne produit qu'un cautionnement'. (I. Bourjon, Dr. Comm., tit. 4. sec. 3, n.25; et Loyseau, Garantie des rentes, ch. 4, n.13: tous deux cités par les codificateurs sous l'art. 1577 du code civil). Par cet engagement, Lamy s'est rendu caution de Legault. Il s'ensuit qu'à défaut de paiement par Legault il naît de cette clause, au profit de Chauret, une 'action de recours' contre Lamy (Pothier, vol. 3, nos 563, 564; 2 Colin et Capitant, p. 154)."

<sup>40</sup> *Ponari v. Spada*, *supra*, footnote 19, at p. 81 (assignment of balance of price); *Sylvain v. Malenfant* (1888), 33 L.C.J. 32, at p. 34; *Fraser v. Roy* (1893), 3 C.S. 501, at p. 506 and *Cardinal v. Boileau* (1897), 11 C.S. 431, cited by Mignault, *op. cit.*, footnote 10, pp. 194-195; *Coulombe v. Beaulieu* (1934), 72 C.S. 131; *Hodge v. Gagnon* (1919), 56 C.S. 291, at p. 293.

<sup>41</sup> A direct application of art. 1959 C.C.

<sup>42</sup> *Fraser v. Roy*, *supra*, footnote 40, at p. 509, per Cimon J.: "... dans le présent cas, elle ne garantissait que la solvabilité alors actuelle du débiteur pour les termes échus et la solvabilité du débiteur pour les autres termes à leur échéance"; *Cardinal v. Boileau*, *supra*, footnote 40.

<sup>43</sup> Mazeaud et Mazeaud, *op. cit.*, footnote 11, t.2, no. 1275, p. 1039.

<sup>44</sup> *Maucotel v. Tétrault* (1905), 28 C.S. 251; see also *Cardinal v. Boileau*, *supra*, footnote 40, at p. 437.

- (e) "If the amounts of any of the said debts are paid to the undersigned, the undersigned hereby agrees to receive the same as agent of the assignor, and forthwith to pay over the same."<sup>45</sup>

A stipulation categorizing the assignor as "agent" in the event of receipt of funds duly transferred to the assignee does not augment the warranty obligations with regard to the general assignment as a whole; it merely safeguards the restitution or transfer of specific funds misdirected by the debtor assigned into the hands of the assignee. The stipulation simply purports to subject the assignee to the rules of mandate in so far as delivery of funds and accounting are concerned.<sup>46</sup>

### C. *Exclusion of Warranty.*

The Civil Code permits the exclusion of most warranties by express stipulation. The assignor however is still bound to warrant against his personal acts, as well as damages arising from his bad faith, gross negligence or fraud in relation to the assignment.<sup>47</sup> Since the very existence of the debts is fundamental to the assignment, a waiver of responsibility in this regard would be without effect.<sup>48</sup> As we have seen, there is no difficulty in stipulating non-warranty for such obligations as an undertaking that the debts are secured or for the solvency of the debtor, since these obligations are not implied by law.

### D. *Effect of a Breach of Warranty.*

Upon a breach of either legal or conventional warranty, the assignee is liable to suit in annulment of the assignment, restitution of price or damages, or both in accordance *mutatis mutandis* with articles 1511 and 1526-1528 C.C.

In a general assignment of book debts, it is more usual that only some rather than all of the assigned debts will prove extinguished or

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<sup>45</sup> The form used in *Bank of Montreal v. Union Gas Co. of Canada Ltd* (1970), 7 D.L.R. (3d) 25, at p. 26.

<sup>46</sup> Arts 1713, 1714 C.C.; *Re Alaska Construction Limited* (1974), 18 C.B.R. n.s. 221, at p. 224: "This document required Alaska to hold in trust for the Bank all moneys received by it from the collection of receivables."

<sup>47</sup> Arts 1507, 1509, 1510, 1576 C.C. "Personal acts" include giving an acquittance to the debtor, making a subsequent re-assignment to the prejudice of the assignee, etc.

<sup>48</sup> Dalloz, *op. cit.*, footnote 38, *sub. art.* 1693 C.N., p. 273, nos 22 *et seq.*; p. 275, no. 87, Mazeaud et Mazeaud, *op. cit.*, footnote 11, t.2, no. 1275, p. 1039; L. Sarna, *Traité de la clause de non-responsabilité* (1975), no. 14, p. 25; Mignault, *op. cit.*, footnote 10, p. 193, unjustifiably confuses the warranty from eviction of existing debts (art. 1510 C.C.) with the warranty of the existence of debts. According to Planiol & Ripert, *op. cit.*, footnote 11, no. 1520, p. 530, the assignor is not obliged to return the price of the assignment where the assignee was aware of a cause of eviction and purchased "à ses périls et risques".

otherwise defective. Although a recourse in warranty upon the individual debts lies, there is some doubt as to whether an assignee may seek annulment, restitution or damages upon the entire assignment as a result of a defect in individual accounts. A suggested solution is found in articles 1501, 1502 and 1525 C.C. which permit a diminution of price or vacation of sale of the whole object where a part only is proven defective; this rule is only applicable where it may be presumed that the buyer would not have purchased the whole without the represented quality or quantity of the defective portion. In the case of a whole class, of book debts, a defect in those debts secured by privilege may prove sufficient grounds for nullifying the entire assignment even though the simple mathematical value of those debts in relation to the whole is minor.<sup>49</sup> If the entire assignment of book debts forms a minor part in a greater transfer of all immoveables and moveables owned by the assignor, it may very well be that a defect in all book debts assigned will not permit a nullification of the greater transfer but merely a diminution of price or damages.<sup>50</sup>

When claiming damages, the assignee may be tempted to sue not for the price paid for the assigned debt, but for the book value of the debt. The authors are in disagreement over the right of the assignee to the latter sum; on one hand, the general rule of the law is said to compensate the creditor for actual loss only; on the other, a contrary rule dictates that loss of profit is an actionable loss, subject to proof that the debt is otherwise collectable.<sup>51</sup> The more reasoned view however would appear to be the former; especially in light of the analogy provided by article 1582 C.C. which permits the discharge of an assigned obligation upon payment of the discount price and not the book value.<sup>52</sup> Where book debts, both present and future are assigned as collateral security, it would indeed be incongruous<sup>53</sup> to permit an assignee to sue the assignor for the book value of accounts which may far exceed the loans stipulated in the

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<sup>49</sup> The secured debts are collectable even in the event of the insolvency of the debtor; the equity in the unsecured debts would then be minimal.

<sup>50</sup> *Martineau v. Côté* (1923), 35 B.R. 558.

<sup>51</sup> *Mignault, op. cit.*, footnote 10, p. 193; *Faribault, op. cit.*, footnote 11, no. 512, p. 489;

<sup>52</sup> *Art. 1582 C.c.*: "Lorsqu'une vente de droits litigieux a lieu, celui de qui ils sont réclamés en est entièrement déchargé en remboursant à l'acheteur le prix de vente avec les frais et loyaux coûts et les intérêts sur le prix à compter du jour que le paiement en a été fait."

*Art. 1582 C.C.*: "When a litigious right is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it."

<sup>53</sup> A security is merely an accessory and subsists no longer than the principal obligation: art. 2017 C.C.

financing arrangements. As well, where the debt arises and is entered after the assignment (future book debt), the courts may not hesitate to apply the rule against granting damages for loss of future profits: for at the time of the execution of the agreement and giving of security, all future book debts may be considered as carrying a future profit to the discounter.<sup>54</sup>

#### *E. Practical Considerations and Conclusions.*

There now remains consideration of the practical effects of the warranties mentioned, namely their execution. Let us consider the following situations involving assignment:

(a) under a trust deed of loan creating a charge affecting present and future book accounts, the trustee for the creditor is usually entitled to exercise the assignment and take control of the books and accounts upon default of the assignee to repay the loan. The creditor-assignee through his trustee becomes aware of some defect in the debts assigned, only at the stage of default, which may be months or years following the advance of the loan. In order to execute for restitution or damages, the creditors would have to seize the remaining assets of the debtor's patrimony, such as stock-in-trade and immoveables which in all likelihood have already been included in the assignment and appropriated by the trustee. Since the default by the assignor under the deed of loan signals not only the assumption in security by the trustee of the entire assets of the enterprise, but also the assignor's insolvency, a breach of warranty relating to the assignment of the book debts leaves the assignee with little practical recourse, except to get the highest price for the book debts in hand, and to enforce whatever guarantee has been given by third parties at the time of the loan.<sup>55</sup>

(b) A discount purchaser of a class of book debts, such as retail consumer accounts usually acquires complete title and control over the accounts soon after the account has been opened, especially when acceptance or notification of the assignment to the debtor assigned is acknowledged concurrently with the opening of the account. Since discount purchasing is done on a continuing basis between the parties, the assignee may use two options to remedy a breach in warranty: the assignee may reduce the level of future financing by the amount of the damages or loss caused, without otherwise disrupting the financing relationship; or he may execute for the loss incurred upon the assets of the enterprise not included in

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<sup>54</sup> This approach has not yet been confirmed or denied by the courts. See generally, *Tupper Plastics and Chemicals Ltd v. Ronald Parties Ltd*, [1955] R.L. 115.

<sup>55</sup> As in *Re Alaska Construction Limited*, *supra*, footnote 46, at p. 224.

the assignment. Unlike the situation contemplated by default under the trust deed the discount purchaser has the advantage of being able to determine whether a breach has occurred long before the insolvency of the assignor is evident.

(c) Where a general assignment as security stipulates that the assignor may continue to collect payments on book accounts as agent of the assignee, the latter, if duly diligent, will be in a position to determine any defects in the debts assigned as soon as the assignor-agent pays over the funds. As in situation (b), the assignor's options in remedy include adjustment of the continuing level of financing, and execution upon the other assets of the enterprise. The same options, of course, arise where the debts assigned are paid directly to the assignee by the debtors.

The assignee who chooses to postpone the exercise of his rights to the assigned funds, may find that a breach in warranty discovered only at the time of default on the principal financing arrangement, will lead to an illusory recourse aimed at an insolvent warrantor, save for his remedy against the sureties.

### III. *Standing to Sue.*

Keeping in mind the various rights and obligations of assignor and assignee imposed by law and contract, we will now consider the rules of standing to sue the assigned debtors upon their default to pay.

By express terms of the Civil Code, a general assignment of book accounts may be effected by sale, pledge or gift;<sup>56</sup> given its amorphous nature, an assignment may involve an irrevocable transfer of all rights, a conditional transfer, or even a partial cession of rights in accordance with the terms of the deed of cession between the parties. It has for some time been a standard commercial practice to execute assignments of book accounts as collateral security for repayment of loans extended to the assignor by the assignee, with the eventual right of retrocession upon fulfilment of the terms of loan. Unfortunately, the Civil Code does not contain a ready definition of "transfer as collateral security", nor does it purport to delineate the rights and obligations of the parties once such a transfer is effected. The Code, of course, does make the grand distinction between alienation of property and the simple charging of property by way of commercial pledge, hypothec and other modes giving rise to privileged rights. As a result of the lack of a codified definition, the courts have for some time continued to debate the exact nature and scope of the transfer of book accounts as collateral security. The recurring questions are: does the "giving" in assignment refer to the

<sup>56</sup> Art. 1578 C.C.

giving of a charge, a right of retention, a privilege?<sup>57</sup> Does the "giving" refer to an alienation of property, and is this alienation conditional, complete or irrevocable?<sup>58</sup> The importance of the debate is apparent: a determination of the constitution of the deed of assignment as an alienation or charging provision will determine the mutual rights and obligations of the parties regarding the conservation and disposal of the assigned rights. More specifically, such determination will also indicate which party has the right to enforce the assigned debts by way of action against the debtor.

With respect to the latter point, it will be seen that the courts in Quebec have generally followed the rule that an assignor may sue the assigned debtor upon impleading the assignee as "mis-en-cause", where the assignment has been given as collateral security. An assignment constituting a definitive alienation of rights, and not given as security, prohibits the assignor from suing the debtor. Whether the assignment is given in sale but not as security, or as a security by way of mere pledge, the assignee maintains a right to sue the assigned debtor without interference from or the impleading of the assignor.<sup>59</sup> Judicial reasoning has tended to assimilate proprietary interest with legal standing to sue in determining which party is entitled to be constituted plaintiff. A recent decision of the Quebec Court of Appeal in *Place Québec Inc. v. Desmarais*<sup>60</sup> has confirmed the general rules regarding suit, but at the same time has redefined the approach to the basic question underlying the issue, namely, what is a transfer for collateral security.

The facts in the *Place Québec* case may be simply stated. On July 12th, 1972 Desmarais instituted an action against Place Québec Inc. for payment of \$100,000.00 plus interest, alleging that the

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<sup>57</sup> *Sirois v. Hovington et al.*, [1969] B.R. 97; *Dupuis v. Savoie*, [1950] C.S. 361; *Laliberté et al. v. Larue et al.*, [1931] S.C.R. 7; *The Montreal Loan and Investment Co. v. Plourde* (1903), 23 C.S. 399; Mignault, *op. cit.*, footnote 10, pp. 188 et seq.; *Devlan Enterprises Inc. v. Fargal Construction Limited* C.S.M. 731, 327, July 9th, 1969, Watt J.

<sup>58</sup> *Canadian Terrazzo and Marble Co. Ltd v. B. Kaplan Construction Co. Ltd. et al.*, [1966] C.S. 505; *Stein v. Bourassa et al.* (1890), 20 R.L. 81; *Kendall and Bros. Ltd et al. v. Henry Morgan and Co.*, *supra*, footnote 2; *In re Pigeon et al.*, [1968] C.S. 513; *Lemaire v. Tourville et al.*, *supra*, footnote 2; *Dessureault Inc. v. Bastien*, [1960] B.R. 1052. *conf.* in [1962] S.C.R. 97; Planiol et Ripert, *Droit civil*, t.7, (1931), no. 1107, pp. 417 et seq.

<sup>59</sup> By the terms of the deed of assignment as collateral security, the assignee is usually given exclusive power to sue the assigned debtor. In the absence of such stipulation, the legal position of the assignee is the same, especially where suit against the assigned debtor is rendered necessary by the default of the assignor to the assignee: *J.J. Robert et al. v. Gaston St. James*, C.S.M. 774, 535, March 4th, 1971, Challies J. reviewed in *Stone Electric Inc. v. Community Development Limited et al.*, [1972] C.S. 397, at p. 403; *Dessureault v. Bastien*, *supra*, footnote 58.

<sup>60</sup> *Supra*, footnote 18.

defendant had failed to pay the price of a sale or transfer of options on land in the City of Quebec which the plaintiff's author-in-title had made to the defendant's author-in-title in April 1964. The Royal Bank of Canada intervened alleging it had received an assignment of the plaintiff's rights in November 1964 as collateral security for a loan made to Desmarais, that the loan, while not retired as of the date of the action, had been fully repaid prior to the intervention, and that it had no objection to the action as instituted. The defendant, while alleging prescription, also pleaded that the plaintiff had no legal interest or standing to sue since the assignment of rights to the intervenant constituted a "fin de non-recevoir" respecting the plaintiff's right to recovery of the \$100,000.00 sale price. The court of first instance condemned the defendant to make payment, and an appeal ensued on the question of prescription and legal interest of the plaintiff.

On the latter issue, Bernier J., with the concurrence of Brossard and Rinfret JJ. held that the plaintiff-assignor was entitled to bring action on the following legal grounds:

- (a) an assignment of rights is "un acte translatif de propriété" and such rights cease to form part of the assignor's patrimony absolutely and definitively when it is made in a manner "pure et simple";
- (b) a conditional assignment of rights, such as a transfer given as collateral security on a loan, may dispossess the assignor of the rights ceded in an *absolute* way but not in a definitive manner since the fulfilment of the resolatory condition (namely payment of the loan) ultimately returns to the assignor the rights ceded;
- (c) during the period prior to the fulfilment of the condition, the assignor retains an "intérêt conditionnel il est vrai, mais un intérêt quand même dans la créance cédée".
- (d) Prior to the fulfilment of the condition, the assignee merely has a right of preference over the proceeds of a forced sale of the object assigned, and upon fulfilment, loses all rights to the object "de plein droit";
- (e) the assignor continues to have a real right in the object assigned subject to a resolatory condition; and that right constitutes a sufficient legal interest to sue for payment of the debt provided such payment is made opposable to the assignee as mis-en-cause or otherwise.

#### *Absolute and definitive assignments*

The reasons for judgment demonstrate certain features of assignments which require greater analysis. The notion of assign-

ment is treated in the Civil Code as an aspect of sale in articles 1570 and following, although article 1578 C.C. extends application of these provisions to assignment by way of pledge or pawning. The civil law system of sale entails the notion of transfer of ownership, while that of pledge regards the transfer of physical possession.<sup>61</sup> In reviewing the assignment document in issue, the Court of Appeal indicated that the assignment, while executed for collateral security, not only transferred possession of the rights of option, but also conveyed a proprietary interest, although not in a "definitive" way. Notwithstanding previous jurisprudential uncertainty as to the status of such assignments,<sup>62</sup> the court did admit that standard form bank assignments have an effect similar to sale, subject to a minor qualification: the assignment or transfer is *absolute* but not *definitive*. In using the underlined words, the judgment unnecessarily created a confusion as to the true effect of the transfer.

The word "absolute" is generally used in the Civil Code to mean irrevocable, due or enforceable;<sup>63</sup> and in referring specifically to assignments, the Code prefers to use the term "parfaite" (perfected<sup>64</sup>). The unfortunate application of the word "absolute" conjures up the notion of "absolute assignment" used in the common law provinces to define a transfer by which the entire interest of the assignor in a chose in action, including the right to sue in his own name, is transferred unconditionally and placed under the control of the assignee, even if given by way of collateral security.<sup>65</sup> However, there is no indication in the decision that the court intended to import common law rules of assignment into the civil law.

What is evident is that the court was anxious to resolve the problem of the assignor's continued interest to sue in the face of dispossession of his proprietary rights in the option. This problem was resolved by invoking the notion of "definitive" assignment which apparently means any assignment not subject to a condition such as retrocession upon payment of a debt which it collaterally secures: since the plaintiff's assignment was not "definitive", he retained an interest to sue. This reasoning cannot escape the inevitable criticism: it would have been much simpler to avoid verbal sleight of hand by stating that the assignment given as collateral

<sup>61</sup> Arts 1472, 1966, 1972 C.C. subject to the possibility of conveyance of ownership by way of the depositor's default in art. 1971, para. 2 C.C.

<sup>62</sup> *Lemaire v. Tourville*, *supra*, footnote 2, at p. 224; *Dupuis v. Savoie*, *supra*, footnote 57, at pp. 364-365; *Allard v. Hamel*, [1976] C.S. 1454.

<sup>63</sup> Arts 1040a *et seq.*, 1084 C.C.

<sup>64</sup> Art. 1570 C.C.

<sup>65</sup> *Taylor v. Equitable Fire & Marine Ins. Co.*, [1918] 1 W.W.R. 676 (Alta); *O'Dwyer v. Banks*, [1953] 2 D.L.R. 204 (Alta C.A.).

security conditionally transferred the entirety of the assignor's proprietary interest to the assignee leaving the former a real right of redemption or retrocession upon which to base his suit. The court fortunately did reason in this vein, but with the unnecessary invocation of the terms "absolute" and "definitive",<sup>66</sup> and with the confusing injection of the notion that "la cession de créance à titre de sûreté accessoire . . . est un nantissement, un gage".<sup>67</sup>

The judgment further saw fit to invoke an analogy between the rights of the assignor following an assignment for collateral security and the real rights of a "dation-en-paiement" creditor prior to the exercise of his right to obtain ownership. The analogy gives rise to many difficulties but underlines the ambiguity of the court in the matter of defining legal interest.

The court apparently felt that a determination of proprietary or real interest in the right ceded is tantamount to a determination of legal interest to sue in accordance with article 55 of the Code of Civil Procedure. That provision requires that a plaintiff must have a sufficient interest (intérêt suffisant) in the action to institute proceedings. The Code of Civil Procedure in several instances does confer upon an owner of real rights an automatic legal interest or standing to sue simply in virtue of the fact of ownership: for example, an owner may force his neighbour to have the boundaries of bordering immoveables determined in order to verify or rectify division lines,<sup>68</sup> co-owners are entitled to institute proceedings in partition of the common property in order to obtain proceeds from a forced sale,<sup>69</sup> and owners of documents or titles may move for the deposit of an authentic copy with a public officer ordinarily in charge of the original.<sup>70</sup> Unfortunately, the Code is not as explicit on the question of legal interest where the rights of ownership of the plaintiff are merely conditional. In fact, prior to the introduction of the new Code of Civil Procedure in 1965, the predecessor of article 55, namely article 77 C.C.P., appears to have vigorously denied legal interest to sue to any plaintiff who did not have an interest "né

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<sup>66</sup> After all, an "absolute" transfer implies a greater absoluteness than a "definitive" transfer.

<sup>67</sup> This unqualified statement is juxtaposed to the following: "La cession de créance à titre de sûreté accessoire est un transfert conditionnel et résolutoire . . .", leaving the inference that the pledge of an incorporeal moveable involves not merely a physical transfer of control, but a juridical conveyance of title for a variable time period. But see a re-affirmation of the notion of pledge in assignments as collateral security in *Canadian Imperial Bank of Commerce v. Zwaig*, [1976] C.A. 682, at p. 685

<sup>68</sup> Arts 762 *et seq.* C.C.P.

<sup>69</sup> Art. 808 C.C.P.

<sup>70</sup> Art. 870 C.C.P.

et actuel".<sup>71</sup> The commissioners of the Code of 1965 felt it necessary to review the issue of interest and noted:

As it is universally admitted that the interest required to take legal action must exist at the moment when the recourse is instituted, it is clear that the terminology of the Code is not rigorously exact; what one intended to say without doubt is not that one can invoke justice when one has not yet an interest in doing so, but rather that the interest required to institute proceedings may flow from a right which itself would only be eventual, which is not at all the same thing. And as the measure of interest is always a question of fact, the rule must be set out in terms which leave to the court the problem of determining it empirically. Hence, the proposed change, which is, moreover, essential if one admits the declaratory action.<sup>72</sup>

The decision in *Place Québec Inc.* seemingly determines that a plaintiff with a right of property affected by a suspensive condition does have the legal interest required by article 55 C.C.P. to sue the debtor of the right. In so determining, the decision of Bernier J., as noted makes passing reference by way of analogy to the rights of parties in the face of a "dation-en-paiement" clause. The full scope of the analogy, however, is difficult to understand, especially if one is to assume that the court would accordingly approve of an action instituted by a "dation-en-paiement" creditor invoking his right of conditional ownership against a third party. The difficulty lies in reconciling recent decisions of the same court which seem to deny standing to a "dation-en-paiement" creditor in safeguarding his conditional rights, as in *Caisse de Dépôt et de Placement du Québec v. Armor Ascenseur Québec Limited*<sup>73</sup> where the Court of Appeal refused to admit the existence of a legal interest to sue by way of opposition to judgment on a privilege by a party entitled to resiliate an emphyteutic lease held by the defendant. The court indicated that the sending of a sixty-day notice of resiliation did not of itself give to the third party opposant a right to oppose judgment since the defendant was still capable of remedying his default. In consequence of the decision, the Superior Court in a similar situation held that the third party opposant was nevertheless entitled in the discretion of the court to obtain a suspension of execution of the judgment on a

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<sup>71</sup> *Létourneau v. Blouin* (1892), 2 C.S. 425; *Montreal Harbour Commissioners v. The Record Foundry and Machine Co.* (1910), 38 C.S. 161. The courts have however permitted a trustee under a trust deed to make an opposition to seizure even where his rights were merely eventual: *Morris v. Fournier et Quesnel* (1938), 43 R.P. 331; compare *Paradis v. Boily et Beaulieu* (1935), 73 C.S. 383.

<sup>72</sup> Commissioners' Report (1965), pp. 10a, 11, 11a, 87a.

Even though the new standards regarding legal interest theoretically expanded the availability of judicial process to persons who merely have a conditional or eventual right, the courts have consistently refused to grant actions which are merely hypothetical in nature, or seek to determine rights which have been settled or extinguished.

<sup>73</sup> [1975] C.A. 202.

privilege, in order to permit it sufficient time to obtain a judgment declaring the resiliation with retroactive effect of the emphyteutic lease and the radiation of the privilege.<sup>74</sup> There was however no equation by the Superior Court between the conditional rights of ownership of the petitioners and the legal interest to sue. On the contrary, the Superior Court subsequently insisted that an hypothecary creditor with a "dation-en-paiement" option cannot purely in virtue of his conditional right of ownership to an immoveable oppose a sheriff's sale of the property at the instance of a chirographic creditor.<sup>75</sup> It has only been a fairly recent development that the Superior Court has decided to accord legal standing to a mere conditional owner of an immoveable, in order to intervene in an action on a privilege directed against the debtor. It is evident however that this development must be restricted in scope: a "dation-en-paiement" creditor, in virtue of his hypothec, and not of his right of conditional ownership, is entitled to be a party to a suit which may have the effect of diminishing his right of hypothec.<sup>76</sup>

With respect to legal interest, the analogy between assignment as security and "dation-en-paiement" is inconsistent. Curiously, the analogy on procedural grounds was unnecessary. It may be noted that the issue of the quality of the assignment could easily have been avoided by emphasizing the fact that the bank had prior to judgment re-assigned all its interest in the options to the plaintiff. While the re-assignment would not necessarily have retroactively given the plaintiff an interest to sue, the representations of the bank did indicate it was prepared to authorize or ratify all acts of the plaintiff in relation to its action.<sup>77</sup> The court consequently could have rejected the allegation of lack of standing on the simple ground of the assignee's ratification.

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<sup>74</sup> *Armor Ascenseur Québec Limitée v. Beauharnois Holdings Ltd et al.*, [1975] C.S. 577.

<sup>75</sup> *Gravel Photogreveur Inc. v. Zicat et autre*, [1976] C.S. 1143, at p. 1144 citing Bernier J., in *Placements Marchand Inc. v. Forlac Enterprises Ltée*, C.S.Q. 05-0232.75, Feb. 17th, 1975.

<sup>76</sup> *Otto Zinner Carpets Inc. v. Richelieu Industrial Leasehold Inc. et al.*, S.C.M. 05-016028-773, Oct. 26th, 1977, Jasmin J.; *Ielsi Painting Contractor Inc. v. Richelieu Industrial Leasehold Inc. et al.*, S.C.M. 05-017987-775, Oct. 26th, 1977, Jasmin J.; *Iberville Lumber v. Joe's Steakhouse*, S.C.M. 05-022645-756, April 15th, 1977, Beauregard J.; *Naro Floor Finishing Ltd v. Glenbarr Development Ltd*, S.C.M. 05-009715-770, Aug. 11th, 1977, Gervais J.; *Glendale Construction Inc. v. Glenbarr Development Ltd*, S.C.M. 05-011536-776, Aug. 11th, 1977, Gervais J.; *Weber v. Glenbarr Development Ltd*, S.C.M. 05-011535-778, Aug. 11th, 1975, Gervais J.; *Contra: Compagnie Miron Ltée v. Jeandur Construction Inc. et al.*, C.S.M. 05-008611-772, Oct. 19th, 1977, Melançon J. See generally, *Fiducie du Québec v. Fabrication Précision Inc. et al.*, C.A. Quebec, 09-000018-769, Feb. 16th, 1978.

<sup>77</sup> Arts 56 and 59 C.C.P.

#### IV. *Assignment as Both Alienation and Pledge.*

Perhaps the decision in *Place Québec Inc.*, by analogizing assignment in security and “dation-en-paiement” rights, merely seeks to emphasize the possibility within the civil law system of transferring full rights of ownership subject to the real right of redemption or retrocession. The problem with this interpretation is that the decision equally categorizes the assignment as a “gage”, conferring to the assignee not a right of ownership but a right of preference. The contradiction is apparent, but suggestively intentional and startling: in consequence, we are left with the conclusion that the assignment as security is both an alienation and a pledge. Given the incorporeality of the moveable right, physical possession of the pledge must be substituted by some sort of qualified “juridical” possession, which implies control of the rights assigned. According to the decision at bar, “juridical” possession by the assignee would not disentitle the assignor from suing on the debts as long as the assignee is made “mise-en-cause” in the proceedings. “Juridical” possession would likewise not constitute the assignee owner of the rights, but merely a party with a real interest opposable to third parties. The fiction of a “juridical” possession is necessary if we are to comprehend the fiction of the giving in pledge of incorporeal rights and is in keeping with the authorities cited by the court on a similar issue.<sup>78</sup>

#### *Summary*

We have seen that the general assignments of book accounts in Quebec law may constitute a sale, pledge or a unique form of alienation of rights. The guidelines provided by law and jurisprudence for the interpretation of such assignments are still in the process of development. It is consequently difficult to determine the respective obligations of the assignor and assignee, especially with respect to the assignor’s warranties following the execution of a transfer of third party debts as security for a repayment of financing. As well, the mutual rights and duties of the assignor and assignee to preserve and enforce the assigned debts by suit ultimately depend on the nature of the constitutive document.

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<sup>78</sup> *Sirois v. Hovington*, *supra*, footnote 57; *Stone Electric Inc. v. Community Development Ltd et al.*, *supra*, footnote 59.